

STATE OF MICHIGAN  
COURT OF APPEALS

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CITY OF SOUTH LYON and SOUTH LYON  
TREASURER,

UNPUBLISHED  
September 22, 2005

Plaintiffs-Appellees,

v

OAKLAND COUNTY DRAIN  
COMMISSIONER,

No. 254571  
Oakland Circuit Court  
LC No. 03-055080-CZ

Defendant-Appellant.

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Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order enjoining it from levying a special assessment to replenish the revolving drain fund after the fund was depleted by the payment of legal fees. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Property owners within the South Lyon Drainage District No. 1 sued CSX Transportation and the Drainage District, alleging that the negligent maintenance of the drain resulted in flooding on property within the Drainage District.<sup>1</sup> Defendant retained counsel to defend the Drainage District in the action. Subsequently, the parties agreed to the dismissal of the case with prejudice and without costs awarded to either party. The order provided that the plaintiffs understood "that all costs incurred by the Defendant Drainage District relating to this action will be assessed to the property owners and public entities within the Drainage District pursuant to the Michigan Drain Code."<sup>2</sup>

The Drainage District incurred legal fees in the amount of \$74,900.03 in defense of the lawsuit. Defendant paid the fees from the Drainage District's revolving drain fund, established

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<sup>1</sup> *Albrecht, et al v CSX Transportation, et al*, Oakland County Circuit Court Docket No. 01-034106-NZ.

<sup>2</sup> Michigan Drain Code (MDC), MCL 280.1 *et seq.*

pursuant to §§ 301-307 of the MDC, MCL 280.301-307. The payment of the fees left the revolving drain fund with a negative balance of \$72,799.70. Defendant sought to recoup the fees paid and replenish the revolving drain fund by levying a special assessment against the properties and public corporations within the Drainage District.

Plaintiffs filed a complaint for declaratory judgment, alleging that the MDC did not contain a specific provision authorizing defendant to levy a special assessment to recover fees incurred in defending a lawsuit. The trial court agreed and entered a permanent injunction barring defendant from collecting monies pursuant to the special assessment, finding that the MDC did not authorize the levying of a special assessment to recoup the fees paid to counsel pursuant to MCL 280.247.<sup>3</sup>

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). If the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted. *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd*, 240 Mich App 153, 166; 610 NW2d 613 (2000). We review an issue of statutory interpretation de novo. *Sotelo v Grant Twp*, 470 Mich 95, 100; 680 NW2d 381 (2004).

MCL 280.247 authorizes the drain commissioner to retain counsel, provides that legal expenses “shall be charged to the several drain districts” which employ the commissioner, and states that those “expenses shall be paid out of the revolving drain fund which shall be reimbursed out of the first moneys available.” The word “shall” designates a mandatory provision. *Roberts v Mecosta County General Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002). The revolving drain fund receives monies collected by general taxation as approved by the county board of supervisors. MCL 280.301.

The MDC authorizes legal fees to be included in the initial cost of a drain, MCL 280.261, and authorizes a special assessment to be levied for that cost. MCL 280.262. In addition, a special assessment may be levied to repair and maintain a drain under specified circumstances. MCL 280.196(3). However, no language in MCL 280.247 provides that the drain commissioner may levy a special assessment to recoup legal fees paid from the revolving drain fund in order to replenish the fund. In light of the inclusion of language authorizing the levying of a special assessment in other provisions of the MDC, the exclusion of such language from MCL 280.247 should be viewed as intentional. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Provisions not included by the Legislature should not be included by the courts. *Polkton Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005).

The trial court correctly concluded that the MDC did not authorize defendant to levy a

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<sup>3</sup> The trial court did not address plaintiffs’ remaining arguments; therefore, we do not do so in this opinion.

special assessment to collect funds to replace those funds paid for legal expenses from the revolving drain fund. *Sotelo, supra*.

Affirmed.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio