

South Bar Lake Drain, Board of Determination

Role and Duties of Board

On June 11, 2020 a petition by the Village of Empire, an at-large entity who may be liable for an assessment of the proposed new Drain signed a petition for the location, establishment and construction of the South Bar Lake Drain.

The Drain Code requires that upon the receipt of a Petition for constructing and establishing a new County, the Drain Commissioner is required to appoint a Board of Determination composed of three (3) disinterested property owners who are residents of the County but do not live in or have any property interests in the proposed Drainage District boundary or the townships included in the Drainage District; in this case either Empire Township of the Village of Empire.

The Drain Commissioner is not part of the Board of Determination and has no role, influence or decisions to make at the Board of Determination meeting. The Drain Commissioner will swear in the Board and once that is done, the meeting is essentially run by the Board members and it is their meeting.

The Board of Determination elects a Chairperson and a Secretary. The Secretary records the minutes of the meeting, with a recording secretary provided.

The Board of Determination will hear testimony related to the necessity for the location, establishment and construction of a new County Drain to be known as the South Bar Lake Drain.

After public testimony, the Board will then decide whether the location, establishment and construction of the new Drain is necessary and conducive to the public health, convenience or welfare for any lands within the Drainage District boundary.

The Drain Commissioner and Engineer will stay for the meeting but have no role in the decision as to whether a project is necessary. They do not support or oppose a project. That is solely within the discretion of the Board. However, the engineer will try to answer any questions the public or the Board may have.

At the meeting the only decisions that will be rendered are whether the location, establishment and construction of the Drain is necessary and conducive to the public health, convenience or welfare for any properties or municipalities within the Drainage District; and whether the lands comprising the Drainage District boundary accurately define the boundaries of the lands benefited by the Drain. For the first item regarding the necessity of the Drain petition, the word 'any' is underlined because it is important to understand that the Drain Code is set up to protect the rights of the affected / incumbered landowners within a Drainage District and it is not a democratic vote based on who in the audience wants to proceed with a project or not. The Michigan Drain Code recognizes that by in large a far greater number of people in a

drainage district typically have no drainage problems and usually a few number of properties typically are burdened with the runoff from those unaffected landowners who are much higher in elevation within a Drainage District. This is why the Drain Code is considered a minority protection law, meaning that the rights of only a few number of landowners within a Drainage District, which could be just one landowner even (i.e., typically the downstream “flooded” properties), are equally or more important that those in the Drainage District that have no drainage problems (i.e., typically landowners who are higher and upstream in the Drainage District and their runoff from their lands drain on to the flooded downstream property owners).

The Engineer, Brian Cenci, P.E., of GEI Consultants, Inc., will be there to present findings from a conditions assessment and analysis of the proposed new drainage system location. These were items required in the Drain Code to be done as part of the new Drain District Application and new Drain petition process. Although part of the work that he was required to do was come up with some recommendations relative to the drainage issues, those issues or those recommendations are not being presented to the Board as the Board does not vote on the cost, size or scope of the work and whether to do any of those recommendations. The engineer is also there to answer any questions procedurally for a Board of Determination meeting, provide a summary of various aspects of the Michigan Drain Code and of course answer any technical or engineering related questions regarding the petition.

The engineer for this project, Mr. Cenci, is originally from Lake Ann in Benzie County, attended Benzie Central H.S. and received dual Bachelors of Science degrees from Michigan State University in 2002 in both Civil Engineering and Fisheries & Wildlife. He has been a certified State Licensed Professional Engineer since 2006. Mr. Cenci works almost solely on projects for County Drain Commissioners throughout Michigan. He currently is working first-hand on approximately 30 projects in 8 different counties in Michigan. Over his career he has worked for 15 different county drain offices in his 20 years with Eng., Inc., and currently with GEI Consultants, and has participated in over 100 Board of Determination meetings and completed over 225 Drain projects in Michigan. He is recognized as an expert in the practical application of the administratively and legally complex law that governs Drain Commissioners in the State, the Michigan Drain Code. In 2018 he was recognized as an “expert” by being admitted into Federal Court for a case involving the Michigan Drain Code and the assessments from a particular drain petition project in Ingham County. Mr. Cenci has also been recognized for his quality, low-cost work and innovative solutions and designs on petitioned county drains in Michigan by being the project engineer / manager on 5 State recognized Innovation & Excellence Award winning projects. Each year the Association of Michigan County Drain Commissioners elects one or two projects for this prestigious award as it is essentially picking the “best drain project in the State completed that given year.” Mr. Cenci recently won this award three consecutive years in a row and has won it now 4 out of the last 5 years, both are firsts for the over 110-year old Association. In 2016 he won for the award for the Walker Drain in Allegan County, 2017 for the North Shore Drain also in Allegan County and 2018 for the Groesbeck Park Drain in Ingham County and 2020 for the Selkirk Lake Drain in Allegan County. His other best overall award winning project was the Towar Rain Garden Drains in 2008, located in Ingham County. He also has received 3 honorable mentions for this award, in 2011, 2012 and 2015.

Now that I've told you what this meeting is about, let me tell you what it's not about. The Board only determines whether a project is necessary. The Board should determine that a project is necessary if it hears any testimony that establishing the new Drain is necessary for the protection of public health, public convenience or public welfare. A common scenario in which a Board should determine a project necessary is if it hears from even one, or more than one, landowner(s) providing testimony of their property being flooded or standing water in their house because of the proposed Drain. The Board does not determine the scope of a project, how to fix the issue, the route of the Drain, how much it costs, who or whether they will be assessed or how the assessments are apportioned. In fact, those issues should not play into the Board's decision making process.

The good thing is the Drain Code is filled with all kinds of due process protections and all of these items will be addressed at a later time at later meetings. If the Board approves a project, it will be up to the Drain Commissioner to determine how much the project will cost and the scope of the project. The drain law in Michigan requires that the Drain Commissioner apportion the costs of a drain project to property owners and public corporations. Apportionments to properties are made based on the principal of benefits derived. Apportionments to municipalities, in this case Leland and Centerville Townships, are based on benefits to public health and to Leelanau County and MDOT for benefits to county and state roads. However, if there is no necessity, there is no project and there can be no new petition for another year.

On the other hand, if the Board does determine that a project is necessary, they will prepare and enter a document called an Order of Necessity.

Anyone aggrieved by the decision of the Board as to whether the maintenance and improvement is necessary and conducive to the public health, convenience or welfare may appeal the decision within 10 days and that appeal must be filed with the Leelanau County Circuit Court. Anyone aggrieved by the Board's decision as to the boundaries of the Drainage District may appeal within 10 days to the Leelanau County Circuit Court as well.

You will be reminded again at the conclusion of the meeting.

Board Decisions

Determination regarding the location, establishment and construction of a new County Drain:

The Drain Code provides that you are to determine if a problem exists and you have received evidence of such (testimony at the BOD, pictures, documentation, etc.) that the establishing and constructing of a new Drain is **necessary and conducive to the public health, convenience, or welfare**. Whether you find that it is or is not, you must sign an order stating such. A blank order will be prepared that you may fill out as you deem fit.

Examples of Public Health, Convenience, or Welfare:

Public health – See below:

and whether a particular property or properties are benefited

and other benefits to property owners such as

a broken or cut tile

particular property or properties are drained because of living conditions are horrible with that property or properties.

In such cases, the improvements are benefiting a landowner and the improvements would go beyond public health or for that matter may not include public health.

In such a case, the finding is that a portion of the costs shall be apportioned to the municipality or township at large.

Certainly under such a determination, the Drain Commissioner has broader discretion in determining who is benefiting and the manner of apportioning the cost of the improvements.

EXAMPLES OF PUBLIC HEALTH:

Community health, free from contaminated water, free flooded land on properties, basement flooding, toilet backups because septic systems cannot function due to the presence of standing water, free from flooded roadways, stagnant water, diseases, septic overflows, allowing safe passage of emergency vehicles, mosquitos, sanitation problems.

EXAMPLES OF PUBLIC CONVIENCE:

Making life better for people, making it easier for economic growth, making it easier for agricultural production and using of agricultural land, making life better for homes and properties that are no longer flooded, making life easier for people.

EXAMPLES OF PUBLIC WELFARE:

State of doing well, happiness, well being, aesthetics and monetary welfare, better schools, the idea that an entire municipality may have a better public perception for not having flooding problems within their jurisdiction and better served in development potential.

At the end of each meeting the following will be read...

Section XIII. Right to Appeal Order of Necessity

Anyone aggrieved by the decision of the Board as to whether the maintenance and improvement is necessary and conducive to the public health, convenience or welfare may appeal the decision within 10 days and that appeal must be filed with the Leelanau County Circuit Court. A municipality may appeal the determination of whether the maintenance and improvement is necessary for the protection of the public health by appealing to the Leelanau County Probate Court within 20 days of receiving notice of the determination. Anyone aggrieved by the Board's decision to revise the boundaries of the Drainage District may appeal within 10 days to the Leelanau County Circuit Court.

The Court's review is limited to whether the Board's actions are authorized by law and whether the Board's findings of fact are supported by material, substantial, and competent evidence on the whole record (i.e., whether or not they were presented at least some minima of evidence, like landowner testimony, to support their decision).

The Order of Necessity will be available at the drain office the following morning after the BOD.

We recommend anyone wanting to aggrieve this, consult an attorney regarding these issues.