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Senate Bill 662 (as enacted)  
Sponsor: Senator Rosemary Bayer  
Senate Committee: Local Government  
House Committee: Natural Resources, Environment, Tourism and Outdoor Recreation

**PUBLIC ACT 112 of 2024**

Date Completed: 9-24-24

### **RATIONALE**

Lake levels regularly fluctuate from weather, natural events, or construction activities. For example, Michigan is experiencing an increasing number of severe storms whose sudden and massive volume of rain can affect Michigan's lake levels. According to testimony before the Senate Committee on Local Government, the 2022 court case *Citizens for Higgins Lake Legal Levels v. Roscommon County Board of Commissioners* in Michigan's Court of Appeals held that a normal lake level established by statute must be strictly maintained with no variance allowed. Reportedly, some communities have been threatened with lawsuits for not keeping lake levels at established normal levels despite the lake level change resulting from temporary or natural phenomena. Accordingly, it was suggested that lake levels under Part 307 be allowed to vary due to weather, natural events, or construction activities.

### **CONTENT**

**The bill amends Part 307 (Inland Lake Levels) of the Natural Resources and Environmental Protection Act (NREPA) to do the following:**

- Modify the definition of "normal level" related to inland lakes to allow for temporary fluctuations in water level resulting from weather, natural events, or construction activities.**
- Exempt financing for dams under Part 307 from a cap on the total amount of bonds and notes that a special assessment district may issue.**
- Modify other requirements of dam financing under Part 307.**

The bill will take effect 91 days after the Legislature adjourns sine die.

Under Part 307, a county board may establish a normal lake level for an inland lake within its jurisdiction by initiating a proceeding within a circuit court to do so. After the court determines the normal level of that inland lake the county may specify a delegated authority to maintain that level. The delegated authority, defined as a county drain commissioner or any person designated by the county to fulfill the requirements of Part 307, may acquire or construct a dam for this purpose, including the use of bonds or notes payable by special assessments.

#### **Inland Lake Level Measurements**

Currently, "normal level" means the level or levels of the water of an inland lake that provide the most benefit to the public; that best protect the public health, safety, and welfare; that best preserve the natural resources of the state; and that best preserve and protect the value of property around the lake. A normal level must be measured and described as an elevation based on national geodetic vertical datum. Under the bill, a normal level means the target level or levels of the water of an inland lake, around which actual levels may fluctuate, that

provide the benefits listed above. A normal level also may be measured and described as an elevation based on geodetic vertical datums including ranges based on tolerance, operational or weather conditions, seasonality, or other similar natural and regional considerations.

In addition, the bill specifies that an inland lake is considered maintained at its normal level during temporary water level variations resulting from weather or natural events, during construction activities authorized by the Department of Environment, Great Lakes, and Energy, or if a county or its delegated authority operated lake level infrastructure in a manner that may affect water levels but is reasonably intended to maintain a normal level. This provision will apply retroactively.

#### Requirements for the Issuance of Bonds and Notes

Under Part 307, all issuance of bonds or notes for inland lake projects are subject to the Revised Municipal Finance Act. This Act prescribes requirements relative to the borrowing of money and the issuance of certain debts and securities. In addition, the Act imposes certain duties, requirements, and filing fees upon political subdivisions of the State.

Under the bill, bonds, notes, and other obligations issued under Part 307 are exempt from Section 505 of the Revised Municipal Finance Act, which generally caps the allowed total amount of these special assessment obligations.<sup>1</sup>

#### Special Assessment District Powers

Part 307 allows a delegated authority to accept the advance of work, material, or money in connection with a normal level project. The obligation to repay an advance out of special assessments may be evidenced by a note or contract. The bill deletes these provisions.

Instead, under the bill, a special assessment district may borrow money or accept an advance of work, material, or money from a public or private corporation, a partnership, an association, an individual, or the Federal government or any agency of the Federal government for payment of financing of any costs in connection with a normal level project, including all the following:

- Costs of easement and land acquisition.
- Engineering fees.
- Financing costs.
- Legal fees.
- Costs of a preliminary, feasibility, practicability, environmental assessment, or impact study.
- Any other permissible costs under Part 307.

The special assessment district must pay or provide reimbursement for the obligations listed above, with or without interest as agreed upon, when funds are available. The obligation of the special assessment district may be evidenced by a contract or note. The contract or note may pledge the full faith and credit of the special assessment district and may be made payable out of any of the following:

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<sup>1</sup> Generally, Section 505 puts a cap on the total amount of municipal securities issued by special assessments to 12% of the assessed value of the taxable property, in addition to other limitations on how many municipal securities a municipality can issue in a calendar year. "Security" means evidence of debt, such as a bond, note, contract, obligation, refunding obligation, certificate of indebtedness, or other similar instrument issued by a municipality, which pledges payment of the debt by the municipality from an identified source of revenue.

- Assessments made or to be made against public corporations at large, or against lands in the special assessment district.
- The proceeds of lake level orders, notes, or bonds issued by the special assessment district.
- Any other available funds.

A contract or note described above is not subject to the Revised Municipal Finance Act unless the principal amount of the obligation is more than \$600,000; however, if the principal amount of the obligation is \$600,000 or less, the contract or note will be subject to the Agency Financing Reporting Act.<sup>2</sup> Projects in which advances or loans are made by any public corporation, the Federal government, or any agency of the Federal government are not subject to the Revised Municipal Finance Act or the Agency Financing Reporting Act.

The county board of commissioners, by a majority vote of its members, may pledge the full faith and credit of the county for the payment of a contract or note of the special assessment district. The bill specifies that all notes previously issued under Section 30717 of NREPA (the Section that governs the acceptance and repayment of advances) must be considered validly issued.

MCL 324.30701 et al.

## **BACKGROUND**

Public Act 188 of 1954 gave Michigan's township governments the legal authority to levy special assessments to generate revenue to fund local projects, such as projects to install dams or other water control mechanisms. Special assessment districts are an area of land where the majority of landowners (or, in some cases, landowners with a majority of the land) agree to allow a government agency to levy a property tax in exchange for a service. Special assessments and special assessment districts require the support of local landowners within the district who are often petitioned for their support. After a township board has determined that the proposed local project is valid and has support from local landowners, the board must schedule two required hearings before implementing a special assessment district. The first must explore the technical details and cost of the project while the second must consider the special assessment roll and allow objections to the assessment to be heard. After the close of the second hearing, the board can create the special assessment district by resolution.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

County boards of commissioners did not have statutory authority to pledge the full faith and credit of the county for the payment of a contract or note of a special assessment district under Part 307. "Full faith and credit" generally refers to a government entity's unconditional guarantee to back the interest and principal of another entity's debt. In this case, the bill will give a county board of commissioners the authority to unconditionally back the interest and principal of the special assessment district on normal level projects. The full faith and credit of a county is often required to obtain financing for special assessment districts and likely will expand financing options for special assessment districts maintaining lake levels for the public's benefit.

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<sup>2</sup> Generally, the Agency Financing Reporting Act prescribes requirements for the reporting of the issuance of certain debt and securities.

### **Supporting Argument**

According to testimony before the Senate Committee on Local Government, there are 352 lakes in Michigan with circuit court ordered normal levels. Most of those lakes have no gates, valves, dams, or ability to adjust for temporary or natural phenomena in the event of extreme weather. Due to the static standard set by the *Citizens for Higgins Lake Legal Levels v. Roscommon County Board of Commissioners* ruling, the authorities responsible for these lakes are legally liable for violations of their normal levels despite not being able to influence these normal levels. The only ways these governing authorities can remain in compliance with the court order are to either modify the court order or introduce new, invasive water control mechanisms.

A modified court order would be a significant undertaking for a county. It would require an invitation to every property owner in the special assessment district for any township that considers its court order currently insufficient. This also would increase the volume of court orders to Michigan's circuit court system. Changing every non-compliant court order in Michigan likely would be a slow and expensive process. To avoid this process, counties could establish control mechanisms, such as dams; however, this would be ecologically destructive to Michigan's waterways. The movement of water across waterways is a primary factor that influences the health of the waterway. The animal and plant life of a lake is best adapted to a natural state of fluctuation. Changes to the natural flow create imbalance in those ecological systems and negatively affect the ecological health of the waterway.

The system of redrafting court orders to reflect normal level fluctuations would cause every special assessment district with an insufficient court order significant administrative burden. Additionally, the incentive for local authorities to hastily construct water control structures to avoid liability in response to the *Citizens for Higgins Lake* ruling would further diminish the ecological health of Michigan's waterways. Therefore, changing Part 307 to reflect a naturally fluctuating normal level is a more straightforward and efficient way to account for fluctuations in the normal levels of Michigan's lakes.

### **Supporting Argument**

The approach municipalities in Michigan use for lake management is unnatural. A static level on a lake is not normal for nature; fluctuations are, and allowing fluctuations on Michigan's waterways will benefit the ecology of lakes around Michigan. Many municipalities are recognizing the ecological benefits of dam removal and river re-naturalization, both of which improve ecological health by improving the fluctuation of waterways and aid stormwater remediation by establishing green infrastructure. Generally, the State should stop working against natural systems for perceived short-term benefits that harm the health of waterways. Therefore, the bill will help Michigan's waterways because it codifies a system that recognizes a more ecologically friendly approach to lake management and all associated benefits.

### **Opposing Argument**

Changing the statutory language will undo the practice of informal variations of lake levels allowed previously by Michigan law, potentially resulting in poorer management of inland lake levels. According to testimony before the Senate Committee on Local Government, people who work with lake level management already know to expect temporary fluctuations and so work with counties to treat court ordered lake levels as targets. This is evidenced by the trial court's ruling in *Citizens for Higgins Lake v. Roscommon County Board of Commissioners*. The ruling stated that the County's duty was to maintain the legal level "subject to the laws of nature and the limitations of the dam".<sup>3</sup> The bill will reduce local authorities' liability, potentially inviting poor planning or mismanagement of lake levels. Testimony indicates that

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<sup>3</sup> *Citizens for Higgins Lake Legal Levels v. Roscommon County Board of Commissioners*, unpublished opinion of the Michigan Court of Appeals, Docket No. 353969 (2022).

loose management of lake level variations could result in potential shoreline damage, property damage, limited boat access site launching, increased aquatic invasive species spread from propeller cropping, damage to native vegetation, and detrimental effects of high to low water impacts on lakes from septic systems. Properly drafting court orders to include variations of water levels could have resolved liability issues that local authorities had concerning static normal lake levels and prevented these negative consequences.

Lakeside property owners tend to be reasonable when establishing expectations about adherence to court-ordered normal levels. According to testimony before the House Committee on Natural Resources, Environment, Tourism and Outdoor Recreation, property owners do not often sue government entities after a natural disaster or dramatic natural event. For example, if there is a large rain event, most property owners understand that lake levels will be higher. Therefore, the bill's policy of adherence to a state of fluctuation is already informally understood, and codifying a range of levels could cause local governments to neglect their duties to manage lake level variations.

**Response:** Although the trial court held that the County's duty was to maintain the legal level "subject to the laws of nature and the limitations of the dam", the appeals court disagreed. The appeals court stated "... this holding, and the defendant's claim that it is not required to maintain the level at [the 1982 court ordered level] renders the 1982 court order meaningless and reads in language that is not present in the order... and so caselaw, as well as the mandatory statutory language, does not support reading in these limitations".<sup>4</sup> Any informal understanding that municipal employees or property owners had about the normal level being treated as a target is now unlawful.

Legislative Analyst: Alex Krabill

## **FISCAL IMPACT**

As the language of the bill is permissive, there will be no mandatory fiscal impact on the State or local units of government. By exempting water level project financing from Section 505 of the Revised Municipal Finance Act, municipalities will have a borrowing cap removed under the bill. This will give municipalities more freedom and autonomy to borrow for water level projects; however, nothing in the bill requires municipalities to do so.

Fiscal Analysts: Jonah Houtz  
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<sup>4</sup> *Id.*

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.