

STATE OF MINNESOTA

IN COURT OF APPEALS

Appellate Court Case No. A111875

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In re the Appeal from the Final Order of  
the Board of Managers of the Bois de Sioux  
Watershed District Redetermining Benefits  
and Damages for Judicial Ditch No. 14

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**APPELLANT'S BRIEF**

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## STATEMENT OF LEGAL ISSUES

### ISSUES:

- I. Whether Minn. Stat § 103E.351, Subd.1 Requires a Drainage Authority to make an independent finding that supports a final decision prior to appointing Viewers.
- II. In the event that the Drainage Authority is required to make an independent finding that supports a final decision prior to appointing Viewers, did the District Court error in dismissing the process entirely, rather than remanding it to the Drainage Authority with instructions.

### RULINGS:

- I. The Trial Court entered in its Summary Judgment Order and corresponding Memorandum that Appellant failed to make an independent finding that supports a final decision prior to appointing Viewers.
- II. The Trial Court failed to address Appellant's request to remand the matter to the Drainage Authority with instructions to Appellant as to the proper procedure to be followed when redetermining benefits and damages under Minn. Stat. Stat § 103E.351.

### APPELLANT'S ANSWER TO THE ISSUES TO BE ARGUED IN BRIEF:

- I. The determination required pursuant to Minn. Stat § 103E.351, Subd.1 is a preliminary determination and thus does not require an independent finding that supports a final decision prior to appointing Viewers
- II. In the event that the Drainage Authority is required to make an independent finding that supports a final decision prior to appointing Viewers, the District Court erred in dismissing the process entirely, rather than remanding it to the Drainage Authority with instructions.

## STATEMENT OF THE CASE

Appellant, Bois de Sioux Watershed District (the “District”) is the Drainage Authority for the Mustinka River flood control project, established in 1954 utilizing Chapter 106 of Minnesota Statutes (new revised and recodified under Chapter 103E). In 2005, the Watershed District initiated the redetermination process by appointing Viewers under section 103E.351 and, after lengthy proceedings, entered a final order in 2009 redetermining the extent of lands benefitted by the flood control project and adjusting upward the amount of benefits to reflect modern day land values. The experienced “Viewers” appointed by the District identified about 465,000 acres of land where farm drainage was increasing the flow of water into the Mustinka and also found that under current land values, the dollar value of benefits received from this drainage was significantly higher than the benefits found in 1954. After entry of an order accepting the Viewers’ report, two groups of landowner appellants (the Haney Group and the Moraine Zone Group) sought review in the District Court.

The Haney Group initially contended that section 103E.351 requires the District to make formal final findings that “the original benefits or damages determined in a drainage proceeding do not reflect reasonable present day land values or that the benefitted or damaged areas have changed” before appointing viewers. They contended that this preliminary determination must actually take the form of findings of fact and conclusions, and that in the absence of those findings, the entire rest of the proceedings are invalid and must be dismissed. The District for its part urged that the Drainage Authority cannot actually make these findings until after completing the redetermination

process and holding its final hearing as M.S. 103E.351 requires a Drainage Authority to retain an open mind and not make a decision until the final hearing is completed. The District thus urged that the initiation involves a preliminary determination only, and that no appeal is provided to attack this preliminary determination, because the only findings that impact the ultimate result is the final hearing decision.

The Moraine Zone Group joined the Haney Group contention, arguing that the Drainage Authority must make a “formal” finding. During the second motion briefing, The Haney Group expanded its argument to now allege the Drainage Authority must make an Order, which a District Court can review, and should direct the redetermination process. They state the Drainage Authority is obligated to define the purpose and scope of the redetermination process before commencing it. The Trial Court agreed with the landowners and held that a Drainage Authority is to make an independent finding “of its own and a final determination before appointing viewers”. Rather than remand for findings, or with instructions as to the proper procedure the Trial Court simply dismissed the entire proceedings, notwithstanding the fact that the overwhelming evidence established that the criteria of section 103E.351 for initiation of a redetermination had been met.

## STATEMENT OF THE FACTS

The Bois de Sioux Watershed District (hereinafter the “District”) is a Chapter 103D duly organized political subdivision of the State of Minnesota. SEE APPENDIX-000003. The District includes portions of five counties in West Central Minnesota. SEE APPENDIX-000119-000120. It has a Board of nine managers appointed by the member counties (hereinafter the “Board”), a salaried staff of two and a consulting engineer. SEE APPENDIX-000128. The District conducts its business generally through monthly Board meetings where the Board deals with issues directly and/or receives reports from and acts on staff recommendations. SEE APPENDIX-000128. The written record of Board action is the monthly Board meeting minutes. SEE APPENDIX-000128-000129.

The Mustinka River is the major waterway within the District. SEE APPENDIX-000086, 000122. The watershed of the Mustinka River consists of about 860 square miles and covers a majority of the District. Id. The first known channelization of the Mustinka River was done by the State of Minnesota in the late 1800's. SEE APPENDIX-000053, 000054, 000089. Judicial Ditch No. 14 (hereinafter “JD No. 14”) was established by Order of the Minnesota District Court dated July 22, 1950, which included a drainage project or plan for flood control proposed by The U. S. Government through the US Army Corps of Engineers (hereinafter “the Corps”) to improve the system. SEE APPENDIX-000054. 19.9 miles of the main channel was excavated as part of this project. Said project included the counties of Traverse and Grant

entering into contracts with the U. S. Government that placed responsibility for maintenance of the system on the counties. SEE APPENDIX-000055, 000124. The benefitted area originally established by the Viewers was substantially reduced by appeals. SEE APPENDIX-000138. The limited ditch records do not explain the basis for these reductions.

The Traverse and Grant Counties Joint Ditch Authority transferred JD No. 14 to the District on April 22, 1991. SEE APPENDIX-000055-000056, 000128. Thereafter the District and its staff received information about JD No. 14 from various sources including letters from The Corps similar to one dated January 17, 1997 stating that serious consideration should be given to dredging the channel to restore the alignment, slowing the bank erosion. SEE APPENDIX-000124. The Corps requested inspection reports to assure that the required maintenance was being performed by the local ditch authority. Inspections of the ditch and review of the ditch files showed the area assessed benefits was unusually small given the size of the system. SEE APPENDIX-000266.

Following the damage done to JD No. 14 by the 2001 spring flood, the Corps and District staff worked on a plan to repair the damage. District staff sought funding from various federal programs as they realized the repairs would be expensive. This was discussed with the Board. SEE APPENDIX-000132. The Board discussed that Viewers might have to be appointed if the federal funding was not available. At the same Board meeting, the statutory process of a redetermination was reviewed by the Board and District staff. SEE APPENDIX-000132. Board Chairperson Jerome Deal

responded that the landowners in the benefitted area had always felt the original area did not include the complete benefitted area. SEE APPENDIX-000138.

The matter came before the Board again in November of 2003. District staff were directed to meet with landowners and discuss the small size of the benefitted area as the Board had established a policy of not initiating ditch projects on its own initiative, but rather requiring requests for action from landowners in writing. SEE APPENDIX-000132, 000137, 000138.

On January 13, 2004, the Board again directed District staff to meet with landowners. The purpose of the meeting was to respond to questions regarding a Redetermination of Benefits. SEE APPENDIX-000132. The staff meeting with landowners was held on March 25, 2004. The District Administrator told the group of landowners that the assessment area is relatively small compared to the size of the ditch system and that it is very difficult to do much maintenance because of the high cost and the small assessment area that is to bear those costs. A majority of the landowners present felt that a redetermination was in order and agreed to discuss this with others who were not present. SEE APPENDIX-000266.

District staff reported at the August 18, 2005 Board meeting that the landowners wished to proceed with a Redetermination and were ready to circulate a petition to establish landowner support. SEE APPENDIX-000132-000133. The District's consulting engineer, Charlie Anderson, stated in his opinion that if a Redetermination was done the entire Mustinka River watershed should be viewed. SEE

APPENDIX-000130. The consensus of the Board was to proceed. SEE

APPENDIX-000132. The District prepared petitions, which the landowners circulated for signatures that provided the reason for seeking a redetermination was:

**“that the original benefits determined for Judicial Ditch 14 do not reasonably represent current land values and benefited areas have changed.”**

**(SEE APPENDIX 0000266, 000066).**

At the November 17, 2005 Board meeting, the District Administrator reported to the Board that petitions had been filed which contained more than 50 percent of the owners of property benefitted or damaged by JD No. 14. The nature and scope of the project and the Redetermination process was fully discussed. The Board ordered that the matter be scheduled for an informal hearing at the December Board meeting and directed the District Administrator to invite all of the landowners and potential Viewer Ron Ringquist. SEE APPENDIX-000133, 000130, 000139.

On December 15, 2005, the District, at its regular Board meeting, held an informal hearing. Meeting minutes of the December 15, 2005 meeting state:

Brief history of the project was proposed.

Attorney Athens discussed the legal issues of this process, and explained that today was not a statutory hearing, but an informal one called because the size of the project was so large and the expense would be considerable. He also explained that the board did not need a petition to order a Redetermination under the statute and it is still a discretionary decision on their part even though sixty-two percent (62%) of all land owner signatures were obtained. Ron Ringquist, Viewer, discussed viewing procedures and expenses. Administrator stated mailed notice was given to all petitioners and many were in attendance. No one voiced any objection, nor reservations, to proceeding. Upon motion by Roach, second by Lampert and carried, the viewers were appointed and staff were

authorized to proceed with the Redetermination process. Viewers appointed were Ron Ringquist, Clifford Emmert, and Merlin Beekman, along with two alternates, Don Finberg and Jim Weidemanne. Voting no were Ellison and Kappahn. Voting yes were Jack Lampert, Robert Roach, Dennis Zimbrick and Doug Daniels. SEE APPENDIX 000133.

The Board directed District staff, specifically including the District's consulting engineer, to assist the Viewers. SEE APPENDIX-000133. Thereafter, the District's engineer did meet with the Viewers on multiple occasions and provided them engineering and other information as requested. SEE APPENDIX-000124, 000125, 000141.

Approximately 29,500 acres are presently assessed benefits within the original determined area. SEE APPENDIX-000062, 000051. The Viewers presented an initial report to the Board in December 2009. SEE APPENDIX-000135. The Viewers found that about 65,000 acres received traditional direct hydrological benefits from JD No. 14, many of which had not been originally assessed. SEE APPENDIX-000120, 000127a. The Viewers also found a second category of 400,000 acres (SEE APPENDIX-000120) that received benefits of a different kind based on the burden they place on JD No. 14. SEE APPENDIX-000127b. The Viewers found a total of approximately \$55,500,000.00 of benefits based on current land values. Of the total benefits, the Viewers assigned approximately \$41,000,000 to the 65,000 acres that receive traditional direct benefits with the remainder apportioned over the 400,000 acres in the new category. SEE APPENDIX-000127b, 000127c.

The January 28, 2010 Board meeting minutes state:

JUDICIAL DITCH #14 VIEWER'S REPORT: Administrator distributed a copy of the viewer's report in its final state that will be taken to hearing in April 15, 2010, at 4:00 p.m. at Wheaton Area Schools, 1700-3'd Avenue South, Wheaton, MN in the auditorium. Copies will be available for review in the Graceville and Elbow Lake libraries. SEE APPENDIX 000135.

A formal property owner's report was thereafter mailed to every property owner proposed to be assessed benefits in the Viewers' Report as required by Minn. Stat. § 103E.351 Subd. 2(b) and Minn. Stat. § 103E.323. SEE APPENDIX-000293.

After giving published and mailed notice, the final hearing was started on April 15, 2010 in the Wheaton High School Auditorium. It was explained at the commencement, that the Board had decided to appoint Viewers after receiving a petition from over 60% of the landowners presently assessed, but that the Board itself had not made a decision, understood it was to keep an open mind, and intended to conduct a full, fair and complete Final Hearing before making a decision. SEE APPENDIX-000068, 000069. Those in attendance were instructed at the beginning of the hearing that the hearing would be continued until June 17<sup>th</sup> to allow individual landowners to meet with the Viewers. The attorneys who later appealed the Board's decision were present and made statements during the open meeting. SEE APPENDIX-000249.

At the continued hearings on June 17, and August 19, all persons present were given full opportunity to be heard. SEE APPENDIX-000073, 000075, 000076. The public hearing portion was closed and the matter was continued for the Board to deliberate before taking action. The Hearing was reopened on September 15, 2010 as

scheduled. Board members extensively questioned the Viewers, the Engineer and the Attorneys. SEE APPENDIX-000228, 000226, 000227. At the conclusion, the Board approved the Amended Viewers' Report distributed that day by a roll call vote with six managers in favor and two opposed. One manager was not present. The Board then directed the preparation of Findings, Conclusions and an Order. SEE APPENDIX-000059.

Two groups of Appellants (The Haney Group and The Moraine Zone Group) appealed the Board's Order to adopt the Amended Viewers' Report. Following the perfection of their appeal, The Haney Group brought a Summary Judgment Motion on three grounds:

- 1) the redetermination was improperly commenced;
- 2) lands cannot be added to a drainage system under Minn. Stat. § 103E.351; and
- 3) the redetermination is based on a flawed, impermissible viewer methodology.

Prior to oral argument, the Moraine Zone Group announced it was bringing a separate Summary Judgment Motion with oral argument set for a separate date. SEE APPENDIX-000217. The Haney Group initially contended that if a Drainage Authority determines "the original benefits or damages determined in a drainage proceeding do not reflect reasonable present day land values or that the benefited or damaged areas have changed", before appointing Viewers, Minn. Stat. § 103E.351, Subd.1 requires this preliminary determination must be spelled out in findings, and that in the absence of those findings, the entire proceedings are invalid and must be dismissed. SEE

APPENDIX-000026, 000156-000161. The District, for its part, urged that the Drainage Authority cannot actually make such findings until after completing the redetermination process and holding its final hearing as Minn. Stat. § 103E.351 requires a Drainage Authority to retain an open mind and not make a decision until the final hearing is completed. SEE APPENDIX-000108, 000111, 000281-000293. The District urged that the initiation involves a preliminary determination only. Id.

The District Court Appellants also argued that because the District only acted after receiving a written request, in the form of a petition, from a majority of the presently assessed landowners, the record was not adequate to show the Board made the required determination. The District responded that Board Meeting Minutes of September 19, 2002 through December 15, 2005, coupled with the District staff meeting minutes of 2004, and the language in the petition requesting a redetermination based on the statutory language, which was prepared by the District, is more than adequate to establish the District made the necessary determination, and again that formal “findings” are not called for as it is only a preliminary determination. SEE APPENDIX-000281-000289.

The Moraine Zone Group joined in this contention in their separate Summary Judgment Motion, arguing that the drainage must make a “formal” finding. SEE APPENDIX-000202. In this second motion briefing, The Haney Group expanded its argument to allege the Drainage Authority findings must allege a “change” either of land values or benefitted areas which a District Court can review, and should direct the redetermination process. SEE APPENDIX-000336-000337. The Haney Group argued

the Drainage Authority is obligated to define the purpose and scope of the redetermination process before commencing it.

At the conclusion of the second oral argument, the Trial Court announced that it would be granting Summary Judgment because the redetermination was not properly commenced, that the Court would not be addressing remaining issues presented in the Summary Judgment motions and that a written Order and Memorandum would follow. The District requested the Trial Court remand the matter, rather than dismiss the matter and give the District instructions as to the proper procedure to be followed. SEE APPENDIX-000346-000347.

The Trial Court issued a Summary Judgment Order dismissing the entire proceedings, stating that as a matter of law, the redetermination proceeding was improperly commenced. SEE ADDENDUM. In its Memorandum, it appears that the Trial Court implies that a Drainage Authority is to make an independent finding of its own and a final determination before appointing viewers. SEE ADDENDUM. The Drainage Authority's request for a remand was not mentioned.

### **STANDARD OF REVIEW**

Minnesota Rules of Civil Procedure 56.03 provides that the trial court shall award summary judgment where there is no genuine issue as to any material fact and either party is entitled to a judgment as a matter of law. In the Matter of Redetermination of Benefits of Nicollet County Ditch 86A, 488 N.W.2d 482, 484 (Minn.Ct.App.1992) (citing Minnesota Rules of Civil Procedure 56.03). On appeal from an award of

summary judgment, the Court of Appeals' sole function is to determine "(1) whether there are any genuine issues of material fact and (2) whether the trial court erred in its application of the law." Id. (quoting Betlach v. Wayzata Condominium, 281 N.W.2d 328, 330 (Minn.1979)).

When reviewing questions of law, the Court of Appeals need not accord deference to the trial court's determination. Id. at 484-485 (citing A.J. Chromy Constr. Co. v. Commercial Mechanical Serv., Inc., 260 N.W.2d 579, 582 (Minn.1977)). Where the lower court applies statutory language to the facts of a case, that conclusion is a matter of law and does not bind the Court of Appeals. Id. at 485 (citing Nhep v. Roisen, 446 N.W.2d 425, 426 (Minn.Ct.App.1989)), pet. for rev. denied (Minn. Dec 1, 1989). Statutory construction is a question of law, which the Court of Appeals reviews de novo. Marshall County v. State, 636 N.W.2d 570, 573 (Minn.Ct.App.2001) (citing Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn.1998)). When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, to be reviewed de novo. Marshall County, 636 N.W.2d at 573-574 (citing Lefto v. Hoggsbreath Enters, Inc., 581 N.W.2d 855, 856 (Minn.1998)).

## LAW AND ARGUMENT

### **I. Whether Minn. Stat § 103E.351, Subd.1 Requires a Drainage Authority to make independent findings that support a final decision before appointing Viewers.**

The first step in resolving this issue requires a detailed analysis of Minn. Stat. §

103E.351, Subd. 1 which states:

**Subdivision 1. Conditions to redetermine benefits and damages; appointment of viewers.** If the drainage authority determines that the original benefits or damages determined in a drainage proceeding do not reflect reasonable present day land values or that the benefitted or damaged areas have changed, or if more than 50 percent of the owners of property benefitted or damaged by a drainage system petition for correction of an error that was made at the time of the proceedings that established the drainage system, the drainage authority may appoint three viewers to redetermine and report the benefits and damages and the benefitted and damaged areas.

Minn. Stat. § 103E.351, Subd. 1 must be compared with other sections of Chapter 103E as our Supreme Court has consistently said that sections of a statute, or other law, that relate to the same subject matter and to each other should be construed together.

See Glen Paul Court Neighborhood Ass'n v. Paster, 437 N.W.2d 52, 56 (Minn.1989)

(stating that sections of the statute should be construed together).

Minn. Stat. § 645.17 provides:

**645.17 PRESUMPTIONS IN ASCERTAINING LEGISLATIVE INTENT.**

In ascertaining the intention of the legislature the courts may be guided by the following presumptions:

- (1) The legislature does not intend a result that is absurd, impossible of execution, or unreasonable;
- (2) The legislature intends the entire statute to be effective and certain;
- (3) The legislature does not intend to violate the Constitution of the United States or of this state;
- (4) When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language; and
- (5) The legislature intends to favor the public interest against any private interest.

When the words of a statute or ordinance in their application to an existing situation are clear and free from ambiguity, judicial construction is inappropriate. Chanhassen Estates Residents Ass'n v. City of Chanhassen, 342 N.W.2d 335, 339 (Minn. 1984) (indicating that sections of the statute should be construed together, giving the words their plain meaning); Kollodge v. F. and L. Appliances, Inc., 80 N.W.2d 62, 64 (Minn.1956) (stating that it is a cardinal rule of statutory construction that a particular provision of a statute cannot be read out of context but must be taken together with other related provisions to determine its meaning.) See also Marshall County, 636 N.W.2d at 570.

Minnesota Law pertaining to drainage ditches is a complex matrix adopted with the intent of reclaiming agricultural land by disposing of excess water that renders the land untillable and fairly allocating the costs among benefitted landowners. See Town of Vivian v. Town of Dunbar, 203 N.W. 431, 432 (Minn.1925). In Minn. Stat. §§ 103E.202 to 103E.345, the legislature has laid out a detailed process that Drainage Authorities are to follow when considering all drainage projects. Viewers for a redetermination are appointed pursuant to Minn. Stat. § 103E.351, Subd. 1. The hearing and procedure, once Viewers are so appointed, is controlled by Minn. Stat. § 103E.351, Subd. 2(a)(b) and (c), which sets forth the following:

- (a) The redetermination of benefits and damages shall proceed as provided for viewers and the viewers' report in sections 103E.311 to 103E.321.
- (b) The auditor must prepare a property owners' report from the viewers' report. A copy of the property owners' report must be mailed to each owner of property affected by the drainage system.
- (c) The drainage authority shall hold a final hearing on the report and

confirm the benefits and damages and benefited and damaged areas. The final hearing shall proceed as provided under sections 103E.325, 103E.335, and 103E.341, except that the hearing shall be held within 30 days after the property owners' report is mailed.

Thus, Subdivision 1 of Minn. Stat. § 103E.351 is remarkably different from the provisions of Minn. Stat. § 103E dealing with drainage projects.

Appellant takes the position that recognizing these striking differences is critical to properly interpreting the Legislature's intentions, and therefore these distinctions cannot be over emphasized. For example, pursuant Minn. Stat. § 103E.202, there are detailed requirements for petitions for drainage projects and repair, and said petitions are to be reviewed by the county attorney pursuant to Minn. Stat. § 103E.238. Then, Minn. Stat. § 103E.241 requires that the Drainage Authority retain an engineer who must complete a detailed survey and prepare a report pursuant to Minn. Stat. § 103E.245, which is to contain detailed information as prescribed by the legislature.

In addition to the foregoing, the detail of the Legislature's directions for a preliminary hearing must be considered as set forth in Minn. Stat. § 103E.261:

Subd. 1. Notice.

When the preliminary survey report is filed, the auditor shall promptly notify the drainage authority. The drainage authority in consultation with the auditor shall set a time, by order, not more than 30 days after the date of the order, for a hearing on the preliminary survey report. At least ten days before the hearing, the drainage authority after consulting with the auditor shall give notice by mail of the time and location of the hearing to the petitioners, owners of property, and political subdivisions likely to be affected by the proposed drainage project in the preliminary survey report.

Subd. 2. Hearing.

The engineer shall attend the preliminary hearing and provide necessary information. The petitioners and all other interested parties may appear and

be heard. The commissioner's advisory report on the preliminary plan must be publicly read and included in the record of proceedings.

Subd. 3. Sufficiency of petition.

(a) The drainage authority shall first examine the petition and determine if it meets the legal requirements.

(b) If the petition does not meet the legal requirements of this chapter, the hearing shall be adjourned until a specified date by which the petitioners must resubmit the petition. The petition must be referred back to the petitioners who, by unanimous action, may amend the petition. The petitioners may obtain signatures of additional property owners as added petitioners.

(c) When the hearing is reconvened, if the petition is not resubmitted or does not meet the legal requirements, the proceedings must be dismissed.

Subd. 4. Dismissal.

(a) The drainage authority shall dismiss the proceedings if it determines that:

(1) the proposed drainage project is not feasible;

(2) the adverse environmental impact is greater than the public benefit and utility after considering the environmental and land use criteria in section 103E.015, subdivision 1, and the engineer has not reported a plan to make the proposed drainage project feasible and acceptable;

(3) the proposed drainage project is not of public benefit or utility; or

(4) the outlet is not adequate.

(b) If the proceedings are dismissed, any other action on the proposed drainage project must begin with a new petition.

Subd. 5. Findings and order.

(a) The drainage authority shall state, by order, its findings and any changes that must be made in the proposed drainage project from those outlined in the petition, including changes necessary to minimize or mitigate adverse impact on the environment, if it determines that:

(1) the proposed drainage project outlined in the petition, or modified and recommended by the engineer, is feasible;

(2) there is necessity for the proposed drainage project.

(3) the proposed drainage project will be of public benefit and promote the public health, after considering the environmental and land use criteria in section 103E.015, subdivision 1; and

(4) the outlet is adequate.

(b) Changes may be stated by describing them in general terms or filing a map that outlines the changes in the proposed drainage project with the

order. The order and accompanying documents must be filed with the auditor.

Subd. 6. Outlet is existing drainage system.

If the outlet is an existing drainage system, the drainage authority may determine that the outlet is adequate and obtain permission to use the existing drainage system as an outlet. The drainage authority shall assign a number to the proposed drainage project and proceed under section 103E.401 to act in behalf of the proposed drainage project.

Subd. 7. Effect of findings.

(a) For all further proceedings, the order modifies the petition and the order must be considered with the petition.

(b) The findings and order of the drainage authority at the preliminary hearing are conclusive only for the signatures and legal requirements of the petition, the nature and extent of the proposed plan, and the need for a detailed survey, and only for the persons or parties shown by the preliminary survey report as likely to be affected by the proposed drainage project. All questions related to the practicability and necessity of the proposed drainage project are subject to additional investigation and consideration at the final hearing.

In light of the foregoing analysis, and in light of Appellant's primary goal of keeping an open mind to facilitate a process that concludes with the most impartial and meaningful final hearing possible, Appellant interpreted Minn. Stat. § 103E.351, Subd.1 to mean that the Legislature intentionally omitted any reference to hearings, engineer reports, findings or order as this type of determination is a preliminary determination because it is critical that the Drainage Authority have an open mind until the conclusion of the final hearing. Thus, the property owners' rights are to be protected by mandating that the authority retain an open mind and not make a decision until the final hearing is completed. Furthermore, Appellant did not, and could not, reach a final decision before appointing Viewers, and did not want to steer the Viewers in a

direction that would lead to unsubstantiated or premature conclusions. It is Appellant's position that Minn. Stat. § 103E.351, Subd. 1 involves a preliminary determination only. See State ex rel. Mosloski v. Martin County, 80 N.W.2d 637, 640-641 (Minn.1957). Appellant's foregoing interpretation of Minn. Stat. § 103E.351, Subd.1 is supported by Minn. Stat. § 103E.261, Subd. 7, which warns drainage authorities to refrain from making premature determinations.

The focus of Appellant throughout this process has been to keep an open mind and not make a premature determination. The objectors say this interpretation leaves them open to abuse of Appellant's power, and that they may be required to pay for frivolous redeterminations or pay unwarranted assessments. However, these landowners have no obligation to the ditch system until there is a final order including them as part of the benefitted area pursuant to Minn. Stat. § 103E.341, and the legislative check is that the property owners' rights are to be protected by mandating that the Drainage Authority not make a final determination until the end of the final hearing.

The Moraine Group objectors have asserted that Appellant's staff pressed for the initiation of this redetermination suggesting that the adoption of the Viewers' report was pre-ordained and the whole concept of an impartial hearing is a sham. The Haney Group's argument that Appellant must make an independent decision before appointing Viewers and direct the process would create situations in which impartial hearings would be unlikely.

This was not a watershed project. The Board appointed Viewers only after being requested to do so by a majority of the assessed landowners, recognizing they have an ownership interest. See Fischer v. Town of Albin, 104 N.W.2d 32, 34 (Minn.1960) (stating that landowners assessed benefits, or assigned damages, acquire property rights in the ditch system). The Board did not discuss what areas might be added nor what basis the Viewers were to use in their evaluation before appointing Viewers.

Appellant knew from past experience that these Viewers would make their evaluation independently. Appellant's only input was to have its engineer work with the Viewers. While engineer Anderson strongly supported the Viewers' findings at the final hearing, this was done on the basis of the engineering study he did after the viewers were appointed. Engineer Anderson's first engineer's report is dated 2009. Appellant believed that proceeding in this manner was what the Legislature intended.

Appellant anticipated that the objectors would present a factual basis for their objections, and possibly a reasoned alternative during the final hearing, which was continued twice and spread over a four month period. However, while individual landowners gave opinions that their property did not benefit, said landowners' conclusion was, simply, that either their property should not be assessed, or that the entire redetermination should be rejected, and there was no prepared alternative to the viewers' report presented to the board. The District simply voting "no" would

not have been appropriate as, without question, land values had changed, and a majority of the landowners added by the Viewers did not object, so some redetermination was clearly necessary.

Here, the District scrupulously followed the Legislature's guideline. The major reason for the December 2005 informal meeting that the Board had with the landowners, who were assessed benefits, was to make sure that they understood they were taking on the risk of what was anticipated to be an expensive viewing process, with no decision having been reached by the Board as to the final result.

The Trial Court's ruling is contrary to established Minnesota law. Neither the Trial Court nor the objectors cite any case law to support their contentions that there must be findings before appointing Viewers; that a Minn. Stat. § 103E.351 Subd. 1 determination is a final decision, or that the Drainage Authority should direct the redetermination process. In fact, there is case law to the contrary.

In State ex rel. Mosloski, 80 N.W.2d at 639-41, our supreme court discusses in detail the history and distinctions between findings made at a preliminary hearing and those made at final hearings in drainage proceedings and held an Order made after a preliminary hearing is not a final determination and is not appealable.

As noted above, Minn. Stat § 103E.261, Subd 5. requires findings and an Order at the conclusion of a preliminary hearing. However, Minn. Stat. § 103E.351, Subd. 1 does not mention either findings or order.

In Titrud v. Achterkirch, 213 N.W.2d 408, 412-413 (Minn.1973) our

Supreme Court stated:

“Objector’s final contention is that the order establishing the ditch should be reversed because the outlet is inadequate. They argue that the order neither made findings nor drew any conclusions concerning the outlet’s adequacy...A specific finding to this effect in the final order establishing the ditch is not necessary. The proposed ditch was found to be ‘practicable’ in the final order, as required by Minn.St. 106.201. We have held that such a determination includes a finding of adequacy of the outlet. (citing State ex rel. Mosloski v. County of Martin, 248 Minn. 503, 510, 80 N.W.2d 637, 641 (1957); In re Petition for County Ditch No. 53, 238 Minn. 392, 401, 57 N.W.2d 158, 164 (1953). We will not reverse the finding unless it is unsupported by the evidence. (citing In re Judicial Ditch No. 12, 227 Minn. 482, 484, 36 N.W.2d 336, 338 (1949) We find that the determination of an adequate outlet through the finding of practicability of the ditch is supported by the evidence.”

In Titrud, our Supreme Court sets forth that the court will look instead to see whether the determination is supported by the evidence in the record. Id. at 412-413. Similarly, in the case at bar, Appellant contends that the determination in question is supported by the evidence in the record, specifically, the Board Meeting Minutes of September 2002 through December 2005, the staff meeting notes of March 25, 2004, and the language copied from the statute in the Petition requesting a redetermination, which was prepared by Appellant. It is clear that said evidence in the record meets the standard set by our Supreme Court in Titrud.

Even in formal judicial proceedings, findings are not required to document reasons for a judicial determination. The Trial Court is demanding greater formality in drainage proceedings than required in judicial proceedings.

For example, in specific circumstances, Rule 52 motions do not require

findings. Fed R. Civ. Pro. 52(a)(3), Minn. R. Civ Pro. 52.01. 9C Miller & Wright, Federal Practice and Procedure § 2574-5; 2 Herr & Haydock, Civil Rules Annotated § 52.4. An order may determine whether a privilege applies without findings. An order may determine whether discovery may lead to relevant evidence, whether a witness should be barred from testifying, without making findings. An order granting or denying summary judgment requires a determination whether there are material issues of fact in dispute, but it does not require findings. The Court of Appeals held, for example, that while the purpose of a “Schwartz hearing” is to “determine” juror misconduct, no findings are required in the order granting or denying relief. Senf v. Bolluyt, 419 N.W.2d 645, 647 (Minn.Ct.App.1988).

The findings of the Trial Court are not jurisdictional and the absence of findings may be disregarded by the appellate court if the record is so clear that the court does not need their aid. Allen v. Village of Savage, 112 N.W.2d 807, 815-816 (Minn.1961). While not a drainage case, it is interesting that the Supreme Court case cited by the objectors to the Trial Court, specifically, Chanhassen Estates Residents Ass’n v. City of Chanhassen, rejected as without merit the argument that specific findings are necessary. See 342 N.W.2d 335, 340 (Minn.1984).

The trial court’s decision failed to address Appellant’s arguments that our Legislature frequently uses the word “determines” to describe a decision that can be made on the initiative of an agency without formal findings. See Minn. Stat. § 3.303 (“The commission shall undertake activities it determines are necessary to assist

state government"); See also Minn. Stat. § 3.736 ("Upon receipt of the request and review of the claim, the commissioner of management and budget shall determine the proper appropriation from which to make payment"). Furthermore, the word determination is often used to connote what the agency decides, as opposed to the findings that it makes. See Minn. Stat. § 10A.02 ("If, after making a public finding concerning probable cause... the board determines..."); See also Minn. Stat. § 13.03 ("If the responsible authority or designee determines that the requested data is classified..."). Some determinations require findings and some do not. The way that the legislature tells us that a determination requires a finding is when it specifically calls for findings in express terms, and the legislature has not done so here. There is a pattern in Minn. Stat. § 103E in which the legislature links hearing, findings and order, and specifically prescribes all three. See Minn. Stat. §§ 103E.261, 103E.335, 103E.336, and 103E.401. None of the three requirements mentioned in the previously identified statutes, specifically hearing, findings or order, are mentioned in Minn. Stat. § 103E.351, Subd.1.

The Trial Court's decision apparently adopts the objectors argument that the Drainage Authority is to direct the redetermination. Nowhere in the drainage code is there any language that suggests the Drainage Authority is to have any part in deciding the issues of benefits and damages until the final hearing. Nothing in Minn. Stat. §103E.261 suggests that the issue as to who is to be assessed benefits for a project is even to be discussed. In contrast, this is a specific subject for

consideration at the proceedings for a final hearing regulated by Minn. Stat. §103E.335, when the Drainage Authority is directed to take up the Viewers' report. For a Board of lay persons to so actively involve themselves at the inception makes it all the more difficult for them to reserve judgment until the conclusion of the final hearing. It is Appellant's position that Minn. Stat. § 103E.351, Subd.1 does not require a "final decision", and in turn, there was no "final decision" in this case, only a motion to appoint Viewers, which is consistent with the most reasonable interpretation of said section.

The Trial Court, pursuant to what appears to be its adoption of the Haney Group argument, states in its memorandum that not only must the Drainage Authority make findings, the Drainage Authority must also make an "independent" determination before appointing Viewers. The Trial Court's decision creates multiple unanswered questions as to what the basis of such an independent determination must be, makes the work of the Viewers' irrelevant, and diminishes the likelihood of a meaningful final hearing. Some of the unanswered questions include: (1) What is to be the basis of this final determination?; (2) Is a recommendation from the engineer that a project's watershed be viewed sufficient in light of the fact that there is no provision for an engineer's report in Minn. Stat. §103E.351?; (3) Is the request from a majority of the landowners in the existing benefitted area a sufficient basis?; (4) Must the Drainage Authority hold a public hearing?; (5) and if so, to whom must it give notice? In the case at bar, the Haney Group states as a material fact that notice of the informal December

2005 meeting was only given to landowners then assessed to JD No. 14. SEE APPENDIX 000006. Must then a Drainage Authority give mailed notice to each of the property owners of record in a watershed project (in the case at bar, some 465,000 acres) before appointing Viewers? The intention of the foregoing examples of questions is to not only support Appellant's position that the Trial Court's decision is inconsistent with Minn. Stat. § 103E.351, but also to identify the concerns and issues that would be created by such a decision, including but not limited to creating a situation in which watershed districts must speculate as to what process it should follow in these cases.

The Trial Court relies on Black's Law dictionary (9<sup>th</sup> ed.2009) to find that the plain meaning of "determination" is a final decision. In doing so it ignores the Legislative admonition in Minn. Stat. § 103E.261, Subd. 7 that Drainage Authorities refrain from making premature determinations. This seems to be a re-write of the statute. Nothing in either Minn. Stat. § 103E.351, or Minn. Stat. § 103E.261 suggests that the Drainage Authority has any role in deciding what lands should be viewed, much less assessed, until the final hearing. The Viewers cannot perform their duties if the Drainage Authority has predetermined the issues and outcomes. Minn. Stat. § 103E.351, Subd. 2 directs the Viewers to conduct their evaluation in the detailed process prescribed in Minn. Stat. § 103E.311 to 103E.321 exactly as if it was a new project.

Minn. Stat. § 103E.351 Subd. 1 is a directory statute, which authorizes the Board to act at its discretion, allows the Board to set its own procedure, permits informality, and specifically does not require a written finding. Our courts have held that a violation of a

directory statute does not invalidate the action taken. See City of Chanhassen v. Carver County, 369 N. W.2d 297, 300 (Minn.Ct.App.1985); See also Manco of Fairmont, Inc. v. Town Board of Rock Dell Township, 583 N.W.2d 293, 295-296 (Minn.Ct.App.1998). See also Agassiz & Odessa Mut.Fire Ins. Co. V. Magnusson, 136 N.W.2d 861, 867-868 (Minn.1965). Objectors will argue these cases do not involve the drainage statute. While this is true, Appellant contends that the opinion in Sullivan v. Credit River Township, 217 N.W.2d 502, 507 (Minn.1974) is particularly instructive that the principle is to be applied throughout statutory interpretation. The Court in Sullivan went to great lengths to describe the importance of the open meeting law and its position that the township erred in not giving notice under the open meeting law, only to conclude:

“Notwithstanding the lack of notice, however, the decision of the trial court must be affirmed because the statute is directory rather than mandatory since it fails to provide a method for enforcement and does not specify that actions taken at a meeting which is not public shall be invalid. We have indicated that a statute which does not declare the consequences of a failure to comply may be construed as a directory statute.” Sullivan v. Credit River Township, 217 N.W.2d at 507.

Ditch proceedings before a Board are not legal proceedings: See 17 DUNNELL MINN. DIGEST Drainage and Watersheds § 3.05(g) (5<sup>th</sup> ed. 2006). A reading of the Supreme Court’s opinion in State v. Truax indicates that the functions of the Drainage Authority in a ditch proceeding are primarily legislative and are only quasi-judicial. State v. Truax, 166 N.W. 339, 340 (Minn.1918). The Drainage Authority, Appellant, is not a Court and its proceedings are necessarily informal. Id. at 340. The members of the

Drainage Authority, who are usually non lawyers, are not governed by legal rules of evidence nor procedures. Id.

Drainage laws must be liberally construed, so as to promote the public health and the drainage and reclamation of wet or overflowed land. Lippmann v. Huhn, 81 N.W.2d 100, 109 (Minn. 1957); In re Improvement of Murray County Ditch No. 34, 615 N.W.2d 40, 45 (Minn. 2000).

The District, at a minimum, substantially complied with Minn. Stat. § 103E.351, which is clearly a directive statute. Manco of Fairmont, Inc. v. Town Board of Rock Dell Township, 583 N.W.2d 293, 295-296 (Minn.1998). See also City of Minneapolis v. Wurtele, 291 N.W.2d 386, 391 (Minn.1980); See also Agassiz & Odessa Mut. Fire Ins. Co. V. Magnusson, 136 N.W.2d 861, 868-869 (Minn.1965). The doctrine of substantial compliance recognizes that the law does not mandate in all cases strict and literal compliance with all procedural requirements. Technical defects in compliance which do not reflect bad faith, undermine the purpose of the procedures, or prejudice the rights of those intended to be protected by the procedures will not suffice to overturn governmental action particularly where, as here, substantial commitments have been made. See Manco of Fairmont, Inc., 583 N.W.2d at 295; See also City of Minneapolis, 291 N.W.2d at 391-392; See also City of Chanhassen, 369 N.W.2d at 300.

Even where findings are explicitly required in judicial proceedings, for example, at the end of a case, a failure to make findings when no finding in favor of Appellant would be justified is harmless error. See Cool v. Hubbard, 199 N.W.2d

510, 514 (Minn.1972); See also 47 DUNNELL MINN. DIGEST Trial § 18.07 (5<sup>th</sup> ed. 2006). Where a case is tried by the court without a jury, where the facts are stipulated and are not in dispute, or where there are no inferences to be drawn from the facts, and where the basis of the court's decision clearly appears from its Memorandum, the appellate court should not reverse to require findings of fact. Appellant disputes that an error was made in these proceedings. However, for the sake of argument, even if an error was determined to be made by Appellant in this matter because of a failure to come to a “final decision”, or because of a failure to make “an independent finding of its own”, such an error, should be construed as harmless, because such premature determinations would not have been justified at that time.

**II. Whether the trial court erred in dismissing the process entirely, rather than remanding it to the drainage authority with instructions.**

The Trial Court erred in not remanding with instructions. Appellant requested the Trial Court to remand with instructions citing In the Matter of Redetermination of Benefits of Nicollet County Ditch 86A, 488 N.W.2d 482, 487 (Minn.Ct.App.1992) and Petition of Ittel, 386 N.W.2d 387, 390 (Minn.Ct.App.1986). Appellant requested a remand with instructions so that it could meet the Trial Court’s procedural requirements. The Trial Court refused to provide any such instructions. In addition, there are two remaining issues pursuant to the summary judgment motion, and the Trial Court declined

to give any inclination as to its position on either of them. The Haney Group alleges there are numerous other errors, and Appellant has already spent substantial sums only to be told to start over. The Trial Court's decision forces Appellant to play a guessing game and possibly be involved in innumerable appeals. In the event the Trial Court's decision is not reversed in all respects, then it is absolutely necessary that this matter be remanded with instructions to Appellant as to the proper procedure that should be followed in this case

Generally speaking, Minn. Stat. §103E has two sections that deal with appeals, specifically Minn. Stat. §§ 103E.091 and 103E.095. Minn. Stat. § 103E.091 is directed towards the issues of the amounts of benefits and damages and does not provide for appealing the process. Minn. Stat. § 103E.095 seems designed to handle the issues objectors raise here, but by its title, seems limited to appeals from the establishment of projects. Unfortunately, this is something that got muddled in the re-codification from Minn. Stat. §§ 106 to 106A to 103E. The original drainage code made it crystal clear that the remedy when a court finds procedural errors is remand, as the appeal provisions were all in one section, specifically Minn. Stat. §106.631.

Minn. Stat. § 106.465 provided that "Any person aggrieved by the redetermination of benefits and benefitted areas may appeal from the order determining the same as provided in section 106.631." Minn. Stat. § 106E.631, Subd. 4 read as follows:

"If the court finds that the order appealed from is arbitrary, unlawful, or not supported by the evidence, it shall make such order to take the place of the order appealed from as is justified by the record before it or remand such matter to the county board for further proceeding before the board. After

determination of the appeal, the county board shall proceed in conformity therewith.”

This language is incorporated in Minn. Stat. § 103E.095 and the Trial Court should have applied it.

**CONCLUSION**

Based on the foregoing, Appellant respectfully requests that this Court reverse the Trial Court’s determination in all respects, or in the alternative, remand the matter with instructions to Appellant District as to the proper procedure to be followed when redetermining benefits and damages under Minn. Stat. § 103E.351.

Dated: November 17, 2011

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CERTIFICATE OF LENGTH COMPLIANCE

I, Thomas C. Athens, an attorney for Appellants, hereby state that Appellant's Brief complies with both the typeface requirement and word count limitation as set forth in Minnesota Rule of Civil Procedure 132 Subd. 3(a). Microsoft Word 2010 was used in the preparation of Appellant's Brief.

There are 7,560 words in the brief.

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