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## No PA 222 Liability in Flooding Case

Government officials, including drain/water resources commissioners, are generally shielded from civil liability under the doctrine of governmental immunity. However, PA 222's Sewer System Disposal Event ("SSDE") exception to governmental immunity creates a pathway to sue a government official for damages resulting from an SSDE where the following five elements are met:

1. the government agency was an "appropriate governmental agency" (with jurisdiction and authority over the sewer system);
2. the sewer system had a defect;
3. the government agency knew, or should have known, about the defect;
4. the government agency failed to take reasonable steps in a timely manner to correct the defect; and
5. the defect was a "substantial proximate cause" of the damage.

The Michigan Court of Appeals recently interpreted these elements in *Pearce v. Crowley*. In that case, properties near an infiltration basin designed to collect stormwater runoff began to experience flooding along the basin boundary. In response, the Drain Commissioner at-

tempted to drain the basin and later constructed a concrete berm between the basin and adjacent properties, which protected the homes. Despite these efforts, groundwater damaged pools and flooded nearby basements. Property owners adjacent to the basin sued the Drain Commissioner under the SSDE exception.



The Court found in favor of the Drain Commissioner. The Court explained that while excess groundwater was not caused by the Drainage District, it could still be a defect. However, the property owners failed to prove that the Drain Commissioner knew or had reason to know about the rising ground water levels. The Court also determined that the groundwater was an unforeseen and extraordinary occurrence outside of the Drain Commissioner's control, and therefore, dismissal of the case was appropriate.

## MI House of Representatives Re-Introduces Chapter 22 Legislation

Last June, the House of Representatives introduced legislation to amend Chapter 22 of the Drain Code to allow for stormwater management at the watershed level. The MACDC gave testimony in support of the amendments, but the legislative session ended before the bills could be voted out of committee. With a new legislative term underway, Representatives Morse and VanderWall re-introduced the Chapter 22 legislation as House Bills 4382 and 4383 on April 12, 2023. The bills are each supported by several co-sponsors.

If enacted, the proposed amendments would provide drain and water resources commissioners with additional tools for managing stormwater and relieving pressure on existing drains. The bills are designed to complement other chapters of the Drain Code and are a response to increasing water levels and extreme storm events; continuing development; loss of natural water storage; and an increasing inability to create bigger, wider, and deeper drains.

The bills propose to allow the creation of county and intercounty water management programs that would facilitate activities such as stormwater reviews and ordinance drafting; public education about stormwater; and stormwater control facilities, infrastructure, and equipment. The amended Chapter 22 process would mirror many of the current Drain Code processes, and would include:

1. Petition by landowner or public corporation
2. Necessity hearing to determine the necessity of water management program for the “public health, safety or welfare” and the boundaries of the water management district
3. Preparation of a water management plan, including recommended activities and estimated costs

4. Approval or rejection of the water management plan
5. Order adopting the water management program and specifying activities consistent with the water management plan
6. Receipt of bids and preparation of a computation of costs
7. Apportionment of benefits
8. Day of review of apportionments

The bills were referred to the House Committee on Local Government and Municipal Finance. The MACDC will continue to monitor the status of the bills as they proceed through the legislature.



## In the Spotlight...

### Spotlight: Senator Rosemary Bayer for Michigan's 13th District

Senator Rosemary Bayer began her career in information technology as a computer engineer and analyst. She was first elected to the Michigan Senate in 2018 and was reelected in the 2022 election. Senator Bayer represents the 13th District, which includes portions of Oakland and Wayne Counties.

Senator Bayer serves as Chair of the MI Department of Education Appropriations Subcommittee, Majority Vice Chair of the General Government Appropriations Subcommittee, and Majority Vice Chair of the Joint Committee on Administrative Rules. Senator Bayer serves on the Committees on Appropriations; Energy & Environment; Finance, Insurance, and Consumer Protection; Housing and Human Services; and Local Government. She is also a member of the Department of Health & Human Resources Appropriations Subcommittee and the Environment, Great Lakes, and Energy Appropriations Subcommittee.

In addition to her role in the Michigan Senate, Senator Bayer serves on the board of directors for NEW, Solutions for Nonprofits, and the SheHive. She is also the co-founder of the Michigan Council of Women in Technology, which provides resources and support for girls and women in the fields of science, technology, engineering, and math.



### MI Supreme Court Declines Appeal in Higgins Lake Case

More than 400 lakes in Michigan have legal lake levels established by a circuit court under Part 307 of Michigan's Natural Resources and Environmental Protection Act ("Part 307"). After a legal lake level is established, the county board of commissioners or its delegated authority is responsible for maintaining that level.

In *Citizens for Higgins Lake Legal Levels v. Roscommon County Board of Commissioners*, a group of landowners around Higgins Lake sued Roscommon County for a violation of its duty to maintain the legal lake level. The lake had experienced slight variations during which the physical level was lower than the legal level due to weather conditions and other factors. The trial court granted summary judgment in favor of the County under the idea that while reasonable efforts should be made to maintain the legal level, slight variations are inevitable.

The Michigan Court of Appeals disagreed with the trial court and held that the legal lake level must be strictly maintained according to the lake level order, which does not account for variations due to weather or other factors. Roscommon County appealed to the Michigan Supreme Court, which recently declined to hear the appeal. This means that the case will go back to the trial court, which is required to issue an opinion consistent with the Court of Appeals' holding that the legal level must be strictly maintained.

The holding in this case has significant implications for county drain commissioners, who often serve as the Part 307 delegated authority for their counties' lake levels. A review of the court orders for established lake levels should take place to evaluate what actions may be necessary to ensure compliance consistent with this case.

## Legislation of Interest

*The following bills of interest to Drain Commissioners and Associate Members are currently pending before the Legislature. Full text and up-to-date action for each bill can be found online on the Legislature's website at [www.legislature.mi.gov](http://www.legislature.mi.gov).*

### **SB 15 & HB 4041**

Senate Bill 15 and House Bill 4041 were introduced by Senator Theis and Representative Steele, respectively, on January 17 and January 24, 2023. These bills would prohibit state and local office holders and employees from using TikTok on electronic devices that are owned, managed, or controlled by the state or local government. The bills have been referred to the Senate Committee on Labor and the House Committee on Regulatory Reform.

### **SB 25**

Senate Bill 25 was introduced by Senator Bayer on January 18, 2023. If enacted, SB 25 would create a "human right to water act," providing that each individual has the right to safe, clean, affordable, and accessible water for consumption, cooking, and sanitary purposes. It would require all state departments and agencies to have policies, regulations, and grant criteria in place to implement the act. SB 25 was referred to the Senate Committee on Housing and Human Services.

### **HB 4023**

House Bill 4023 was introduced by Representative VanderWall on January 18, 2023. If enacted, HB 4023 would amend the Natural Resources and Environmental Protection Act to impose additional setback requirements for the installation of new underground storage tanks that are used to contain regulated substances or the replacement of existing underground storage tanks. HB 4023 was referred to the House Committee on Natural Resources, Environment, Tourism and Outdoor Recreation.

### **HB 4033**

House Bill 4033 was introduced by Representative Paiz on January 19, 2023. If enacted, HB 4033 would amend Michigan election law to allow for the reimbursement of a county, city, or township for the cost of conducting a special election to fill a state senator or representative vacancy if directed by the governor. HB 4033 was reported from the House Committee on Elections with a substitute and referred to a second reading on March 7, 2023.

### **SBs 223, 224 & HBs 4261, 4262, 4263**

Senate Bills 223 and 224 were introduced by Senator Runestad on March 21, 2023, and House Bills 4261, 4262, and 4263 were introduced by Representatives Schuette, Kunse, and Kuhn, respectively, on March 14, 2023. The very similar bill packages would amend the Freedom of Information Act to add Part 2, which would be called the "legislative open records act." If enacted, the bills would subject certain public records held by state officers, legislators, departments, or other public bodies in the legislative branch to FOIA disclosures. SBs 223 and 224 were referred to the Senate Committee on Elections and Ethics, and HBs 4261, 4262, and 4263 were referred to the House Committee on Ethics and Oversight.

### **SB 154 & HB 4220**

Senate Bill 154 and House Bill 4220 were introduced by Senator Webber and Representative Tisdell, respectively, on March 8, 2023. The identical bills would amend the Freedom of Information Act's definition of "public record" to include records prepared, owned, used, in the possession of, or retained by an officer, employee, contractor, volunteer, or other agent of a public body in the scope of their duties to the public body. SB 154 has been referred to the Senate Committee on Civil Rights, Judiciary, and Public Safety, and HB 4220 was referred to the House Committee on Judiciary.

### **HB 4234**

House Bill 4234 was introduced by Representative Tsernoglou on March 9, 2023. HB 4234 would amend the Michigan Campaign Finance Act to modify the requirements related to election contributions. HB 4234 was referred to the House Committee on Elections.

### **HB 4428**

House Bill 4428 was introduced by Representative Coleman on April 19, 2023. HB 4428 would create a new act entitled the "local government public notice act," which would set forth specific methods and requirements for local governments and other governmental entities to provide certain public notices. HB 4428 was referred to the House Committee on Local Government and Municipal Finance.

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