

DRAIN CODE REVISIONS

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**House Bills 4641 (Substitute H-1,
with Floor Amendment)**
Sponsor: Rep. Frank Accavitti, Jr.

House Bill 4642 (Substitute H-1)
Sponsor: Rep. Jeff Mayes

**House Bill 4644 (Substitute H-3, with
Floor Amendment)**
Sponsor: Rep. Frank Accavitti, Jr.

House Bill 4643 (without amendment)
Sponsor: Rep. Marie Donigan

**House Bill 4688 (Substitute H-1, with
Floor Amendment)**
Sponsor: Rep. Neal Nitz

Committee: Agriculture
Complete to 8-8-07

A SUMMARY OF HOUSE BILLS 4641-4644 AND HOUSE BILL 4688 AS REPORTED FROM COMMITTEE AND WITH FLOOR AMENDMENTS

The bills would amend various sections of the Drain Code to:

- Allow a county to change the name of the "Office of County Drain Commissioner" to the "Office of the Water Resources Commissioner," if that county's commissioner performs functions other than those of a drain commissioner, including, but not limited to, operating sewers, lake level and soil erosion enforcement, and facilitating compliance with federal Clean Water Act mandates. (HB 4641)
- Increase the amount of a commissioner's individual bond, if not covered by a blanket bond, from \$5,000 to \$100,000. (HB 4641)
- Define the term "visibly in existence," limit its applicability to one type of public drain, and mandate the release of drain easements no longer needed. (HB 4642)
- Specify the legal expenses that may be charged to a drainage district. (HB 4643)
- Enhance a drain commissioner's ability to remove obstructions, interference, or encroachment of drains, including taking immediate action in emergencies. (HB 4644)
- As amended, House Bill 4644 would define "**obstruction**" as any lessening of the cross-section of a drain, including, but not limited to, reductions resulting from bridges, cables, pipelines, sewers, conduits, roadways, culverts, or other structures (unless construction of the structure was approved by the commissioner or the drainage board.) "**Obstruction**" would *not* include structures falling under the authority of the Department of Transportation, county road agencies, or municipalities if properly designed and constructed and if they do not reduce the existing hydraulic capacity of the drain. (HB 4644)

- Persons causing obstructions would receive written notice of 10 business days to remove the obstruction (instead of the current 5), except in emergencies.
- A drain commissioner would have to consider any environmental impact before beginning any work to remove an obstruction. (HB 4644)
- Increase the amount a drain commissioner could assess a drainage district annually (from \$1,250 to \$2,500 per mile or fraction thereof) if the district's drain fund balance dipped below a certain threshold (raised to \$5,000 under the bill). (HB 4688)
- Increase the amount a drain commissioner could spend annually on drain maintenance without additional authorization from \$2,500 to \$5,000 per mile or fraction thereof, exclusive of certain expenses and costs. (HB 4688)

A more detailed explanation of each bill follows.

House Bill 4641 (Substitute H-1, with Floor Amendment) would permit a county board of commissioners (other than in Wayne County) to change the name of the "Office of County Drain Commissioner" to the "Office of Water Resources Commissioner" if that county's drain commissioner performed functions other than acting as a drain commissioner, including, but not limited to, operating sewers, lake level and soil erosion enforcement, and facilitating compliance with federal Clean Water Act mandates. The name change would be accomplished by resolution, with consent of the drain commissioner. A "water resources commissioner" would have the powers and duties and be elected in the same way as a "drain commissioner." The amount of an individual surety bond required of a drain commissioner not covered by a blanket bond would be increased from \$5,000 to \$100,000, although the board of commissioners would have the discretion to require a bond in a different amount. (MCL 280.21)

House Bill 4642 (Substitute H-1) would amend Section 6 of the Drain Code, which is a "quiet title" provision designed to resolve disputes about the validity of public drain easements. The bill would define the term "visibly in existence," and make the term apply only to one type of drain easement. The bill would also mandate the release of drain easements no longer needed.

Since 1956, drain easements have been required to be recorded in county offices of the register of deeds. (MCL 280.11) Many drain easements, however, were created before then and are not on file with the register of deeds. Section 6 of the Drain Code defines two types of public drains (presumably in addition to drain easements recorded with the county register of deeds) that are nevertheless valid and binding against anyone who buys the property containing the drain after (1) the location and establishment of the drain or (2) the existence of the drain became visible or (3) the written drain easement or right of way was executed. The two types are: (1) all established drains regularly located and established under law in effect at the time of location and establishment and "visibly in existence," and (2) all drains "visibly in existence" in written drain easements or rights of way on file in the office of the drain commissioner. Under the bill, the requirement that a drain be "visibly in existence" would apply only to the first category: established drains regularly located and established under law and *not* those "evidenced in written easements or rights of way on file in the office of the drain commissioner." "Drains that are visibly in existence" would

be defined as **"open or closed drains that can be visibly identified by banks, slopes, manhole covers, or other structures that would identify the existence of a drain."**

Currently, drain easements no longer needed for drainage purposes *may* be conveyed back to landowners after 30 days' notice to the general public (by notice in a newspaper of general circulation in the county or where the drainage district boundaries are located). The bill would change "may" to "shall" and would require the drain commissioner or board to consider any timely protests or public comments received before determining that all or part of an easement is not necessary for drainage and before releasing all or part of an easement. (MCL 280.6)

House Bill 4643 would describe what legal expenses a drain commissioner may charge to a drain district. Under the bill, legal expenses would expressly include, but not be limited to: (1) litigation and witness fee expenses; (2) judgments or orders and associated costs entered against a drainage district; and (3) attorney fees. Under the bill, the expenses could be paid out of the drain fund of the drainage district *or* the revolving drain fund, and assessed to the drainage district to reimburse the revolving drain fund in accord with the code. (MCL 280.247)

House Bill 4644 (Substitute H-3, with Floor Amendments) would prohibit a person from obstructing, permitting an obstruction, or otherwise interfering with or encroaching upon a drain or drain right-of way.

- **"Obstruction"** would include "any lessening of the cross-section of a drain, including but not limited to, that resulting from any bridge, cable, pipeline, sewer, conduit, roadway, culvert, railroad ties, or other structure" (unless the structure was approved by the commissioner or drainage board). **"Obstruction"** would *not* include a structure falling under the authority of the Department of Transportation, a county road agency, or a municipality if properly designed and constructed and if it does not reduce the existing hydraulic capacity of the drain.
- **"Interfere"** would mean "any action that is inconsistent with the district's easement and that hinders or impedes the intended purpose, design, or operation of the drain or that will increase the cost to the district of performing any of its work on the drain."
- **"Encroach"** would not be defined. (The bill as introduced defined "encroach" as "any action which advances upon the proper, established, or usual limits of the drain or drain right-of-way.")

The person causing *or* permitting the obstruction, interference, or encroachment would be responsible for the expense of removing it and that expense would be a lien upon the property of the offender. A drain commissioner or drainage board could take immediate corrective action without providing the requisite written notice to the offender in an emergency endangering the public health, safety, welfare or property in a drainage district.

The prohibition of obstruction, interference, or encroachment of any drain or drain right-of way would not apply if created by natural causes. But an owner of livestock (horses, cattle, pigs, and others) who permits his or her animals to obstruct any drain by tramping in it is considered to be the party causing the obstruction.

As amended (Substitute H-3), the bill would require a drain commissioner to consider any environmental impact before commencing any work to remove an obstruction.

The law currently provides that nothing in this section of the Drain Code (Section 421) prevents anyone from making a criminal complaint under any existing law "for any obstruction of a drain." The bill would revise this sentence to allow criminal complaints for "any obstruction, interference, or encroachment of a drain or drain right-of-way." (MCL 280.421)

House Bill 4688 (H-1) would increase the amount that a drain commissioner (or drainage board in the case of intercounty drains) could assess a drainage district if a district's drain fund dipped below a specified amount and would raise the amount that a drain commissioner or drainage board could spend on drain maintenance without additional authorization.

Annual inspections. The law currently permits annual inspections of drains "laid out and constructed" under the Drain Code. The bill would change "laid out and constructed" to drains "established" under the Drain Code.

Raise maximum amount of allowed assessment in any one year to replenish drain fund. Current law specifies that if the drain fund of a drainage district contains less than \$2,500 per mile or fraction of a mile, a drain commissioner or drainage board may assess a drainage district up to \$1,250 per mile or fraction of a mile in any one year. The amount collected is deposited in the drain fund of a drainage district for necessary inspection, repair, and maintenance of the drain. The bill would increase the allowed maximum assessment from \$1,250 to \$2,500 per mile or fraction thereof and allow the assessment if the drain fund balance dropped below \$5,000 per mile or fraction thereof (instead of the current \$2,500).

Raising cap on assessments for maintenance and repair without petition. In addition, the Drain Code provides that if an inspection discloses the need for drain maintenance and repair, a drain commissioner or the drainage board may, without petition, expend up to \$2,500 per mile or fraction of a mile in any one year. The bill would raise the amount that could be expended without petition to \$5,000 per mile or fraction thereof, not including inspection and engineering fees and publication and mailing costs. The determination of the maximum expenditure allowed without a petition or resolution would be based on the total number of miles of the drain, and not on the actual number of miles or location of the maintenance or repair.

Non-incidental employee expenses chargeable to drain fund. Under Section 196(13), salaries, expenses, and fringe benefits of clerical, administrative, and engineering employees of the drain commissioner or the drainage board working *incidental* to the operation, repair, or maintenance of a drain, are chargeable to and paid as budgeted from the county general fund, and are *not* chargeable to the drain fund of a drainage district. Under House Bill 4688, except as provided elsewhere under the code and in counties with a population exceeding 750,000 (using 2000 census figures, Wayne, Oakland, and Macomb Counties), that portion of the salaries, expenses, and fringe benefits of administrative and engineering employees under the supervision of the drain commissioner that are directly

attributable, but not incidental, to a drain or otherwise not recovered by fees established by resolution or ordinance of the board of commissioners, *may* be chargeable to the drain fund of a drainage district.

Retain both newspaper and first-class mail notice of certain assessments. Unlike the introduced version of the bill (which would have allowed notice by publication in a general circulation newspaper *or* by first-class mail), the H-1 Substitute would retain the current requirement that the drain commissioner notify landowners subject to certain assessments by publication in a newspaper of general circulation within the drainage district *and* by first class mail to the name and address as it appears on the last assessment roll.

Delete misdemeanor provision. The bill would delete a provision that specifies that a violation of Section 196 is a misdemeanor punishable by imprisonment for not more than one year, or by a fine of not more than \$1,000, or both. (MCL 280.196)

FISCAL IMPACT:

With the exception of House Bill 4688, the proposed revisions to the Drain Code would have no apparent fiscal impact. To the extent that House Bill 4688 increases the ability of drain commissioners or drainage boards to assess drainage districts, it could increase revenue of those agencies, which are units of local government. The amount of the potential revenue increase cannot be readily determined.

It is our understanding that the Michigan Department of Transportation (MDOT) is the only state agency subject to drain commission assessments. To the extent that House Bill 4688 increased drain commissioner or drainage board assessments, it could increase MDOT's assessment costs.

Section 14a of Public Act 51 of 1951 (Act 51) effectively limits the Michigan Department of Transportation's liability for drainage assessments by limiting how much State Trunkline Fund revenue may be used for drain assessments. Section 14a of Act 51 limits the State Trunkline Fund's share of drain assessments to a pro-rata share of storm water runoff attributable to the state trunkline highways within a drainage district as determined by an engineering study. These provisions of Act 51 would not be affected by the proposed Drain Code amendments.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.