

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF JACKSON

FIFTH JUDICIAL DISTRICT

Case Type: Other Civil

Court File No. 32-CV-18-146

Hon. Darci J. Bentz

In re the Appeal from the Final Order  
of the Heron Lake Watershed District, Acting as  
Drainage Authority for County Ditch No. 3  
Establishing Drainage Project, Adopting  
and Confirming Viewers' Report of  
Improvement Benefits and Damages,  
Authorizing the Application of Separable  
Maintenance, and Directing Construction  
of the Project

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## RESPONDENT'S MEDIATION BRIEF

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### I. INTRODUCTION

Alba Grain has appealed the order of the Heron Lake Watershed District ("District"), acting as drainage authority, establishing the Jackson County Ditch #3 drainage improvement project ("CD #3 project") and the benefits and damages assessment that the District relied on in ordering the project.<sup>1</sup> As explained by the Engineer, the proposed CD 3 improvement project will consist of cleaning/improving three open ditches, constructing 21 new tile branches and 19 new tile sub branches. The improvements to CD 3 will result in increased capacity throughout the system and increased flows in some parts of the system, specifically Branch 1. The project will provide important relief from flooding conditions, and is therefore supported by landowners on the system with some urgency.

Pursuant to Minnesota Statutes §103E.341, to order a drainage project, the drainage authority must find that the project benefits and costs are properly determined, and that the benefits exceed the costs. If benefits and costs are properly determined and benefits exceed costs, the drainage authority must order the project. The detailed and complete record of the District's proceedings and process in ordering the CD #3 project demonstrate the District's compliance with Minn. Stat. 103E.341.

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<sup>1</sup> Notice of Appeal, May 14, 2018. In re the Appeal from the Final Order of the Heron Lake Watershed District, Acting as Drainage Authority for County Ditch No. 3 Establishing Drainage Project, Adopting and Confirming Viewers' Report of Improvement Benefits and Damages, Authorizing the Application of Separable Maintenance, and Directing Construction of the Project. Minnesota Fifth Judicial District, Jackson County.

The District engineer recommended that repair costs for the CD #3 project system be determined based on the cost of repairing the currently existing system ("option 1"), which is the same method of calculating repair costs that the District applies in its other drainage improvement projects and that Jackson County applies in determining drainage project repair costs. The District engineer analyzed two alternative methods, options 2 and 3, for calculating repair costs, but Jackson County made clear that those methods are not aligned with the County's longstanding method of calculating repair costs. Alba Grain's separable maintenance assessment for the CD #3 project is \$327,808.81 when repair costs are calculated using option 1, and Alba Grain's total assessment for 531 acres, including the \$20,660.77 improvement cost, is \$348,469.58.

The Redetermination of Benefits for CD #3 reported \$968,911.50 in net benefits to Alba Grain, and the determination of benefits for the CD #3 project reported \$39,063 in net benefits to Alba Grain. Even if the CD #3 project moved forward as proposed by Alba Grain at the hearing under options 2 or 3, Alba Grain's separable maintenance assessment would be \$295,825.22 or \$239,987.82, respectively. Under option 2 Alba Grain's separable maintenance assessment is \$31,983.59 less than under option 1, and under option 3 Alba Grain's separable maintenance assessment is \$87,820.79 less than under option 1.

The District's decision as the drainage authority is afforded strong deference when it follows the decision-making process defined in Minn. Stat. 103E.341. Its decision is based on a sound record and carefully considered judgment.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

In February 2014, Jackson County, which has been the drainage authority on CD #3, ordered a redetermination of benefits on CD #3 that was completed in March 2017. In August 2014, landowners on CD #3 submitted to the District a petition for improvement to CD #3 in conformance with Minn. Stat. 103D.625, subd. 4. Because Jackson County has historically been the drainage authority on CD #3 the District regularly consulted with the County throughout the CD #3 project proceedings. The petition for improvement requested that the District consider separable maintenance under Minn. Stat. 103E.215, subd. 6, as part of the proposed improvement. Separable maintenance is a calculation of the cost to repair an existing ditch system. The calculation determines how much of the improvement costs would have to be undertaken to repair the system regardless of whether the improvement to the system is constructed.

District engineer Chuck Brandel of ISG prepared a Final Engineer's Report that found that the benefits of the CD #3 project exceeded costs. The report recommended assessing separable maintenance using option 1, the same method used by Jackson County to repair drainage systems.

Due to historical construction and repairs to CD #3 at different times, some areas of the CD #3 project system consist of three parallel tiles. The Drainage Supervisor for the Jackson County Public Works Department stated that Jackson County would replace the system as it exists in the ground at the time of replacement, for example replacing three tiles with three tiles, as Jackson County has always done. The District followed Section 103E.215 by calculating separable maintenance based on the cost of the proposed improvement required to repair the separable part of the existing system. This approach found strong support in the record from the District engineer's analysis and the statements by the Jackson County Drainage Supervisor made at District hearings and meetings on the CD #3 project.

Following discussion at public hearings and meetings on the CD #3 project and the project's separable maintenance costs, the District ordered the District engineer to provide costs under alternative options for calculating separable maintenance. The engineer produced costs for two alternative options. Option 2 caps separable maintenance costs at the cost to improve the tile where repair costs for that section exceed improvement costs for that section. Option 3 replaces sections of three tile with one tile. Options 1, 2, and 3 all present approximately the same total project costs, but result in different separable maintenance costs. The total separable maintenance cost is \$5,759,471 under option 1, \$5,197,532 under option 2, and \$4,216,491 under option 3.

In August 2017, a landowner on the CD #3 project system filed a request to re-open the CD #3 redetermination of benefits with the Jackson County court administrator, and in December 2017 the Jackson County board heard the appeal. At the hearing, the Drainage Supervisor for the Jackson County Public Works Department stated that the County's method for repairing tiles is to replace a three parallel tile system as a three parallel tile system, and that this method is consistent with instruction at professional trainings.

Jackson County denied the request to re-open the CD #3 redetermination of benefits, finding that the County has always followed the method of assessing cost to repair the currently existing system and in doing so avoids creating unintentional improvement costs that could result, for example, from calculating the cost to repair existing areas of three tiles with one tile. Jackson County found no evidence supporting the assertion that the repair costs calculated in the redetermination of benefits were inaccurate. Following Jackson County's denial of the appeal based on its finding that assessment of the currently existing tile system is consistent with the County's method of conducting a Redetermination of Benefits, the District and District engineer removed options 2 and 3 from an amendment to the Final Engineer's Report.

In April 2018, the District Board of Managers, as drainage authority, adopted the Findings of Fact and Final Order Establishing Drainage Project, Adopting and Confirming Viewers' Report of Improvement Benefits and Damages, Authorizing the Application of Separable Maintenance, and Directing Construction of the Project. In May 2018, Alba Grain, a landowner on the CD #3 project system, filed an appeal from the Final Order for the CD #3 project.

Alba Grain appealed the order establishing the CD #3 improvement project and the benefits and damages determination made during the CD #3 drainage proceedings. Minnesota Statutes

§103E.095 establishes a separate appeals process for establishment appeals and benefits and damages appeals. Minn. Stat. 103E.095, subd. 3 states that if both the establishment order and the benefits and damages assessment are appealed, the benefits and damages appeal must be stayed until the court resolves the establishment appeal.

Minn. Stat. 103E.095, subs. 1-2, governs establishment appeals, during which the court determines whether the drainage project will go forward. If the court affirms the establishment order, the benefits and damages appeal may go forward under Minn. Stat. 103E. 091, subs. 2, 4, which includes right to a trial by jury for a possible redetermination of benefits and damages.

To date, parties Heron Lake Watershed District and Alba Grain have submitted informational statements with the District Court, have a mediation deadline of March 1, and have a pre-trial conference scheduled for March 12 and court trial dates of March 21 and 22 before the Honorable Darci J. Bentz.

### **III. LEGAL ISSUES**

#### **a. Separable maintenance**

The legal standard for applying separable maintenance is defined at Minn. Stat. 103E.215, subd. 6, which requires the drainage authority to determine the part of the “cost of the proposed improvement required to repair the separable part of the existing system” and to assess those repair costs against all landowners on the system, while assessing the costs to improve the system only against those landowners who will benefit from the system improvements.

The District, in reviewing the separable maintenance issues in CD #3, followed a plain language interpretation of Minn. Stat. 103E.215, subd. 6 in relying on option 1 to determine separable maintenance costs and assessments to landowners for the CD #3 project.

#### **b. Deference to drainage authority decisions**

Drainage authority decisions are generally given significant deference in Minnesota courts when the drainage authority has followed the appropriate statutory framework and process in considering and ordering a drainage project. See *Georke Family Partnership v. Lac qui Parle-Yellow Bank Watershed District*, 857 N.W.2d 50 (Minn. App. 2014)(the scope of review applicable to agency decisions applies to decisions of a watershed district's board of managers, and the applicable standard is whether the authority's action was reasonable). See also *In the Matter of the Petition for Improvement of Murray County Ditch No. 34 Petition for improvement of Murray County Ditch*, 615 N.W.2d 40 (Minn. 2000)(the Minnesota Supreme Court upheld a drainage authority's establishment order that was challenged based on the drainage authority's calculation of project costs and benefits by subtracting repair costs from redetermination benefits, and subtracting improvement costs from improvement benefits, in conducting its cost-benefit analysis for the project. The Court found that the drainage authority correctly determined

the separate costs and benefits of the separable maintenance and improvement aspects of the improvement project under Minn. Stat. 103E.215, subd. 6. The court highlighted that the drainage authority's findings and the engineer's support were "amply supported by the record" in deferring to the drainage authority's findings of fact made during the process of applying Minnesota Statutes to the improvement project at issue.)

#### **IV. SETTLEMENT DISCUSSIONS TO DATE**

Alba Grain proposed a settlement amount of \$350,000 in a December 5, 2018 letter to Bruce Sellers of Wendland Sellers Law Office, attorney for the CD #3 project petitioners. Alba Grain's attorney explained that he arrived at the \$350,000 settlement amount based on the amount that the improvement benefits exceed improvement costs for the CD #3 project. Mr. Sellers responded to Alba Grain on January 17, 2019 with a proposed settlement amount of \$59,902.29. This amount would be considered an increase in damages and would reduce Alba Grain's CD #3 project assessment for separable maintenance to \$267,906.52. Alba Grain responded on January 18, 2019 stating that Alba Grain would consider Mr. Seller's January 17 counterproposal. On January 22, 2019, Alba Grain proposed a revised settlement amount of \$320,000.

The District's counsel had similar, though more general discussions with counsel for Alba Grain. A critical consideration for the District as the drainage authority is that any concession in settlement with Alba Grain is a zero sum calculation that will thereby increase the costs of the project to the other landowners in the system. Further, any settlement must be reviewed and approved as an amendment to the final order of the District's Board of Managers.

#### **V. CONCLUSION**

The District's process in establishing the CD #3 project and its application of the benefits and damages costs for the CD #3 project align with the statutory requirements of Minn. Stat. Ch. 103E. A variety of options exist for calculating separable maintenance costs and the District carefully considered the local practice in Jackson County, relied on the District engineer's professional recommendation, reviewed and considered alternative options 2 and 3, and looked to its own experience managing other drainage system projects before adopting the District engineer's recommendation that separable maintenance be calculated under option 1, the cost to repair the currently existing system, and ordering the CD #3 project.

The District believes that it is working with a solid record and sound decision made on faithful adherence to the drainage code and established drainage authority practice. The District is certainly supportive of a settlement to resolve the appeal, but such a settlement must be supported by the record and the drainage law, be reasonable, and be within the range of tolerance of the other affected landowners so that an important and overdue flood relief project may proceed.

The District's administrator and engineer will be present for the mediation.

Respondent's Mediation Brief  
32-CV-18-146

Dated this 7<sup>th</sup> day of February, 2019.

Respectfully submitted,



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