

**Fahey Schultz
Burzych Rhodes**

EXPERT COUNSEL



REAL SOLUTIONS

Common Township Special Assessment Mistakes

ATTORNEY KYLE A. O'MEARA

JULY 21, 2022



DISCLAIMER

- This presentation, and the materials associated with it, are comprised of general information and not intended as legal advice related to specific questions of attorney-client privilege.
- Please contact an attorney if you need assistance related to a specific legal issue.





PRESENTATION GOALS

- 1. Learn about special assessment generally.
- 2. Review common “mistakes” townships make when imposing special assessments.
 - Emphasis on Act 188.
- 3. Answer questions.



SPECIAL ASSESSMENTS

- **What are special assessments?**
 - **A special assessment is a levy upon property within a specified district.** Although it resembles a tax, a special assessment is not a tax. In contrast to a tax, **a special assessment is imposed to defray the costs of specific local improvements**, rather than to raise revenue for general governmental purposes.” *Michigan's Adventure, Inc v Dalton Tp*, 287 Mich App 151, 155; 782 NW2d 806 (2010) citing *Kadzban*, 442 Mich. at 500, 502 NW2d 299 (citation omitted) (emphasis added).
- **What is the difference between special assessments and taxes?**
 - “ The differences between a special assessment and a tax are that (1) **a special assessment can be levied only on land**; (2) **a special assessment cannot ... be made a personal liability of the person assessed**; (3) **a special assessment is based wholly on benefits**; and (4) **a special assessment is exceptional both as to time and locality.**” *Niles Tp v Berrien Cnty. Bd of Com'rs*, 261 Mich App 308, 323–24; 683 NW2d 148 (2004) (internal citations omitted) (emphasis added).
- **Key Terms: (1) Special Assessment; (2) Special Assessment District**



- **Act 188 of 1954 (Most Common), MCL 41.721 *et. seq.*,**
 - Township Public Improvement Act.
 - Authorizes many categories of improvements (street lights, inland lake improvements, water system, sanitary sewer improvements, roads, parks).
 - Two public hearings required.
- **Act 33 of 1951 (Police, Fire, Ambulance), MCL 41.801 *et. seq.*,**
 - Allows special assessments to fund police, fire, and ambulance services (incorporated in Public Health Code).
 - Incorporates Act 188 process. MCL 41.803(1).
 - Must submit question to assess for services to electorate if the owners of 10% of lands in the district petition the Township Board. MCL 41.801(3).
- **Common Non-Township Statutes**
 - Lake Improvement Boards (“Part 309”), MCL 324.30901 *et. seq.*,
 - Inland Lake Level Control (“Part 307”), MCL 324.30701 *et. seq.*,
 - Michigan Drain Code, MCL 280.1 *et. seq.*,



SPECIAL ASSESSMENT AUTHORITY



7 COMMON SPECIAL ASSESSMENT MISTAKES

AND TIPS FOR AVOIDING
THEM



I. NOT THINKING STRATEGICALLY

Instead of rushing into a project, take the time to **think** about the project:

1. What do the project plan documents look like?
2. How will the Township finance the project?
3. Set a timeline and a kick-off meeting for project planning.
4. How long do I want the special assessment district to last?
5. “Mapping Out” the required steps and township board meetings to approve the project.
6. Do we have a petition?



2. FEAR OF THE PROCESS OR COSTS

- The process to properly approve a project using special assessments under Act 188 can initially appear complex with the various meetings, public hearings, resolutions, and approval of costs and plans.
- Poor planning or estimates of costs could result in the township not approving enough assessments to fund a project.
- Fortunately, Act 188 allows a township to pass through incidental expenses related to approving a special assessment such as legal, engineering, consultant, and notice costs, among other costs, to those being assessed. See MCL 41.721.
 - Utilize your Township attorney!
- You can ensure stakeholder support by requiring a petition.



3. PROVIDING NOTICE/ NOTICE CONTENT

The content of special assessment notices (especially the one related to a public hearing regarding approving special assessments) is extremely important.

Successful special assessment appeals often relate to notice deficiencies versus “substantive” assessment calculations.

Failing to provide notice or missing the proper content in notices can invalidate special assessments and require a township to hold additional hearings to fix deficient notice, which all costs money and delays projects.



ACT 188 NOTICE “EASTER EGGS”

- **Act 162:** Although Act 188 outlines a “notice requirement” section in MCL 41.724a, it does not reference Act 162 of 1962 (MCL 211.741 which governs the content of notices for all special assessment hearings.
 - Appeal language
 - Right to submit letters in lieu of attendance
 - *If a township reads Act 188 in isolation, it may forget to include required notice language about the ability to appeal a special assessment under MCL 211.746.*
- **Newspaper Act:** Act 247 of 1963, MCL 691.1051
 - A statute defines what a “newspaper” is!
 - Paying list of subscribers or published weekly for two years without interruption
 - Published weekly for at least one year without interruption
 - Average 25% news and editorial content per issue
- **Objection Petition Rights.** See *Trussell v Decker*, 147 Mich App 312, 325; 382 NW2d 778 (1985).





4. KNOWING WHEN TO REQUIRE OR NOT TO REQUIRE A PETITION

- Townships often confuse whether they need or do not need a property owner petition for a particular Act 188 project.

Simple Answer: A township does not need a property owner petition to begin or even complete the Act 188 process for a special assessment project, but townships *may* want to require a petition to gauge stakeholder support.

No Petition: Minority of property owners (20%) can submit an objection petition and require a petition. MCL 41.723(1).





WHEN TO REQUIRE A PETITION

- Depending on the improvement, a township can require a petition from property owners who own more than 50% of the lands in a proposed special assessment district or own more than 50% of the frontage of infrastructure to be improved (e.g., a road) to submit a petition desiring a special assessment project before beginning the special assessment process. MCL 41.723(3).
- A township may also simply begin a project without a petition, but it must require a petition if a minority of property owners (landowners with more than 20% of land area in a district or frontage) submit an “objection petition” against a project. MCL 41.723(1).
- Costly or first-time improvements vs. repeat projects.
- Act 188 does not incorporate Election Law regarding petition requirements.



5. NOT FIXING PAST MISTAKES

An elected official may find that special assessments were imposed not in accordance with Act 188 or other authorizing statute.

- For example, a township may have passed a special assessment (presumably under Act 188) without holding any public hearings or by not providing the required mailing notice to those being assessed.

Act 188 has a process for fixing “mistakes”

- MCL 41.733 outlines the process where if a township recognizes an error in the special assessment process, it can go back to the last “step” in the Act 188 approval process where the error occurred and “fix” it.
- To avoid challenges on existing assessments, a township can also hold the entire Act 188 process over again to ensure it creates valid assessments.



6. UNDERSTAND THAT YOU CAN SAY “NO”

- In some circumstances, a property owner or property owners' association may pressure a township to deviate from the Act 188 process in ways such as:
 - (1) not holding required hearings (often to “speed up” a project
 - (2) wanting to borrow funds for a project in a way not consistent with Michigan law.
- Remember that a township can and should say “no” to a project that would require it to face potential legal ramifications to cut corners or political ramifications by getting into neighborhood disputes.
- A township can always refuse to proceed with a special assessment project even if it receives a property owner petition for the project. MCL 41.723(1).



NO





7. CONSIDERING ALTERNATIVES

- Look at the bigger picture.
 - For example, if a township receives a requests for a special assessment project for major road improvements or police protection, it may be more appropriate to put a millage question on the ballot if the improvement will be of benefit to the rest of the township.



8. *BONUS* THE “PURPOSE” OF YOUR PROJECT

- Act 188 requires approving plans for a particular project. See MCL 41.725(1).
- Sometimes being too “specific” regarding a project’s purpose can be an issue.
- For example, “aquatic weed control treatments” versus “treating aquatic weeds using [chemical name].”
 - The latter description can theoretically “lock in” a township to a certain method of aquatic weed control even if a new method becomes available that may be more efficient and cheaper.





Questions?

Attorney Kyle A. O'Meara

FAHEY SCHULTZ BURZYCH RHODES PLC

4151 Okemos Rd., Okemos, MI 48864

Tel: 517-381-0100

komeara@fsbirlaw.com

www.fsbirlaw.com

