

**APPELLATE COURT CASE NUMBER A111875**

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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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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**RESPONDENT GRANT AND OTTER TAIL COUNTY APPELLANT'S  
RESPONSE BRIEF**

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**STATEMENT OF THE LEGAL ISSUES**

- I. WAS THE TRIAL COURT CORRECT IN FINDING THAT THE DITCH AUTHORITY DID NOT MAKE A PREREQUISITE DETERMINATION THAT EITHER: 1) ORIGINAL BENEFITS OR DAMAGES DETERMINED IN AN EARLIER DRAINAGE PROCEEDING DID NOT REFLECT REASONABLE PRESENT DAY LAND VALUES; OR 2) THAT THE BENEFITED OR DAMAGED AREAS HAVE CHANGED, BEFORE ORDERING A REDETERMINATION OF BENEFITS FOR JUDICIAL DITCH #14?

**Trial Court Held:** That *no* determination was made by the Ditch Authority prior to ordering a redetermination of benefits for Judicial Ditch #14 and thus the redetermination of benefits which proceeded from the Ditch Authority's appointment of Viewers was improperly commenced and should be properly vacated.

**Most apposite cases:**

None.

**Most apposite statutes:**

Minn. Stat. §103E.351

## STATEMENT OF THE CASE

This appeal arises from the Trial Court's September 19, 2011 Summary Judgment Order and Judgment wherein the trial court vacated the September 30, 2010 Findings of Fact, Conclusions, and Order for Redetermination of Benefits for J.D. No. 14 (hereinafter "Redetermination Order") of the Bois de Sioux Watershed District (hereinafter "Ditch Authority"). The basis for the Trial Court's vacation of the Order was that the Ditch Authority did not comply with the statutory requirements for initiating a redetermination of benefits set out by the Legislature under Minn. Stat. § 103E.351, Subd. 1.

The redetermination of benefits process which resulted in the Redetermination Order commenced on December 15, 2005 when the Ditch Authority appointed Viewers. At that meeting, a petition was presented to the Ditch Authority Board requesting a redetermination; however, as will be described more fully below, no determination was made by the Ditch Authority Board that any of the statutory criteria for ordering a redetermination had been met. The redetermination process, as conducted by the Viewers, continued for a number of years until the Redetermination Order was issued on September 30, 2010.

Following the Redetermination Order, two groups of landowners appealed. One group, the Haney Group, represented by Gislason & Hunter, appealed on behalf of all landowners within the supposed benefitted area of Judicial Ditch 14. The second group, the Moraine Group, which the undersigned represents, appealed on behalf of landowners that live within a geographically and hydrologically distinct portion of the supposed

benefitted area. The appeals were consolidated for purposes of judicial efficiency, but the appellant groups retained their separate nature and representation.

On May 11, 2011, the Haney Group noticed its motion for summary judgment with a hearing originally scheduled for June 21, 2011. The Moraine Group did not proceed with its motion for summary judgment at that time because the Ditch Authority had not yet produced its record of the proceedings for review by appellants. The record was produced on June 7, 2011 and the Moraine Group proceeded with its own motion for summary judgment soon thereafter.

The Moraine Group's motion for summary judgment was heard on August 15, 2011. At the conclusion of that hearing, the Trial Court indicated it would be granting summary judgment in favor of the Haney and Moraine Group Appellants, but that its order and specific reasoning would be forthcoming.

On September 9, 2011, long after the time for submission of argument or fact to the Trial Court on either summary judgment motion, the Ditch Authority, raising the argument for the first time, wrote to the Trial Court asking that the matter be remanded to the Ditch Authority with instructions rather than an outright vacation of the redetermination. Both the Haney and Moraine Group wrote to the Trial Court objecting to the improper and untimely submission.

The Trial Court's order, issued on September 19, 2011, vacated the Redetermination Order. In its memorandum, the Trial Court wrote:

Minn. Stat. § 103E.351 subd. 1 is, in essence, a jurisdictional type statute setting forth requirements that must be followed to initiate a proceeding. The statute requires a final, formal determination. The actions of the District are not

the acts of making an independent definite and final decision. The District failed to properly follow the language of the statute, and thus the initiation of the redetermination of benefits fails.

Appellant's Addendum at XV. This appeal by the Ditch Authority followed.

### **STATEMENT OF THE FACTS**

On December 15, 2005, the Ditch Authority appointed Viewers to conduct a redetermination of benefits for Judicial Ditch No. 14. At that meeting, a petition asking for a redetermination was presented to the Ditch Authority; however, exactly why Viewers were appointed remained and remains unclear.<sup>1</sup> The minutes of that meeting state only that a petition was presented and that viewers were appointed. No independent decision of the Ditch Authority appears in those minutes. *See* Appellant's Appendix at 000239 (Findings of Fact, Conclusions, and Order for Redetermination of Benefits, Page 5, attached to the Affidavit of Jason G. Lina at Exhibit 7). Indeed it was this failure to make a determination as to which—if any—of the statutory criteria of Minn. Stat. § 103E.351 justified the appointment of Viewers and the initiation of a redetermination proceeding that led to the Trial Court's vacation of the proceedings.

The statutory procedure for conducting a redetermination of benefits is laid out by the legislature at Minn. Stat. § 103E.351, Subd. 1. The statute states:

If the drainage authority determines that the original benefits or damages determined in a drainage proceeding do not reflect reasonable

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<sup>1</sup> In fact, that is the crux of this case on appeal. As will be shown, the Ditch Authority itself seemingly did not definitively settle on whether the redetermination proceeded from a petition or a determination of the Ditch Authority until pressed by the Trial Court during the August 15, 2011 hearing. *See* Appellant's Brief at XIII (Trial Court's September 19, 2011 Summary Judgment Order and Judgment).

present day land values or that the benefited or damaged areas have changed, or if more than 50 percent of the owners of property benefited 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 benefited and damaged areas.

The minutes for the December 15, 2005 meeting—as reproduced in the Redetermination Order’s Findings of Fact—state:

WHEREAS, On December 15, 2005, the Bois de Sioux Watershed District, at its regular Board meeting, accepted the Petitions For Redetermination of Benefits regarding Judicial Ditch No. 14. The meeting minutes read as follows:

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 Lambert 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 Kapphahn. Voting yes were Jack Lambert, Robert Roach, Dennis Zimbrick and Doug Daniels.

Appellant’s Appendix at 000239 (Findings of Fact, Conclusions, and Order for Redetermination of Benefits, Page 5, attached to the Affidavit of Jason G. Lina at Exhibit 7). While perhaps a statement more suited for Respondent’s argument section, this passage shows that no determination whatsoever was made by the Board as to why it was proceeding with a redetermination of benefits—except perhaps that it had received what

it considered to be a sufficient petition. Indeed, the explanation provided by the Ditch Authority itself for these minutes—in the September 30, 2009 Findings of Fact—is that a petition for redetermination was accepted.

On the basis of this Finding of Fact by the Ditch Authority, the Moraine Group maintained before the District Court that it was clear that the Ditch Authority had initiated the redetermination on the basis of the landowner petition. However, both the Haney Group and the Moraine Group also maintained that—whether initiated by the Ditch Authority on its own or by virtue of having received a petition—the Ditch Authority had failed to meet the statutory criteria of Minn. Stat. § 103E.351.

The Moraine Group’s position that the Ditch Authority had initiated the redetermination on the basis of the petition was taken because, throughout the process, the Ditch Authority has repeatedly asserted that the redetermination was conducted because of having received a landowner petition.

At Exhibit 216 of the Record supplied by the Ditch Authority, Ditch Authority Administrator Jon Roeschlein corresponds with Herman-Hoffman Tribune newspaper editor Nick Ripperger, stating “The Bois de Sioux Watershed District board, as the ditch authority over JD#14, *were required to proceed with the redetermination process upon receipt of the petition...*.” Appellant’s Appendix at 000243 (Affidavit of Jason G. Lina at Exhibit 8) (Emphasis added). This correspondence would become part of a Ripperger article reprinted in the Wheaton Gazette on April 13, 2010—just prior to the initial public hearing on April 15, 2010. In that article, lengthy passages which appear to come from

the Roeschlien letter found at Exhibit 216 are reproduced. Appellant's Appendix at 000245 (Exhibit 9 to Affidavit of Jason Lina). That article states that:

The [Ditch Authority] board determined that the petition met the legal requirement of representing a majority of landowners or land currently assessed for benefits (it was about 60 percent) and consequently was required by law to proceed with the redetermination process.

*Id.* While the article was part of the Ditch Authority-produced record, it appears from that same record that no correction or attempt at correction was ever made by the Ditch Authority.

The initial public hearing on the redetermination was held on April 15, 2010. Ditch Authority attorney Thomas Athens, speaking on behalf of the Board at the initial public hearing on the redetermination stated:

The Statute states that when there's a petition filed by landowners in the existed benefits land, by more than 50 percent the Board decides the order of redetermination then there will be a redetermination benefits.

In this case there was a petition filed by 59 and 62 percent of the existing landowners, depending how you calculate it, asking for the redetermination. This was presented to the Board. I'll get into that in a little more detail, but that's what brings us here. *The Board is not something that started this. The Board is here to make a decision on this. But the Board has a statutory obligation to redetermine benefits because they have that petition and they started the process.*

Appellant's Appendix at 00246 (April 15, 2010 Final Hearing statements of Ditch Authority Attorney Thomas C. Athens, Transcript at Page 4 line 17 through Page 5, line 7, attached to the Affidavit of Jason G. Lina at Exhibit 10) (emphasis added). Athens later continued:

I know complaints have come. But in the earlier, in this decade they [the petitioners] came to the Watershed District complaining and wanted to

know their options, and among their options was to try to stop people upstream from dumping water in the Mustinka River, but their other option was the redetermination of benefits and they elected to go in this manner.

*They signed a petition, as I said 60 percent, and that petition was filed in November of 2005 and that started this process.*

Appellant's Appendix at 000248 (April 15, 2010 Final Hearing statements of Ditch Authority Attorney Thomas C. Athens, Page 9, lines 6-16, attached to the Affidavit of Jason G. Lina at Exhibit 11) (emphasis added). And again:

This was brought here by a petition and as I said by 60 percent of the landowners and I think the petition is adequate. But the Board did meet with the landowners at a board meeting and in December 15 of 2005 ... But the Board at that time the notes show that they were told despite the fact of the petition – they didn't have to order the redetermination. They had a motion and passed it and it was six, two, among the Board members, *so the Board did order the redetermination to go forward based on the petition and the landowners.*

Appellant's Appendix at 00250 (April 15, 2010 Final Hearing statements of Ditch Authority Attorney Thomas C. Athens, Page 80, line 23 through Page 81 line 11, attached to the Affidavit of Jason G. Lina at Exhibit 12) (emphasis added).

When the Ditch Authority brought on the Rinke Noonan law firm to assist it, Rinke Noonan attorney Kurt Dieter also thought the redetermination was done as a result of a petition:

The issue as to .351, whether the petition is adequate. I've only been involved a couple of weeks. I'm sure that will be an issue that will be resolved at some point, so I guess I better not comment on that. I haven't done a legal analysis on the petition, but I know the other attorneys have and I'm confident that it is an adequate petition.

Appellant's Appendix at 00249 (April 15, 2010 Final Hearing statements of Kurt Dieter, Page 80, line 23 through Page 79 line 24 through Page 80, line 6, attached to the Affidavit of Jason G. Lina at Exhibit 12).

At the last public hearing on the matter, Athens again stated that the redetermination was on the basis of a petition: "Okay, good afternoon. It's 1:00, so we'll get started. *This is a continuation of the hearing on your Petition for Redetermination of Benefits on JD 14.*" Appellant's Appendix at 000231 (August 19, 2010 Final Hearing statements of Ditch Authority Attorney Thomas C. Athens, Page 1, lines 7-11, Affidavit of Jason G. Lina at Exhibit 6) (Emphasis added).

The problem with proceeding with a redetermination on the basis of a landowner petition is that the petition did not fit the statutory criteria set forth in Minn. Stat. § 103E.351.<sup>2</sup> Thus, at the August 15, 2011 hearing on the Moraine Zone's motion for summary judgment: "The [Ditch Authority] conceded at oral argument that it did not initiate its redetermination proceeding based upon a petition from 50 percent of the landowners." Appellant's Brief at XIII (Trial Court's September 19, 2011 Summary Judgment Order and Judgment) (emphasis in the original).

Instead, the ditch authority now stated that it had relied solely on the Board's own ability to order a redetermination. As the Trial Court responded:

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<sup>2</sup> The petition—drafted by counsel for the Ditch Authority—stated that a redetermination of benefits was requested because the original benefits did not reasonably represent current land values and benefitted areas have changed. Appellant's Appendix at 000066. Minn. Stat. §103E.351 states that a landowner petition is only sufficient if it is for correction of an error that was made at the time of the proceedings that established the drainage system.

[T]he only way that the District could effectively initiate the redetermination of benefits proceeding would be through a determination by the District that the original benefits or damages determined in a drainage proceeding did not reflect reasonably present day land values or that the benefitted or damages areas had changed. That procedure was not followed in this case.

*Id.* The Trial Court explained that the procedure of § 103E.351, subd. 1 was not followed in that:

Neither any minutes of any District meeting nor the District's September 30, 2010 Findings of Facts, Conclusions and Order for Redetermination of Benefits for J.D. No. 14 demonstrate that the District made an independent finding of its own to indicate that the original benefits or damages determined did not reflect present day land values or that the benefitted or damages areas have changed.

*Id.*, Appellant's Brief at XIV. In other words, the record was devoid of any showing that any determination by the Ditch Authority had been made.

Indeed, even as late as its Appellant's Brief to this Court, the Ditch Authority has not directed this Court to any determination by the Ditch Authority that the statutory requirements of Minn. Stat. §103E.351 for proceeding with a redetermination of benefits have been met. The reason is simple. They can't. No such determination exists in the record.

## **ARGUMENT**

### **Standard of review**

A political subdivision of the state has no inherent power to make assessments and can only exercise that power which is given to it by the legislature. *See e.g., Hyland v. Metropolitan Airports Com'n*, 538 N.W.2d 717, 719 (Minn. App. 1995). Any drainage

proceeding in Minnesota is purely statutory and its validity depends upon strict compliance with the provisions of the statute by which the proceeding is regulated or controlled. *Matter of Repair and Imp. of Judicial Ditch No. 9 Freeborn County*, 386 N.W.2d 358, 360 (Minn. App. 1986)(citing, *In re County Ditch No. 11, Martin County*, 91 N.W.2d 657, 660 (1958)). Summary Judgment is appropriate where there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Minn. R. Civ. Pro 56.03. Summary judgment is appropriate when applying statutory language to undisputed material facts of a case. *Schulte v. Corner Club Bar*, 544 N.W.2d 486, 488 (Minn. 1996). On appeal from summary judgment, an appellate court asks two questions: whether there are any genuine issues of material fact and whether lower courts erred in their application of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

- I. WAS THE TRIAL COURT CORRECT IN FINDING THAT THE DITCH AUTHORITY DID NOT MAKE A PREREQUISITE DETERMINATION THAT EITHER: 1) ORIGINAL BENEFITS OR DAMAGES DETERMINED IN AN EARLIER DRAINAGE PROCEEDING DID NOT REFLECT REASONABLE PRESENT DAY LAND VALUES, OR 2) THAT THE BENEFITED OR DAMAGED AREAS HAVE CHANGED, BEFORE ORDERING A REDETERMINATION OF BENEFITS FOR JUDICIAL DITCH #14?

The Trial Court was absolutely correct. Try as it might, this Court will not find where any determination was made by the Ditch Authority that the statutory basis for initiating a redetermination of benefits was met. When this Court considers the dance the Ditch Authority has engaged in since the Moraine and Haney Groups' appeal of the

Redetermination Order, it should become clear that the Ditch Authority itself recognizes its error.

A redetermination of benefits for a public drainage system is initiated by strict compliance with Minn. Stat. § 103E.351, Subd. 1. *See In re County Ditch No. 11, Martin County*, 91 N.W.2d 657, 660 (1958). That statute tells the Ditch Authority that it can conduct a redetermination of benefits if:

1. It determines that the original benefits or damages determined in a drainage proceeding do not reflect reasonable present day land values,
2. It determines that the benefited or damaged areas have changed, or
3. If more than 50 percent of the owners of property benefited 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.

*See* Minn. Stat. §103E.351, Subd. 1. As is clear from the minutes of the December 15, 2005 hearing where the Viewers were appointed and directed to proceed with a redetermination of benefits, Minn. Stat. §103E.351, Subd. 1 was, in no way, complied with by the Ditch Authority. *See* Appellant's Appendix at 000239 (Findings of Fact, Conclusions, and Order for Redetermination of Benefits, Page 5, attached to the Affidavit of Jason G. Lina at Exhibit 7). It was not complied with because the Ditch Authority did not make either of the determinations required by the statute and because the petition it received did not comply with the statutory requirements<sup>3</sup>.

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<sup>3</sup> The petition stated that the landowners were asking for a redetermination because "the original benefits determined for Judicial Ditch 14 do not reasonably represent current land values and benefited areas have changed." It said nothing about an error in the proceedings that established the system.

***A. The evidence shows the Ditch Authority originally proceeded on the basis of a defective petition.***

As was described in the fact section, until the motions for summary judgment in this matter were filed, it appeared undisputed that the Ditch Authority was proceeding on the basis of having received a petition from the landowners. Indeed, the transcripts of the public hearings for the redetermination stated that the meetings were the “Final Hearing on Viewer Report & Petition for Redetermination of Benefits of Judicial Ditch # 14.” See Appellants Appendix at 000231 (April 15, 2010 Final Hearing Page 1, attached to the Affidavit of Jason G. Lina at Exhibit 6) (emphasis added).

In spite of the evidence indicating the petition was the basis for the redetermination, the Ditch Authority argued in response to the Haney Group’s Motion for Summary Judgment that the petition wasn’t the basis at all.

At the outset, it is crystal clear that the Board understood they were determining that land values and the benefitted areas had changed and made its determination independently of the petition, which the Board considered a request for action which it sought for documentation showing landowner support. See the Affidavits of Jon Roeschlein, Jerome Deal, and Charlie Anderson.

Appellants Appendix at 000108, June 24, 2011 Memorandum of Law in Opposition to Moraine Zone Appellants’ Motion for Summary Judgment, at page 28. However, a self-serving affidavit that contradicts other testimony is not sufficient to create a genuine issue of material fact in summary judgment context. *Risdall v. Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72 (Minn. Ct. App. 2009).

In no way was the role of the petition “crystal clear.” Recall that Mr. Roschlien is an administrator for the Ditch Authority, not a Board member. Further recall, as cited

above, that long-prior to the referenced affidavit, Mr. Roschlien had written to a local newspaper explaining *that the redetermination started because of a petition and that the receipt of the petition meant the Ditch Authority had to conduct the redetermination.* Appellant's Appendix at 000243 (Affidavit of Jason G. Lina at Exhibit 8). Next, Charlie Anderson is the Ditch Authority Engineer. He too is not a Ditch Authority board member and cannot testify as to what the Board understood. Indeed, Mr. Anderson's affidavit makes no averments as to what happened at the December 15, 2005 Ditch Authority meeting. Thus, one of the affiants in support of the "crystal clarity" of the Board's actions had earlier flat-out stated that the petition initiated the redetermination, a second says nothing about what happened at the meeting in question, and neither were even Board members.

The affidavit of Mr. Deal, the only Board member from whom an affidavit was presented, will be discussed more fully below. For now, though, it is important to note that Mr. Deal himself states in his affidavit that the purpose of the December 15, 2011 meeting was to decide whether the landowners wanted to proceed with a redetermination. Appellants Appendix at 00139. Deciding with the landowners whether they wish to proceed after having been presented a petition for redetermination of benefits sounds like proceeding on the basis of a petition. They certainly, as the Trial Court said, "are not the acts of making an independent definite and final decision" by the Ditch Authority Board. *See* Appellant's Addendum at XV.

By the time of the next Motion for Summary Judgment, the Ditch Authority attempted to weave an explanation to show that the petition was kinda-sorta important:

The petition listed land values and the need to add lands as a basis. The petition states:

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

When the petition was accepted, the Managers were accepting a petition that was asking them to make a determination that the original benefits do not reasonably represent current land values and benefitted areas have changed.

Appellants Appendix at 000273, August 3, 2011 Memorandum of Law in Opposition to Moraine Zone Appellants’ Motion for Summary Judgment, at page 4. The problem is that the minutes of the December 15, 2005 meeting of the Ditch Authority do not show that the petition was accepted, nor do they show that *any* determination by the board was made. Thus, the determination the petition was supposedly asking the Ditch Authority Board to make was never made. Further, whereas in its June 24<sup>th</sup> memo it was “crystal clear” the petition was irrelevant, by August 3, the petition was a request to make a determination. As eloquent as the dancing around it may attempt to be, one cannot help but notice the elephant in the room: *The Board did not make any determination.*

An exasperated Trial Court, at the August 15, 2011 hearing finally demanded of the Ditch Authority that they stop the dance as to the role the petition played. Appellant’s Brief at XIII and the Ditch Authority “conceded... that it did not initiate its redetermination proceeding based upon [the] petition. (Trial Court’s September 19, 2011 Summary Judgment Order and Judgment).

The arguments made by the Moraine Group below, repeated in abbreviated form above, were that there was no question of fact as to how the redetermination was

commenced: it was commenced via a defective petition. The trial court took the Ditch Authority at its word; however, and examined whether any proper determination under 103E.351, Subd. 1 was ever made. The Trial Court found it was not. The Moraine Group still maintains, however, that summary judgment was appropriate on the basis of undisputed evidence—other than “testimony” by Ditch Authority Counsel—that the redetermination was initiated on the basis of a defective petition.

***B. No determination was made by the Ditch Authority.***

If the redetermination was ordered on the basis of a determination by the Ditch Authority Board, where is that determination? It certainly does not exist in any of the minutes of the Board or in the Findings of Fact, Conclusions, and Order for Redetermination of Benefits.

Throughout, the Ditch Authority has attempted to confuse the issue by stating that it need not make *formal findings* when ordering a redetermination under Minn. Stat. §103E.315, Subd. 1. Indeed, the Ditch Authority goes so far as to state in their Appellant’s Brief at page 8 that the Moraine Group argued “that the drainage [sic] must make a ‘formal’ finding.” The Ditch Authority cites this Court to page 25 of the Moraine Group’s July 15, 2011 Motion for Summary Judgment to support its proposition that the Moraine Group demands “formal findings.” Appellant’s Brief at page 8. However, the Moraine Group never argued—and certainly not at the part of its brief below referenced by the Ditch Authority—that *formal findings* needed to be made. See Appendix at 000202.

Rather, the Moraine Group argued that the appropriate *determination* was never made. As the Trial Court stated, “The plain meaning of ‘determination’ is a final decision.” *See* Appellant’s Addendum at XIV (citing Black’s Law Dictionary (9<sup>th</sup> ed. 2009)). The Ditch Authority, on September 30, 2010, issued Findings of Fact, Conclusions, and Order for Redetermination of Benefits for J.D. No. 14. In those Findings of Fact, there is nothing that states a “determination” was made in 2005 as to the reason for initiating the redetermination. No final decision was made *by the Board* on December 15, 2005 that original benefits or damages determined in a drainage proceeding did not reflect reasonable present day land values, or that the benefited or damaged areas had changed. Viewers were simply appointed. The minutes say nothing as to the Board making a determination.

The Ditch Authority has never been able to answer where the determination by the Board that justified appointing the Viewers exists in the December 15, 2005 minutes. Today, the Ditch Authority says it is obvious. But it wasn’t obvious to the Ditch Authority’s own administrator who, on April 15, 2010, believed the redetermination was because of the petition. It wasn’t obvious to the Ditch Authority when conducted the Final Hearing, the transcript of which states that the hearing is on *a petition*. *See* Appellants’ Appendix at 000231. It wasn’t obvious when the Ditch Authority made its September 30, 2010, Findings of Fact, Conclusions, and Order for Redetermination of Benefits for J.D. No. 14 and described the December 15, 2005 meeting as one wherein the Board “accepted the Petitions for Redetermination of Benefits.” *See* Appellant’s Appendix at 000239.

In presenting its evidence in opposition to Summary Judgment, only the affidavit of Jerome Deal represents the testimony of a Ditch Authority Board member. In his affidavit, he states: “Periodically over the years our board has discussed redetermination of benefits. These discussions have always included reviewing the statute’s requirements: *the need to find a change in land values, and/or benefitted area...*” Appellant’s Appendix at 00137, Affidavit of Jerome Deal at Paragraph 3 (emphasis added). Thus, even Mr. Deal—the Ditch Authority Board’s chairman—recognizes that the Board *must* have a stated reason for initiating a redetermination of benefits.

Whether one classifies it as a finding or as a determination, there has to be something the Board does that places on record its decision that a redetermination is justified because one of the statutory criteria of Minn. Stat. § 103E.315 has been met. Here, there is nothing. A deficient petition was presented. Viewers were appointed. Nothing happened on December 15, 2011 that properly initiates a redetermination under the statute.

The Ditch Authority argues in its brief that this Court must perform a “detailed analysis of Minn. Stat. § 103E.351, Subd. 1, and consider Minn. Stat. §645.17’s presumptions in ascertaining legislative intent. Appellant’s Brief at 10-11. It would seem, however, that this Court should first apply the canons of construction at Minn. Stat. § 645.08:

[W]ords and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition.

The statute says “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 benefited or damaged areas have changed.” Minn. Stat. §103E.351. The plain meaning of the statute is that a determination must be made by a ditch authority. No such determination appears in the record.

It is, perhaps, the hubris of the Ditch Authority—a public body—that led local landowners to make the initial decision to appeal the Ditch Authority’s Redetermination Order. All that those affected by the proposed redetermination want is that the Ditch Authority be straight with them, follow the requirements set forth by the Legislature in statute, and not infringe upon their property rights as enshrined in the common law. In the case of the Moraine Group, arguments raised below that the redetermination constituted an unlawful taking were not—correctly on the basis of the Trial Court’s decision—addressed. But certainly a group concerned as to whether its property rights are being respected has a legitimate concern when it appears that the Ditch Authority did not even follow a simple and basic procedural step.

Instead, landowners are faced with the Ditch Authority’s protestations such as, “Minnesota Law pertaining to drainage ditches is a complex matrix.” Appellant’s Brief at 12. In arguments before the Trial Court the Ditch Authority felt compelled to give complex answers to simple questions, arguing that you can only understand the drainage code if you understand a labyrinthine series of legislative changes, court decisions, opinions of “experts” interpreting the law, and manuals. In its brief to this Court, the

Ditch Authority argues that “the first step in resolving this issue requires a detailed analysis” of Minn. Stat. § 103E.351 in which it is read in conjunction with presumptions in ascertaining legislative intent and compared with other sections in the drainage code. No. The first step is to apply the plain meaning of Minn. Stat. § 103E.351, Subd.1

In this case, drainage law really isn’t a complex matrix. The Trial Court’s decision relies, as it should, on a simple reading of Minn. Stat. §103E.351. That statute demands either a proper petition, or a proper determination. The Ditch Authority itself says—now—that it didn’t conduct a redetermination because of the petition it received. But the Ditch Authority also cannot point to any determination made which shows the statute was in any way met.

The decision of the Trial Court is correct, and this Court should affirm.

***C. Remand is improper where error occurred at the initiation of the proceeding***

The Ditch Authority argues that upon the Trial Court’s finding that the redetermination had been improperly commenced, the Trial Court should have remanded back to the Ditch Authority. As shown in the facts, this argument was never made before the Trial Court except in an improperly submitted letter to the Trial Court after the time to present facts and argument had passed.

However, on the merits, the Ditch Authority’s demand for a remand is simply nonsensical. The Trial Court’s decision is that the redetermination was never properly commenced. Thus, there is nothing to remand. One cannot resurrect what never was properly initiated.

The Ditch Authority's demand for remand to the Ditch Authority so that it may properly commence what it did not properly commence should be denied. Its protestations that it will not know what to do if the case is not remanded are absurd. It can either let the matter drop—as it should. Or it can properly commence a redetermination by simply following § 103E.315 and the other statutory procedures required of it. The Ditch Authority's claim that without a remand which explains the statute to them perhaps belies the authoritativeness of its explanation of the “complex matrix” of the drainage code which the Ditch Authority attempts to provide this Court in defending their position.

The matter should not be remanded. What was never properly initiated cannot be remanded. The power to properly initiate a redetermination continues to lie with the Ditch Authority.

### **Conclusion**

The Ditch Authority needed merely to follow § 103E.351. It did not do so. A statutorily deficient petition was presented. Viewers were appointed. This isn't how the statute tells a drainage authority to commence a redetermination. To commence a redetermination, the ditch authority must make a determination. It made none. The proceedings which followed from the improper commencement were rightly vacated by the Trial Court. The decision of the Trial Court should be affirmed.

Respectfully submitted this 15th day of December, 2011.

**FLUEGEL, ANDERSON, MCLAUGHLIN  
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