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State of Minnesota
In Court of Appeals

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

TRAVERSE COUNTY RESPONDENTS' BRIEF

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STATEMENT OF ISSUES

A. Whether Appellant failed to properly commence the redetermination of benefits proceeding for JD No. 14 because Appellant did not make the necessary determination or act upon a sufficient land owner petition, as required by Minn. Stat. § 103E.351, subd. 1?

Holding Below: The district court concluded that, as a matter of law, the Appellant failed to make the necessary determination in order to properly commence the redetermination of benefits proceeding for JD No. 14. Appellant does not claim to have commenced the redetermination proceeding based upon a land owner petition.

Most Apposite Authorities:
Minn. Stat. § 103E.351, subd. 1

Oelke v. Faribault County, 70 N.W.2d 853 (Minn. 1955)

B. Whether the district court properly vacated Appellant's September 30, 2010 Final Order after concluding that Appellant improperly commenced the redetermination of benefits proceeding for JD No. 14 under Minn. Stat. § 103E.351, subd. 1?

Holding Below: The district court properly vacated the Appellant's September 30, 2010 Final Order. The issue of remanding versus vacating Appellant's September 30, 2010 Final Order was not properly before the district court and the district court did not consider this issue.

Most Apposite Authorities:
Minn. Gen. R. Prac. Rule 115.11

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1983)

State ex rel. Spurck v. Civil Service Bd., 32 N.W.2d 583 (Minn. 1948)

In re Hutchinson, 440 N.W.2d 171 (Minn. App. 1989)

STATEMENT OF THE CASE

On September 30, 2010, the Board of Managers of the Bois de Sioux Watershed District (the "District") entered a final Findings of Fact, Conclusions, and Order for Redetermination of Benefits for JD No. 14 (the "District's Final Order"). (App. at 1.) The District's Final Order purported to increase the total benefits determined for Judicial Ditch No. 14 ("JD No. 14") from $589,099.67 to $55,521,279.53 and add approximately 435,500 acres to the acres purportedly benefited by JD No. 14. (App. at 4, 7, 127a-127b.) On October 27, 2010, land owners from Traverse County (the "Traverse County Respondents") filed a Notice of Appeal with the Eighth Judicial District Court of Minnesota in Traverse County. (App. at 1-13.) Land owners from Grant and Otter Tail Counties (the "Grant and Otter Tail County Respondents") also filed Notices of Appeal with the District Court in Grant and Otter Tail County. (App. at 14-19.) The appeals were consolidated by an Order dated April 1, 2011.

On May 11, 2011, the Traverse County Respondents filed a Motion for Summary Judgment and Memorandum of Law in Support of its Motion for Summary Judgment. (App. at 20-79.) This Motion raised three main issues:

(1) Whether the redetermination of benefits proceedings were properly commenced pursuant to Minn. Stat. § 103E.351, subd. 1;

(2) Whether the redetermination of benefits proceedings improperly included lands that were not previously included in the JD No. 14 drainage system; and

(3) Whether the methods utilized by the District and the appointed viewers to calculate and assess the amount of benefits were authorized by Minn. Stat. § 103E.315.

The Grant and Otter Tail County Respondents moved for summary judgment on July 14, 2011. (App. at 178-269.)

On September 19, 2011 the Honorable Gerald J. Seibel granted the Respondents' Motion for Summary Judgment, concluding that the District did not properly commence the redetermination of benefits proceedings pursuant to the requirements of Minn. Stat. § 103E.351, subd. 1. (App. at 350, 354.) The district court did not rule on either of the other two issues raised by the Traverse County Respondents' Motion for Summary Judgment. (App. at 350.) The district court vacated the District's Final Order because the District failed to commence the redetermination of benefits in compliance with Minn. Stat. § 103E.351, subd. 1. (App. at 350.)

Appellant has now appealed from the district court's September 19, 2011 Summary Judgment Order and Judgment.

STATEMENT OF THE FACTS

I. Background Information

A redetermination of benefits proceeding is a statutory drainage proceeding used to redetermine and assess the value that a public drainage system provides to properties in the area, either in the form of benefits or damages. *See* Minn. Stat. § 103E.351; (App. at 64.) JD No. 14 is a public drainage system originally established on July 22, 1950 over which the District has authority. (App. at 4.) Prior to the redetermination of benefits

proceeding that has resulted in this appeal, the benefits from JD No. 14 were $589,099.67. (App. at 4.) The properties assessed for benefits from JD No. 14 were entirely within Grant and Traverse County, Minnesota and amounted to a total of 29,479.60 acres. (App. at 4-5.)

II. The District's Attempts to Commence and Proceed With a Redetermination of Benefits for JD No. 14.

On January 13, 2004, the District planned to schedule a meeting to discuss the potential of redetermining benefits for JD No. 14. (App. at 132.) On August, 18, 2005, District staff met with certain land owners to discuss proceeding with a redetermination of benefits. (App. at 132-133.) At some time prior to December 15, 2005, the District received a petition entitled "Petition for Redetermination of Benefits Pursuant to Minn. Stat. § 103E.351" (the "Petition"). (App. at 22, 66.) The Petition, according to its express language, was brought because "the original benefits determined for J.D. No. 14 do not reasonably represent current land values and benefitted areas have changed." (App. at 22.) On December 15, 2005, the District held an "informal" hearing to discuss, among other things, the large size of the project and considerable expense of the project. (App. at 133.) Then, without any determination made by the District and not based upon the Petition, the District appointed viewers and staff to proceed with the redetermination process. (App. at 133.)

Shortly after this December 15, 2005 "informal" hearing, the District began to discuss the question of financing the attempted redetermination of JD No. 14. (App. at 134.) It was evident to the District that the cost of the redetermination would potentially

be in the hundreds of thousands of dollars. (App. at 134.) Thereafter, the viewing process continued throughout 2006, 2007, 2008, 2009, and 2010. (App. at 134-135.) Finally, in anticipation of a hearing at the Wheaton High School on April 15, 2010, property owner's reports were scheduled to be mailed out on March 22, 2010. (App. at 136, 168.).

It was not until the lead up to the April 15, 2010 hearing that land owners in the Bois de Sioux Watershed District received formal notice of the five years of viewing of JD No. 14 and the related costs incurred. (App. at 6, 23.) As further background with regard to this first formal notice, the District's minutes reflect that the District's Board received and discussed the viewers' report on December 17, 2009. Then, on January 28, 2010, the Board received the viewers' report in its "final state." (App. at 135.) The minutes of both the December 17, 2009, meeting and the January 28, 2010 meeting reflect that the District contemplated an April 2010 hearing on the redetermination. However, the Property Owner's Reports were not scheduled to be mailed until March 22, 2010, as reflected by the District's March 18, 2010 minutes. (App. at 135-136.)

A copy of a Property Owner's Report appears at Appendix 168, and a copy of the Benefits and Damages Statement appears at Appendix 64-65. The Property Owner's Report is separate from the Benefits and Damages Statement. (App. at 167.) The Benefits and Damages Statement (App. at 64-65.) is the narrative part of the viewers' report on file with the District. The viewers' report included the Benefits and Damages Statement. The viewers' report did not include the Property Owner's Report or a representative sample of a Property Owner's Report. (App. at 167.) The Traverse

County Respondents' May 11, 2011, Memorandum, at page 4 (App. at 23.), mistakenly states that property owners in the Bois de Sioux Watershed District received a Benefits and Damages Statement in late January 2010. Instead, the record now reflects that the Property Owner's Reports were mailed to landowners, but not until March 22, 2010. (App. at 136.) Also, as noted in the last paragraph of the Property Owner's Report (App. at 168), attached to the mailed Property Owner's Report was a copy of the Notice of Public Hearing on the Redetermination (App. at 61.), a copy of the viewers' Benefits and Damages Statement, and a copy of a page from the viewers' report relating to the owner's property.

III. <u>The District's Final Order</u>.

As reported at the April 15, 2010 hearing, after almost five years of viewing, the District had incurred approximately $350,000.00 in expenses for the redetermination. (App. at 6.) Following additional hearings on June 17, 2010, August 19, 2010, and September 16, 2010, the District issued the District's Final Order on September 30, 2010. (App. at 14, 52.) The District's Final Order contains no record of a determination having been made in compliance with Minn. Stat. § 103E.351, subd. 1, but merely states that at an "informal" hearing on December 15, 2005, "[n]o one voiced any objection, nor reservations, to proceeding." (App. at 57.) The District's Final Order purports to increase the net benefits to a total of $55,521,279.53. (App. at 7.) This would be an increase of approximately $54,932,000.00 in benefits, or approximately 93 times the amount of net benefits previously determined for JD No. 14. (App. at 7.) Also, the District's Final Order would add roughly 435,500 acres to the amount of acres benefited

by JD No. 14, from less than 27,500 acres to approximately 465,000 acres of land. (App. at 4, 5, 127a-127b.)

It is noteworthy that there is currently no need for major repairs to JD No. 14. Engineer Charles Anderson, a licensed engineer with extensive experience in drainage projects, commented on JD No. 14's "good" state of repair at the April 15, 2010 hearing. (App. at 123, 169-170.) Mr. Anderson stated that the ditch still functions as it was originally intended to function and it has the same capacity as it did when it was originally dug. (App. at 170.) He remarked that "the channel cross-section is in fairly good repair. The only known out-of-repair feature that I'm aware of at this time is a bridge. It's a bridge into a private residence. . . That bridge is an old wooden bridge." (App. at 170.) Mr. Anderson summarized his opinion of JD No. 14 and stated that "at the moment I would say the ditch is in reasonably good condition." (App. at 170.)

IV. The Traverse County Respondents' Appeal

On October 27, 2010, the Traverse County Respondents filed a Notice of Appeal from the District's Final Order. (App. at 1-13.) The Traverse County Respondents include approximately 198 land owners with land not previously assessed into JD No. 14. (App. at 1-3.) They appealed the redetermination of benefits as to all lands owned by them and all other lands not owned by them which were not previously determined to be benefited or damaged by JD No. 14, as permitted by Minn. Stat. § 103D.535, subd. 4(a). (App. 3-4.) Among other relief, the Traverse County Respondents requested that the District's Final Order be dismissed in its entirety and, in the alternative, that the District's Final Order be adjudged invalid and void. (App. at 12.) The Traverse County

Respondents' Motion for Summary Judgment and Memorandum of Law in Support of their Motion for Summary Judgment repeatedly requested that the District's Final Order be found "ineffective, invalid, and void as a matter of law." (App. at 20, 39-40.)

V. Subsequent Pleadings and Papers

In response to the Traverse County Respondents' pleadings thus far described and the Notices of Appeal filed by land owners in Grant and Otter Tail Counties (the "Grant and Otter Tail County Respondents"), the District filed a Memorandum of Law in Opposition to the Motion for Summary Judgment. (App. at 80-143.) Nowhere in this response did the District request that the district court remand the District's Final Order rather than vacate it. The District simply opposed the Respondents' request for a motion for summary judgment as being contrary to the drainage code. (App. at 116.)

With its Memorandum of Law in Opposition to Motion for Summary Judgment, the District submitted four affidavits: Affidavit of Charles Anderson ("Anderson Aff.") (App. at 123-127f); Affidavit of Jon Roeschlein in Opposition of Appellant's Motion for Summary Judgment ("Roeschlein Aff.") (App. at 128-36.); Affidavit of Jerome Deal ("Deal Aff.") (App. at 137-139); and Affidavit of Ronald Ringquist ("Ringquist Aff.") (App. at 140-43) (collectively the "Affidavits"). The Affidavits were presumably included with the District's Memorandum of Law in order to support its argument that the District did in fact comply with Minn. Stat. § 103E.351, subd. 1 and did make a "determination independently." (App. at 110.)

The Affidavits do not show that a determination was made. The Anderson Aff. states: "The board *understood* the land values and the benefitted are had changed." (App.

at 125.) (emphasis added) The Roeschlein Aff. states: "It was *stated* repeatedly at these Board meetings that the assessed benefits wouldn't cover a repair, that the land values had changed, and that the benefitted area had changed, and no one said they disagreed." (App. at 129-130.) (emphasis added). The Deal Aff. states that "the landowners in the area *always felt* there were additional lands that should be assessed . . . The Board *discussed* that land values had obviously changed, that a repair on such a huge ditch system would be extremely burdensome on such a relatively small benefitted area, and there was *general agreement* that there was the basis for a re-determination." (App. at 138.) (emphasis added) The Ringquist Aff. does not contain any relevant statements as to the improper commencement under Minn. Stat. § 103E.351. Altogether the Affidavits show only that there was a vague understanding, a feeling, discussion, general agreement, and that things were stated. Not one of the Affidavits shows that the District made a determination as required by Minn. Stat. § 103E.351, subd. 1.

Later, on July 15, 2011, land owners in Grant and Otter Tail Counties (the "Grant and Otter Tail Respondents") filed a Memorandum of Law in Support of Motion for Summary Judgment. (App. at 178-217.) In the District's Memorandum of Law in Opposition to the Grant and Otter Tail County Respondents' Motion for Summary Judgment, the District did not raise the argument that the district court remand, rather than vacate, the District's Final Order. (App. at 270-312.)

On September 9, 2011, ten days before District Court Judge Gerald Seibel issued the Order granting of the Traverse County Respondents' motion for summary judgment, and after the Judge had indicated that he intended to grant the motion for summary

judgment, the District, through its attorneys, sent a letter to Judge Siebel. (App. at 346-347.) This letter improperly raised for the first time the issue of whether the District's Final Order should be vacated or remanded. (App. at 346-347.) The district court never permitted any motions to reconsider. On September 19, 2011, the Honorable Gerald Seibel filed his Summary Judgment Order and Judgment granting Summary Judgment in favor of the Traverse County Respondents and the Grant and Otter Tail County Respondents. (App. at 348-355.) This appeal followed

SUMMARY OF TRAVERSE COUNTY RESPONDENTS' ARGUMENT

First, Appellant did not follow the statutory process for commencing a redetermination proceeding. The statutory process requires that the District either act upon a sufficient land owner petition or that it make a specific determination. The District did not fulfill either of these conditions. Minnesota law requires strict compliance with the provisions of the drainage code. The District must therefore strictly follow the plain meaning of the statutory requirements for commencing a redetermination proceeding.

If the language of Minn. Stat. § 103E.351, subd. 1, is considered to be ambiguous, the intent of the legislature must be discerned to understand the meaning of the term "determines". Understanding the purpose of such a determination within the drainage code informs the Court as to the meaning of the determination required to commence a redetermination. The purpose of the determination is to provide the drainage authority with jurisdiction over the proceeding and to provide notice to the potentially affected land owners. In order for a "determination" to fulfill these jurisdictional and notice roles, the determination must be made in a manner that is clear, definite, and formal. Without such a

clear, definite, and formal determination, the Legislature's intent to provide jurisdiction and notice at the commencement of a redetermination proceeding is not fulfilled.

Second, because Appellant did not properly raise the issue of whether the district court should remand rather than vacate the District's Final Order, this issue is not properly before this Court. Because this Court should not review issues that are not properly before it, this Court need not address Appellant's argument that the district court should have remanded the District's Final Order rather than vacate it.

In the event that this Court does address this issue of whether the district court should have remanded rather than vacated the District's Final Order, this Court should affirm the district court's decision to vacate the District's Final Order. By not properly commencing the redetermination, the District acted outside the bounds of the governing statute and without jurisdiction over the drainage proceeding. The District's lack of compliance with the statute is fatal to the entire attempted proceeding and the District's Final Order is therefore void. The district court properly vacated the District's Final Order.

If this Court does not affirm the district court's decision to vacate, then this Court should remand the case back to the district court so that the district court can—for the first time—address this issue.

ARGUMENT

I. STANDARD OF REVIEW

"Where . . . the trial court is itself acting as an appellate tribunal with respect to the agency decision, this court will independently review the agency's record." *Improvement of County Ditch No. 86, Branch 1, County of Blue Earth v. Phillips*, 614 N.W.2d 756, 760

(Minn. App. 2000), *rev'd sub nom., Petition for Imp. of County Ditch No. 86, Branch 1 v. Phillips*, 625 N.W.2d 813 (Minn. 2001). Where the trial court based its decision on legal considerations, this court conducts a de novo review. *Id.* "Furthermore, statutory construction is a question of law, which we review de novo." *Id.* (citing *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990)).

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT APPELLANT FAILED TO PROPERLY COMMENCE THE REDETERMINATION PROCEEDING AS REQUIRED BY MINN. STAT. § 103E.351, SUBD. 1 BY FAILING TO MAKE THE REQUIRED DETERMINATION.

A. Minn. Stat. § 103E.351, Subd. 1 – Conditions to Commence a Redetermination Proceeding.

Minn. Stat. § 103E.351, subd. 1 provides conditions for the appointment of viewers and the commencement of a redetermination proceeding. The first issue Appellant raises on appeal is the interpretation of Minn. Stat. § 103E.351, subd. 1. This subdivision 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% 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 in the benefitted and damaged areas.

This subdivision requires that one of two "conditions" be met in order for a drainage authority to appoint viewers to redetermine benefits and to commence a redetermination benefits proceeding. *See Hyland v. Metropolitan Airports Comm'n*, 538 N.W.2d 717,

720 (Minn. App. 1995) ("A statutory title may be considered when attempting to ascertain the legislature's intent."). Stated individually, the two alternative pre-requisite conditions to commence a redetermination are:

> [1] "If the drainage authority determines that the original benefits or damages determined in the drainage proceeding do not reflect reasonable present day land values or that the benefitted or damaged area have changed, or
>
> [2] [I]f more than 50% of the owners of property benefited or damaged by a drainage system petition for correction of an error that was made at the time the proceedings that established the drainage system . . ."

Minn. Stat. § 103E.351, subd. 1. Stated simply, to commence a redetermination proceeding, the drainage authority must either make a determination or act upon a land owner petition. (App. at 353.)

Here, the District neither made a determination prior to appointing viewers nor did the District act upon a land owner petition. Therefore, the district court properly concluded that the District failed to properly commence the redetermination of benefits proceeding as required by Minn. Stat. § 103E.351, subd. 1.

B. <u>The District did not Properly Commence the Redetermination Based Upon a Landowner Petition</u>.

Minn. Stat. § 103E.351, subd. 1, allows for a redetermination to be commenced upon a petition brought by more than 50 percent of the benefited or damaged property "for correction of an error that was made at the time of the proceedings that established the drainage system." While there was a Petition circulated and discussed at District meetings, the District does not claim to have proceeded based upon the Petition. (App. at

133.) However, even if the District wished to rely upon an argument that the redetermination was commenced based upon a petition, its argument would fail because the Petition is not sufficient under Minn. Stat. § 103E.351, subd. 1.

Here, the Petition expressly states that it was brought for the following reason:

> [T]he original benefits determined for Judicial Ditch 14 do not reasonably represent current land values and benefitted areas have changed.

(App. at 66). However, this is not a statutorily permissible purpose for which land owners may bring a petition for a redetermination of benefits proceeding.

Minnesota law requires that the provisions of Minn. Stat. Ch. 103E "be strictly complied with." *State v. Oldre*, 229 N.W. 878, 879 (Minn. 1930). Here, the Petition does not strictly comply with Minn. Stat. § 103E.351, subd. 1. A drainage authority may not appoint viewers to redetermine benefits under section 103E.351 based on a petition brought for reasons other than those provided for by this section. The District could not have properly relied upon the insufficient Petition. Therefore, because the District did not, and could not, commence the redetermination by fulfilling the petition condition, the District could have properly commenced the redetermination based only upon the second condition—a District determination.

C. The District did not Make the Statutorily Required Determination to Commence a Redetermination Proceeding Pursuant to Minn. Stat. § 103E.351, Subd. 1.

1. The meaning of "determines" is clear and free from ambiguity.

When construing the meaning of a statute, the objective is to ascertain and effectuate the legislature's intent. *Peterson v. Haule*, 230 N.W.2d 51, 57 (Minn. 1975).

"Where the words of a statute are clear and free from ambiguity, we have no right to construe or interpret the statute's language. Our duty in such a case is to give effect to the statute's plain meaning." *Tuma v. Comm'r of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986); Minn. Stat. § 645.16; *See* (App. at 353).

Here, the words of Minn. Stat. § 103E.351, subd. 1 are clear and free from ambiguity. As outlined above, the Minn. Stat. § 103E.351, subd. 1 provides two conditions, one of which must be met before a drainage authority may commence a redetermination. The district court, citing the definition of "determination" from Black's Law Dictionary in its Summary Judgment Order and Judgment, stated that a "determination" is "a final decision." (App. at 354.) The plain meaning of the term "determines" is consistent with this definition. Plainly, a determination requires a clear, definite, and "final decision." (App. at 354.)

Under the plain meaning of the word "determination", the District did not make a determination as required by statute. The District did not determine that the original benefits or damages determined in the drainage proceeding did not reflecting reasonable present day land values. *See* Minn. Stat. § 103E.351, subd. 1.

In its brief, the District refers to the Minutes from September 2002 through December 2005, a Petition that the Board circulated to certain assessed land owners, and staff meeting notes from March 25, 2004 to show that the District was proceeding as though a determination had in fact been made. (Appellant's Brief at 19; App. 66, 132-133.) The discussions and notes referenced in Appellant's Brief, as well as the Affidavits generated by the Appellant do not amount to a "determination" under the plain meaning

of that term. These notes and discussions are not a final decision. The district court properly concluded that the District failed to properly commence the redetermination. This court should affirm the district court's Summary Judgment Order and Judgment.

2. Even if the word "determines" is considered to be ambiguous, the rules of statutory interpretation show that the District failed to make the required determination as was intended by the Legislature.

When the words of the law are not explicit, the intention of the legislature may be ascertained by various factors. *See* Minn. Stat. § 645.16. "[I]n the interpretation of statutes, the courts are required to discover and effectuate the legislative intent, to consider objects which the legislature seeks to accomplish by the statute and the mischief sought to be remedied, and to avoid the result which would be absurd or would do violence to the language of the statute." *State on Behalf of Forslund v. Bronson*, 305 N.W.2d 748, 751 (Minn. 1981); *see also Lenz v. Coon Creek Watershed Dist.*, 153 N.W.2d 209 (Minn. 1967) (looking to the purpose behind the enactment of the statute to discern the legislature's intent). The meaning of the legislature's requirement that a drainage authority make a "determination" may be discerned by understanding the purpose of such a "determination".

A primary purpose of the determination to be made under Minn. Stat. § 103E.351, subd. 1 is to provide a jurisdictional basis for the drainage authority over the redetermination proceeding. A second purpose of the determination is to provide notice to previously un-assessed land owners who may become subject to the substantial costs incurred in a redetermination proceeding. These purposes are discerned by reading Minn.

Stat. § 103E.351 in the context of Minn. Stat. Ch. 103E in its entirety and by reviewing the relevant case law.

a. <u>The determination required by Minn. Stat. § 103E.351, subd. 1 is essentially jurisdictional.</u>

"Each proceeding has its own statutory prerequisites for obtaining jurisdiction . . ." *Oelke v. Faribault County*, 70 N.W.2d 853, 860 (Minn. 1955); *see also In re Judicial Ditch No. 17*, 117 N.W.2d 392, 396 (Minn. 1962) (discussing compliance with a statutory petition requirement as a "jurisdictional prerequisite"). "The authority of the legislature to enact drainage laws is derived from the police power, the right of eminent domain, [and] the taxing power . . . *Nostdal v. Watonwan County*, 22 N.W.2d 461, 466 (Minn. 1946). "A ditch proceeding is one *in rem* and *in invitum*; it is purely statutory. Its provisions must be strictly complied with." *State v. Oldre*, 229 N.W. 878, 879 (Minn. 1930). Unless the necessary statutes are complied with, the drainage authority does not have jurisdiction over the drainage proceeding.

Certain preliminary determinations in drainage proceedings have been discussed by courts as having a jurisdictional effect. *See Mosloski v. County of Martin*, 80 N.W.2d 637, 641 (Minn. 1957) (citing *In Re Judicial Ditch No. 6 in Freeborn County*, 194 N.W. 402 (Minn. 1923)). For example, *Mosloski* states that the determination as to the adequacy of a Petition for the commencement of a drainage proceeding is important because it provides jurisdiction for the drainage authority over the proceedings. *Id.* In *Petition of Brandt*, 62 N.W.2d 816, 818 (Minn. 1954), the Court's primary concern was "whether the amended petition contained sufficient signatures to confer jurisdiction in the

county board . . ." In most drainage proceedings, a threshold determination must be made as to the statutory adequacy of the Petition. *See Matter of Redetermination of Benefits of Nicollet County Ditch 86A*, 488 N.W.2d 482, 486-87 (Minn. App. 1992); Minn. Stat. § 103E202. Statutory requirements other than the petition requirement have been discussed as having a jurisdictional aspect. For example, in *Mosloski* the court stated that the "purpose of making the findings on the preliminary hearing final was to settle jurisdictional questions before too much expense had been incurred." *Mosloski,* 80 N.W.2d at 641. Such initial determinations are fundamental, "going as they do to the jurisdiction of the court or county board to entertain the proceeding at all . . . ." *In Re Judicial Ditch No. 6 in Freeborn County*, 194 N.W. 402, 403 (Minn. 1923); *see also State ex rel. Timmerman v. Compton,* 161 N.W. 378, 379 (Minn. 1917).

Likewise, the process to commence a redetermination proceeding under Minn. Stat. § 103E.351, subd. 1, also has a jurisdictional aspect. While it is true that the petition requirement for the redetermination of benefits proceeding is somewhat different from the petition requirements in proceedings for a new drainage system, an improvement, an improvement of an outlet, a lateral, or the diversion of drainage system waters, a redetermination of benefits proceeding may also be commenced by petition. *See* Minn. Stat. §§ 103E.212, 103E.215, 103E.221, 103E.225, 103E.227, 103E.351. Most of the above proceedings require that a preliminary hearing be held to determine the sufficiency of the petition and to establish the jurisdiction of the drainage authority over the proceeding before the project can continue. *See* Minn. Stat. § 103E.212, subd. 1, 103E.215, subd. 1, 103E.221, subd. 4, 103E.225, subd. 2, 103E.227, subd. 3(b). While

Minn. Stat. § 103E.351, subd. 1, does not require that a preliminary hearing be held to determine the sufficiency of a petition, a petition, nevertheless, fulfills the same jurisdictional role as a petition in other drainage proceedings.

Given the unique nature of a redetermination proceeding, a drainage authority determination may be made in place of the land owner petition. Because the determination may be made in place of the land owner petition, which would fulfill a jurisdictional role, the determination must also fulfill the jurisdictional role that each drainage proceeding contains. *See Oelke v. County of Faribault*, 70 N.W.2d 853, 860 (Minn. 1955) (stating that each proceeding has prerequisites for obtaining jurisdiction). This is particularly true here, where the eventual result of the redetermination would have been to add roughly 435,500 acres not previously part of JD No. 14. (App. at 4, 5, 127a-127b.) Viewing Minn. Stat. § 103E.351, subd. 1, in the context of Minn. Stat. Ch. 103E as a whole, it becomes apparent that the Legislature's purpose in requiring a drainage authority determination before commencing a redetermination of benefits is to fulfill this same jurisdictional role. The drainage authority must have jurisdiction over a drainage proceeding in order for the proceeding to be properly commenced. For a redetermination, that means either a proper petition or a proper determination.

Because a primary purpose of the legislature in requiring that a determination be made is to give the drainage authority jurisdiction over the drainage proceeding, the determination must be made in a clear and definite way. For this reason, the district court appropriately stated that the board should have stated its determination and the basis therefore, with "clarity and completeness." (App. at 354.) Also, the district court

appropriately stated that "Minn. Stat. § 103E.351, subd. 1, in essence, [is] a jurisdictional type statute." (App. at 355.) This jurisdictional purpose requires a clear and definite determination. The District did not make such a determination. Therefore, this Court must affirm the district court's Summary Judgment Order and Judgment.

b. The determination required by Minn. Stat. § 103E.351, subd. 1 is intended to provide notice to unassessed land owners.

The concept of proper notice to land owners at the commencement of a drainage proceeding has also been discussed by Minnesota Courts. *See State v. Oldre*, 229 N.W.878, 879 (Minn. 1930). In *Oldre*, the Court notes that notice be sufficient and proper before the Board would be deemed to have jurisdiction over a drainage proceeding. *Id.* Most drainage proceedings require notice of a preliminary hearing to potentially affected land owners. *See* Minn. Stat. § 103E.261. Minn. Stat. § 103E.351 does not expressly require notice of a preliminary hearing. Only notice of a final hearing is explicitly required at Minn. Stat. § 103E.351, subd. 2(c). If no other notice is required to be given to potentially affected land owners, the first notice that such land owners might receive of a redetermination may come after years of expenditure and shortly before the conclusion of the proceeding at the final hearing.

Consistent with the legislature's general interest in requiring notice to those that may be affected by a drainage proceeding, as seen throughout Minn. Stat. Ch. 103E, the requirement that a "determination" be made under Minn. Stat. § 103E.351, subd. 1, could be seen as fulfilling the Legislature's desire to provide some early notice of drainage proceedings to potentially affected land owners.

Here, beginning in January of 2004, the Board began to consider the redetermination of benefits to JD No. 14. (App. at 132.) In August of 2005, members of the Board staff met with assessed land owners to discuss the redetermination of benefits process. (App. at 132.) On December 15, 2005, Attorney Athens explained to the Board at an informal hearing called specifically because of the considerable expense that would be involved, that a Petition would not be required for the redetermination and that it was still a "discretionary decision on their part." (App. at 133.) After the premature appointment of the viewers in December of 2005, the Board discussed financing the process and the potential of borrowing an amount of "up to $200,000" from outside sources, in addition to the use of internal funds. (App. at 134.) Through 2006, 2007, 2008, 2009, and 2010 the viewers continued their work with costs piling up. (App. at 134-135.) Finally on January 28, 2010, the Board Administrator distributed a copy of the final Viewers Report to the Board. (App. at 135.) Throughout this over six year period when the Board was considering a redetermination and spending hundreds of thousands of dollars on the viewing of the watershed district (an estimated $350,000.00 by April 15, 2010), at no point was notice of the redetermination given to land owners that were not previously assessed into the system. (App. at 6.) Finally, at the end of March of 2010, a Property Owner's Report was sent to all land owners that would be affected by the redetermination of benefits proceeding. (App. at 136.) Only at this point, for the first time, were these land owners formally notified that a proceeding had been going on for over six years that was incurring substantial cost that would be borne by them.

Had the District made the required determination and filed it in the District's files, there would have been at least some notice of this growing potential liability. Or, had the District proceeded as is recommended by the Minnesota Public Drainage Manual and passed a resolution of the drainage authority for the redetermination of benefits and filed this resolution in the District's files, there would have been some notice to unassessed land owners. (*See* App. at 174.) However, no such determination was made.

D. Appellant's Various Attempts to Argue that Compliance with Minn. Stat. § 103E.351, subd. 1 is Not Required Fail.

1. Any desire by the District to keep an "open mind" does not excuse the District from complying with Minn. Stat. § 103E.351, subd. 1.

First, the District incorrectly states that Minn. Stat. § 103E.261, subd. 7 "warns drainage authorities to refrain from making premature determinations." (Appellant's Brief at 16.) This statute does not contain any such warning. This subdivision provides the extent to which the preliminary findings and order are conclusive. It is important to note that they are conclusive as to "the signatures and legal requirements of the petition . . . ." *Id.* at subdivision 7(b). It is this initial conclusion that allows for the drainage authority to have jurisdiction over the proceeding and its potential impact on affected land owners. *See Mosloski v. Martin County*, 80 N.W.2d 637, 641 (Minn. 1957). Rather than warning drainage authorities from making premature determinations, Minn. Stat. § 103E.261, subd. 7 actually requires that some preliminary determinations be made and that they be conclusive. The general notion that the District was keeping an "open mind" and therefore could not comply with Minn. Stat. § 103E.351, subd. 1 is not convincing.

2. **The lack of a statutory requirement in Minn. Stat. § 103E.351 for a preliminary hearing, findings, and order does not excuse the District from complying with the statute.**

As stated above, certain drainage proceedings require a preliminary hearing, findings and order pursuant to Minn. Stat. § 103E.261. A redetermination proceeding does not require these. However, compliance with the statutory requirements for redetermination proceeding is not diminished by the fact that they are different from the requirements for other proceedings. "[D]rainage proceedings in this state are purely statutory and their validity depends upon a strict compliance with the provisions of the statute by which they are regulated and controlled." *Hagen v. Martin County*, 91 N.W.2d 657, 660 (Minn. 1958).

3. ***Titrud v. Achterkirch*, 213 N.W.2d 408 (Minn. 1973) is inapposite.**

The District relies upon *Titrud v. Achterkirch*, 213 N.W.2d 408 (Minn. 1973) for the proposition that it does not need to make a determination, but may instead show by evidence on the record that a determination must have been made. However, *Titrud* does not relieve the Board from making a determination.

In *Titrud,* a Petitioner brought a Petition for the establishment of a new drainage system. *Id.* at 410. In such a proceeding there is a preliminary hearing which is followed by a preliminary order. *Id.* at 412; *see* M inn. Stat. § 106.101 (1971); Minn. Stat. § 103E.221. Following the preliminary order there is a viewing process and then a final hearing and final order. *See* Minn. Stat. § 106.201 (1971); Minn. Stat. § 103E.325. The objector in *Titrud* argued that the drainage authority had failed to make a final conclusion concerning the adequacy of the outlet in the final order. *Titrud,* 213 N.W.2d at 412. The

drainage authority had found that the outlet was adequate in its preliminary order and had then found in its final order that the proposed ditch was "practicable." *Id.* The objector argued that the final order was insufficient because it did not sufficiently restate in the final order that the outlet was adequate. *Id.* *Titrud*, relying on *Moslsoki*, states that a final order's determination that the ditch is "practicable" is statutorily sufficient and the drainage authority need not find again that the outlet is adequate. *Id.*

Titrud is consistent with the language of the drainage code. Minn. Stat. § 106.101, subd. 5 (1971) required that the board find in its preliminary order that, among other things, "the outlet is adequate. . ." Minn. Stat. § 106.201 (1971), on the other hand, which explained the requisites of the final order, contained no similar requirement. In a final order the board must find, among other things, "that the proposed system is practicable . . ." Minn. Stat. § 106.201, subd. 2 (1971). *Titrud* is consistent with these statutory requirements.

In its large block quote, Appellant uses an ellipsis to remove a crucial detail from *Titrud*. (Appellant's Brief at 19.) Specifically, Appellant removed the following detail from the quote: "The drainage authority in the present case *found in its order following the preliminary hearing* that the outlet was adequate." *Titrud,* 213 N.W.2d 408, 412 (Minn. 1973) (emphasis added). By removing this language and replacing it with an ellipsis, Appellant obfuscates *Titrud's* meaning. *Titrud* ruled that the drainage authority did not have to make a finding as to the adequacy of the outlet in the final order—citing precedent and referring to the language of the statute. *Id.* *Titrud* does not create a "standard" that allows drainage authorities to cobble together a determination from

evidence on the record. *Titrud* reaffirms the rule that the drainage authority is required to strictly comply with the statute. The District misinterprets *Titrud* when the District argues that the "standard" set by that case permits the District to merely rely on evidence in the record and not make a specific determination under Minn. Stat. § 103E.351, subd. 1.

Furthermore, even if a court could view the evidence in the record to glean or compile a determination, the record here does not show that a determination ever occurred. Appellant refers to District Minutes from 2002 through 2005, discussions about the possibility of a redetermination proceeding, a Petition which the District prepared and circulated to certain assessed land owners, and staff meeting notes from March 25, 2004. (Appellant's Brief at 19; App. at 66, 132-133.) Appellant has also previously pointed to various Affidavits submitted by the Board in support of its position that a determination was in fact made—for example, the Affidavits of Charles Anderson, John Roeschlein, and Jerome Deal. (App. at 125, 129, 137-139, 157-158.) The Affidavits also do not show that a determination was made. The most one can say from the Affidavits is that the Board discussed a redetermination, the Board circulated a Petition, the Board took notes on discussions relating to a redetermination, the Board understood that land values had changed, concerns were stated by the Board at meetings, and the Board was satisfied that the benefitted land area had changed. (App. at 66, 129, 132-133, 137-139, 157-158.) Taken together, these allusions to a decision having been made by the District fall short of a determination as contemplated by Minn. Stat. §

103E.351, subd. 1. That the District must submit affidavits to attempt to explain what it determined proves that the District did not make a proper determination.

4. Even though a ditch proceeding is a quasi-judicial proceeding the District must still comply with statutory requirements.

Appellant looks to other statutes and other bodies of law to argue that the statutory requirements of Minn. Stat. § 103E.351 need not be followed with any precision. (Appellant's Brief at 19-21.) Appellant cites various rules, statutes, and case law for the rule that an agency can "determine" something without formal findings. *Id.* Respondent agrees that there is no requirement in Minn. Stat. § 103E.351 that a drainage authority make any formal findings. However, a determination still must be made in order to commence a proceeding that is not commenced upon a land owner petition. Appellant's argument that the rules governing a drainage proceeding need not be followed because a drainage authority is merely a quasi-judicial authority is not supported by the overwhelming case law which provides that the provisions of a drainage statute must be strictly complied with. *See Hagen v. Martin County*, 91 N.W.2d 657, 660 (Minn. 1958); *Oelke v. County of Faribault*, 70 N.W.2d 853, 857 (Minn. 1955).

In support of its argument, Appellant relies on *State v. Truax*, 166 N.W. 339 (Minn. 1918). In *Truax*, the relator argued that an order establishing a ditch should be vacated because the county board refused to swear in witnesses appearing before it during the proceeding. *Id.* at 340. *Truax* found that the practice of not swearing in witnesses was not fatal to the county's final order. *Id.* *Truax* notes that ditch proceedings are not governed by the legal rules of evidence and states that "Unless there is some

requirement in the statute to that effect, we think county boards are not required to put under oath those who appear before them." *Id.* In other words, because the statute in *Truax* did not require ditch proceeding witnesses to be sworn in, the court would not require witnesses to be sworn in.

Here, unlike the issue in *Truax*, the statute *does* require that either a petition be brought or a determination be made. Also, as the district court stated, "[a]lthough the redetermination proceedings may be quasi-judicial in nature and do not require all of the formality of a judicial proceeding, not all formality can be ignored." (App. at 354.)

For the same reasons, Appellant's arguments based upon theories of substantial compliance and harmless error also fail.

5. Minn. Stat. § 103E.351 is not a "directory" statute.

Appellant contends that Minn. Stat. § 103E.351 is a directory statute. (Appellant's Brief at 23-24.) Appellant relies in part on *Chanhassen v. Carver*, 369 N.W.2d 297 (Minn. App. 1985). *Chanhassen* dealt with the interpretation of an unrelated statute – Minn. Stat. § 270.52 – that requires the county auditor to certify costs not later than September 1. *Id.* at 300. *Chanhassen* held that where such a statute is "designed to secure uniformity and dispatch in the public business" and "there are no statutorily defined consequences for failure to comply" the statute is merely directory. *Id.* Here, the purpose of the statute is not to secure uniformity. The purpose of Minn. Stat. § 103E.351 is to prescribe the process for commencing a redetermination of benefits proceeding that has consequences for individuals' property rights. Also, there are consequences for failing to comply with Minn. Stat. § 103E.351. Minnesota common law is unequivocal

that in drainage law proceedings, the statute "must be strictly complied with" or be overturned on appeal. *See Oelke v. County of Faribault*, 70 N.W.2d 853, 857 (Minn. 1955) (citing *In Re Judicial Ditch No. 12*, 36 N.W.2d 336, 341, *cert. denied, Great Northern Ry. Co. v. Lehman* (337 U.S. 938)).

E. The District Court's Summary Judgment Order and Judgment Must be Affirmed.

Minn. Stat. § 103E.351, subd. 1 explicitly requires that one of two conditions be met in order for a redetermination proceeding to begin. Here, no petition was brought in compliance with the statute. Also, no determination was made in compliance with the statute. Appellant's attempts to re-interpret the meaning of "determines" are misguided and fail. Compliance with the statutory requirements for redetermination proceeding—like all drainage proceedings—has a jurisdictional effect. *See Oelke v. County of Faribault*, 70 N.W.2d 853, 860 (Minn. 1955). This Court must therefore affirm the district court's summary judgement order and judgment and once again reaffirm the requirement that statutes governing drainage proceedings must be strictly complied with. *Id.*

III. APPELLANT MAY NOT ARGUE ON APPEAL THAT THE DISTRICT COURT SHOULD HAVE REMANDED THE DISTRICT'S FINAL ORDER RATHER THAN VACATE IT BECAUSE APPELLANT DID NOT PROPERLY RAISE THIS ISSUE BELOW.

A. This Issue is Not Properly Before this Court.

Minn. Gen. R. Prac. 115.11 states that "motions to reconsider are prohibited except by express permission of the court, which will be granted only upon a showing of compelling circumstances." Here, no such express permission was granted by the Court.

On May 11, 2011, the Traverse County Respondents filed their Motion for Summary Judgment with the Traverse County District Court. (App. at 20-41.) On June 24, 2011, the Appellant responded with a Memorandum of Law in Opposition to Respondents' Motion for Summary Judgment. (App. at 80-116.) On July 5, 2011, Respondent filed a Reply Memorandum in Support of its Motion for Summary Judgment. (App. at 144-164.) On September 9, 2011, ten days before the Court issued its September 19, 2011 Order, Appellant sent a letter to Judge Gerald Seibel attempting to argue various points. (App. at 346-347.) As is stated in the letter, the Judge had already indicated to the parties that he intended to grant the Motion for Summary Judgment. *Id.* The bulk of this letter argues that the district court should remand the District's Final Order with instructions rather than vacate it. *Id.* At no point in the record before this had the Appellant raised this issue. Therefore, the District's singular attempt to argue for remand rather than vacation was not properly before the district court.

"The papers filed in the trial court or agency, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. An Appellate Court may not base its decision on matters outside the record on appeal and may not consider matters not produced and received in evidence below. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1983). Minn. R. Civ. App. P. 103.04 also states that "the scope of review afforded may be affected by whether proper steps have been taken to preserve issues for review on appeal, including the existence of timely and proper post-trial motions." The advisory comment to this appellant rule also

states that "as a general proposition, appellant review is limited to review of the facts and legal arguments that are contained in the trial record."

The September 9, 2011 letter from Appellant to Judge Seibel is not part of the trial record. It was not submitted pursuant to a proper permission granted by the Court and should not be considered by this Court. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 Minn. 1988.

B. <u>Even if this Court Does Address this Issue, this Court Must Affirm the District Court's Decision to Vacate the District's Final Order</u>.

In general, a court's judgment that is rendered in absence of jurisdiction over the subject matter or the parties is a void judgment. *See Matson v. Matson*, 310 N.W.2d 502, 506 (Minn.1981) (citing *Lange v. Johnson*, 295 Minn. 320, 323, 204 N.W.2d 205, 208 (1973); *In re a Petition for Instructions to Construe Basic Resolution 876 of the Port Authority of the City of St. Paul*, 772 N.W.2d 488, 495 (Minn. 2009). Like courts, administrative agencies must also have the requisite jurisdiction in order to proceed.

> An administrative agency's jurisdiction, as we recognized in State ex rel. Spurck v. Civil Service Bd., 226 Minn. 253, 259, 32 N.W.2d 583, 586 (1948), is limited and is dependent entirely upon the statute under which it operates. "Jurisdiction of an administrative agency consists of the powers granted it by statute. Lack of statutory power betokens lack of jurisdiction. It is therefore well settled that a determination of an administrative agency *is void* and subject to collateral attack where it is made either without statutory power or in excess thereof."

McKee v. Ramsey County, 310 Minn. 192, 195, 245 N.W.2d 460, 462 (1976) (emphasis added) (quoting *State ex rel. Spurck v. Civil Service Bd.*, 226 Minn. 253, 259, 32 N.W.2d

583, 586 (1948)). Stated simply, an administrative action made without properly following the statute is void.

Here, the District failed to follow the requirements of Minn. Stat. § 103E.351, subd. 1 and therefore improperly commenced the redetermination proceeding. Therefore, the District did not have the statutorily required jurisdiction over the redetermination proceeding. For this reason, the district court properly considered the District's Final Order void and therefore properly vacated it. This Court must affirm the district court's decision to vacate the District's Final Order.

C. **If this Court Does Not Affirm the District Court's Decision, it Should Remand to the District Court.**

If this Court does not affirm the district court's decision to vacate, this case should be remanded to the district court to determine whether the District's Final Order should be remanded or vacated. Pursuant to Minnesota law, appeals of watershed district board orders are made to the district court. *In re Hutchinson*, 440 N.W.2d 171, 175 (Minn. App. 1989), *rev. denied* (Minn. Aug. 9, 1989). The district court is to act as the court of first impression and as the appellate tribunal as to legal conclusions. *Id.* Because the decision of whether to vacate or remand the District's Final Order was never before the district court, it must be properly put before the district court for the district court's review. The district court may then make such an Order "as is justified by the record." *Hagen v. Martin County*, 91 N.W.2d 657, 662 (Minn. 1958).

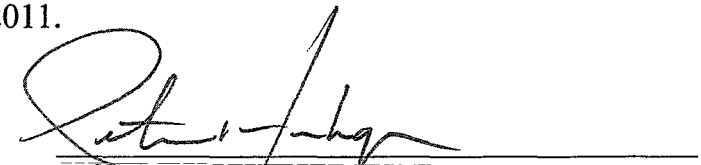
The District may not argue on appeal that the district court should have remanded this case to the District. Therefore, this Court should affirm the district court's Summary Judgment Order and Judgment in all respects.

CONCLUSION

In the words of the Summary Judgment Order and Judgment, "[t]he statutory language is clear." (App. at 353.) Here, the District, a sophisticated, powerful organization with ready access to legal counsel, failed to follow the statutory requirements for commencing a redetermination proceeding. The District's redetermination of benefits for JD No. 14 would have greatly expanded JD No. 14's benefited area and would have increased by 93 times the amount of benefits from JD No. 14 to $55,521,279.53. (App. at 4, 7.) Such an expansive and financially substantial proceeding, which affects the property rights of hundreds of land owners, must be given the proper respect and formality that it deserves. For the above reasons, Minnesota courts have consistently required strict compliance with statutory requirements in drainage proceedings. Here again, this Court must reaffirm a drainage authority's requirement to comply with the letter of the law. So as to not undermine the intent of the legislature in requiring that a determination be made in order to provide notice and establish jurisdiction, this Court must affirm the district court's summary judgment order and judgment entered below.

The Traverse County Respondents respectfully request that this Court affirm the judgment of the district court.

Dated this 16th day of December, 2011.



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Appellate Court Case No. A111875

STATE OF MINNESOTA

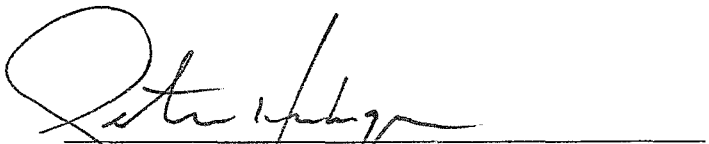
IN COURT OF APPEALS

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	Trial Court Case Nos. 78-CV-10-207 26-CV-11-45 56-CV-11-286

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subds. 1 and 3, for a brief produced with a 13 point font. The length of this brief is 8,882 words. This brief was prepared using Microsoft Word 2003.

Dated this 16th day of December, 2011.



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