

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

In re CITY OF STERLING HEIGHTS,

Case No. 17-  
Hon.

-AS

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**COMPLAINT FOR SUPERINTENDING CONTROL**

Civil actions between these parties or other parties arising out of the transaction or occurrence alleged in the Complaint have been previously filed in this Court, where they were given docket numbers 17-000416-CC, 17-000418-CC, 17-000420-CC, 17-000421-CC, 17-000422-CC, 17-000423-CC, 17-000473-CC, 17-000476-CC, 17-000485-CC, 17-000522-CC, 17-000523-CC, 17-000524-CC, 17-000526-CC, 17-000541-CC, 17-000544-CC, 17-000562-CC, 17-000566-CC, 17-000568-CC, 17-000571-CC, 17-000574-CC, 17-000593-CC, 17-000591-CC, and were assigned to Judge James M. Biernat, Jr. These actions remain pending.

/s/ Kevin J. Gleeson  
Kevin J. Gleeson (P30099)

NOW COMES Plaintiff CITY OF STERLING HEIGHTS, by and through its attorneys Sullivan, Ward, Asher & Patton, P.C., and for its Complaint for Superintending Control, states as follows:

**PARTIES, JURISDICTION and VENUE**

1. The City of Sterling Heights (hereinafter "Sterling Heights") is a public corporation located within Macomb County, Michigan.

2. The Macomb Interceptor Drain Drainage District (hereinafter “the Drainage District”) is a special purpose public corporation established under the Drain Code of 1956, operating and existing under the Michigan Constitution and the laws of the State of Michigan, and located within Macomb County, Michigan.

3. The Drainage District is governed by the Drainage Board.

4. The current Drainage Board consists of Chair Candice Miller, Public Works Commissioner, and Members Bryan Santo, Director of the Macomb County Department of Roads, and Rob Mijac, Macomb County Commissioner.

5. Sterling Heights is one of the eleven public corporation communities serviced by and participating in the Drainage District.

6. Jurisdiction and venue properly lie in this Court pursuant to MCR 3.302, MCR 3.305, MCL § 280.483, MCL § 600.605, and MCL § 600.1621.

### **GENERAL ALLEGATIONS**

7. The Drainage District was created by Macomb County as a mechanism to obtain funding to purchase the Macomb Interceptor Drain, a sanitary sewer system, from the Detroit Water and Sewage Department.

8. The Drainage District owns and operates the Macomb Interceptor Drain, which was purchased from the Detroit Water and Sewage Department on or about September 2, 2010 by way of an Acquisition Agreement. [2010 Acquisition Agreement, attached hereto as **EXHIBIT A**].

9. In the 2010 Acquisition Agreement, the Drainage District acknowledged that it was afforded the opportunity to conduct due diligence of the Macomb Interceptor Drain and was in receipt of published reports prepared by NTH Consultants in 2006, following NTH

Consultants' inspection of interceptor sewer pipes within the Macomb Interceptor Drain, and which reflect that the 15 Mile Road interceptor was in need of repair or facing possible failure.

10. Section 478 of the Drain Code of 1956 provides that the Drainage Board is "responsible for the operation and maintenance of the drain." MCL § 280.478.

11. Section 471 of the Drain Code of 1956 permits a drainage board to contract with any private or public corporation, or any agency thereof, in respect to any matter connected with the construction, operation, maintenance, use or services of any drain.

12. On or about September 22, 2010, pursuant to section 471 of the Drain Code of 1956, the Drainage District contracted with the Macomb County Wastewater Disposal District (hereinafter "the Wastewater District"), an agency of Macomb County, to operate, maintain and make improvements to the Macomb Interceptor Drain, as required. [September 2010 Agreement, attached hereto as **EXHIBIT B**].

13. Pursuant to the September 2010 Agreement, the Wastewater District was contractually required to hire consultants and contractors, apply for grants and loans, and carry out activities necessary and appropriate for the operation, maintenance, improvements and administration of the Macomb Interceptor Drain. [**EXHIBIT B**].

14. The September 2010 Agreement further contractually required the Wastewater District to provide annual reports to the Drainage District of its activities for the preceding twelve months. [**EXHIBIT B**].

15. The Wastewater District has continuously received funds from the public corporation communities of the Drainage District for operation and maintenance services of the Macomb Interceptor Drain.

## **2016 INTERCEPTOR FAILURE AND 2017 APPORTIONMENT**

16. On December 24, 2016, the 11-foot diameter sewer interceptor beneath 15 Mile Road collapsed, creating a 300 foot x 100 foot sinkhole, affecting sewerage service to more than 500,000 residents of Macomb County and causing the evacuation of 23 homes.

17. Since its collapse, the current Drainage Board, through its Chair, has publically commented that there are no records or evidence of prior inspections of the Macomb Interceptor Drain since its purchase from the Detroit Water and Sewage Department in 2010. See <https://www.youtube.com/watch?v=u7sI5mGDTwU>; <https://www.youtube.com/watch?v=aMXELjcTxmA>.

18. The current Drainage Board notified eleven (11) communities, including Sterling Heights, that they would be assessed for all emergency repair costs associated with the Macomb Interceptor Drain collapse.

19. True to its word, on March 27, 2017, the Drainage Board of the Drainage District tentatively apportioned the cost to repair the failure, through a by-pass, and resume service to each of the eleven public corporation communities of the Drainage District.

20. During a public hearing on the apportionments on April 19, 2017, Sterling Heights *alone* objected to the tentative apportionment of cost assessed by the Drainage Board for reason that the interceptor failure was directly caused by the failure to undertake regular inspections, maintenance and repairs to Macomb Interceptor Drain, and as such, does not constitute a “necessary” expense allowed to be assessed under section 478 of the Drain Code of 1956. [Public Hearing Agenda, attached hereto as **EXHIBIT C**].

21. Notwithstanding the objection, on April 19, 2017, the Drainage Board confirmed apportionment of the estimated \$70 million project cost associated with repair of the failure and resumption of service to be borne by each of the public corporation communities of the Drainage District, and issued a Final Order of Apportionment. [Final Order of

Apportionment, attached hereto as **EXHIBIT D**; Correspondence dated April 24, 2017, attached hereto as **EXHIBIT E**].

22. The Macomb County Office of Public Works has publicly acknowledged that it believes that the subject interceptor had not been inspected since 2010, the same year the Wastewater District and/or Macomb County became contractually obligated to operate, maintain, improve and administer the Macomb Interceptor Drain. See <http://www.freep.com/story/news/local/michigan/macomb/2017/01/13/fraser-sinkhole-update-candice-miller/96540552/> (“Miller told the board that the interceptor line, which was purchased in 2009 ‘over the objections of some’ in the public works office, was last inspected in 2010”); <http://m.publicworks.macombgov.org/sites/default/files/content/government/publicworks/pdfs/news/15MileInterceptorOverview17March17.pdf>.

### **COUNT I** **CERTIORARI RELIEF**

23. Sterling Heights incorporates by reference each and every allegation contained in paragraphs 1 through 22 above as though fully restated herein.

24. Proceedings under the Drain Code are administrative proceedings.

25. Section 483 of the Drain Code authorizes judicial review of a final order of apportionment by proceedings in certiorari.

26. Though the Drain Code provides for “certiorari,” a superintending control order has replaced a writ of certiorari pursuant to MCR 3.302(C).

27. The Drainage Board’s April 19, 2017 Final Order of Apportionment is not supported by competent, material and substantial evidence where the catastrophic failure was the direct result of the failure to inspect, maintain and repair the Macomb Interceptor Drain.

28. Section 478 of the Drain Code of 1956 provides, in relevant part, that only “necessary expenses incurred in administration and in the operation and maintenance of the

drain and not covered by contract shall be paid by the several public corporations assessed for the cost of the drain.” MCL § 280.478.

29. The cost of the emergency repairs to the Macomb Interceptor Drain is not a “*necessary expense*” that can be apportioned to Sterling Heights because section 478 of the Drain Code of 1956 unambiguously prohibits the apportionment of expenses “covered by contract.” The repair costs to be apportioned are “covered by a contract” where they arise directly out of the Wastewater District’s breach of the September 2010 Agreement and constitute recoverable breach of contract damages. Therefore, any apportionment to Sterling Heights is improper, at this time.

30. Further, to the extent this Court ultimately determines that the Wastewater District was not responsible to inspect, maintain and/or improve the Macomb Interceptor Drain, the cost of the emergency repairs are not “*necessary expenses incurred in the administration and in the operation and maintenance of the drain,*” that can be apportioned to the public corporation communities because the repair costs are only being incurred as a result of the improper conduct of the prior Drainage Board of the Drainage District. Section 478 of the Drain Code of 1956 clearly does not contemplate or intend for a public corporation community to be apportioned *unnecessary* expenses or incur a financial burden arising from a drainage board’s failure to fulfill its statutorily created obligations to inspect, maintain and repair a drain.

31. The Macomb County Office of Public Works has publicly acknowledged that it believes that the subject interceptor had not been inspected since 2010, and by extension, that the Wastewater District and/or Macomb County breached contractual obligations owed to the Drainage District.

32. In addition, the Wastewater District and/or Macomb County was aware that the subject interceptor was in need of repair or facing possible failure and did nothing to repair and/or improve the line to avoid its ultimate decay and collapse.

33. In light of the Wastewater District, Macomb County and/or the prior Drainage Board of the Drainage District's failure to fulfill obligations to inspect, maintain and repair the subject interceptor, the apportionment of repair costs to Sterling Heights is improper.

34. A writ of superintending control is necessary to secure entry of an order setting aside the Final Order of Apportionment against Sterling Heights, and reapportioning the cost as allowed under the Drain Code of 1956.

**COUNT II**  
**MANDAMUS RELIEF**

35. Sterling Heights incorporates by reference each and every allegation contained in paragraphs 1 through 34 above as though fully restated herein.

36. A drainage district is "a body corporate with power to contract, to sue and to be sued, and to hold, manage and dispose of real and personal property, in addition to any other powers conferred upon it by law." MCL § 280.5.

37. The Wastewater District has continuously received funds from the eleven public corporation communities of the Drainage District for operation and maintenance services of the Macomb Interceptor Drain.

38. The interceptor collapse and sinkhole creation was directly caused by a failure to inspect, maintain and improve the Macomb Interceptor Drain.

39. Public corporation communities of the Drainage District continue to be invoiced for amounts due and owing for the Wastewater District's operation and maintenance services. [April 2017 Invoice, attached hereto as **EXHIBIT F**].

40. Section 5 of the Drain Code of 1956 affords the Drainage District the power to institute legal action.

41. Mandamus relief lies here because the Drainage District has a clear legal duty to seek legal redress against the Wastewater District and/or Macomb County for breach of contract arising from the failure to maintain and improve the Macomb Interceptor Drain which resulted in the 2016 catastrophic failure.

42. On March 13, 2017, the Drainage Board resolved to terminate the September 2010 Agreement with the Wastewater District. The Drainage Board did not reference any of the Wastewater District's above-referenced breaches of the September 2010 Agreement within the Resolution. [Resolution No. 2017-1, attached hereto as **EXHIBIT G**].

43. Despite having knowledge of the September 2010 Agreement between the Drainage District and the Wastewater District, five months have passed since the collapse of the Macomb Interceptor Drain, and the current Drainage Board has refused and/or failed to take any action against the Wastewater District, and/or Macomb County, to recover the costs associated with the emergency repair.

44. Upon information and belief, the current Drainage Board's refusal to take any action against the Wastewater District and/or Macomb County is due to the fact that the current three-member Drainage Board is comprised of the Macomb County Public Works Commissioner, Director of the Macomb County Department of Roads, and a sitting Macomb County Commissioner, creating an inherent conflict of interest.

45. The Drainage Board's only action to date is termination of the contractual relationship between the Drainage District and the Wastewater District. Yet, the Drainage Board has refused and/or failed to make a demand upon the Wastewater District and/or



Macomb County for the recovery of breach of contract damages incurred by the Drainage District.

46. As a public corporation community that continues to be invoiced for amounts due and owing for the Wastewater District’s purported operation and maintenance services of the Macomb Interceptor Drain, Sterling Heights has a right to compel the Drainage District to seek legal redress against the Wastewater District and/or Macomb County, and the recoupment of funds for the emergency repair.

47. No other legal remedy exists to address the Wastewater District and/or Macomb County’s breach of contractual duties.

**PRAYER FOR RELIEF**

WHEREFORE, for the foregoing reasons, CITY OF STERLING HEIGHTS respectfully requests that this Honorable Court:

- a. Exercise superintending control and set aside the April 19, 2017 Final Order of Apportionment to City of Sterling Heights, and reapportion the cost as allowed under the Drain Code of 1956;
- b. Enter an order to show cause why the April 19, 2017 Final Order of Apportionment to City of Sterling Heights should not be set aside, and the cost reapportioned as allowed under the Drain Code of 1956;
- c. Exercise superintending control and grant mandamus relief, compelling the Macomb Interceptor Drain Drainage District to pursue legal remedies against the Macomb County Wastewater Disposal District and/or Macomb County;

d. Enter an order to show cause why the Macomb Interceptor Drain Drainage District should not be compelled to pursue legal remedies against the Macomb County Wastewater Disposal District and/or Macomb County;

e. Enter an injunction prohibiting the Macomb Interceptor Drain Drainage District from assessing Sterling Heights for the costs of the emergency repair of the Macomb Interceptor Drain;

f. Award any other relief the Court deems appropriate.

Respectfully submitted,

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