This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0028

Charles Carlson,
Appellant,

vs.

Faribault County Drainage Authority, et al.,
Respondents.

Filed June 21, 2021
Affirmed
Hooten, Judge

Faribault County District Court
File No. 22-CV-18-255

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for appellant)

Gerald W. Von Korff, Rinke Noonan, Ltd., St. Cloud, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this appeal under Minn. Stat. § 103E.095 (2020), appellant challenges the district court's affirmance of respondent Faribault County Drainage Authority's improvement order for a county ditch system. We affirm.

FACTS

Appellant Charles Carlson owns farmland that is benefited by Faribault County Ditch No. 24 (CD 24). The Faribault County Board of Commissioners (the drainage authority) acts as the drainage authority for CD 24.

1915 ditch construction and 1959 improvement

CD 24 was originally constructed in 1915 as a buried tile system.[1] The ditch's original outlet drained into the Blue Earth River in Winnebago City Township. In 1959, CD 24 was improved with the construction of 1,800 feet of deep open ditch and 8,700 feet of shallow grassy waterway.[2]

2013 repair petition and proceedings

In June 2013, a third-party filed a petition for the repair of CD 24 with the drainage authority because of persistent erosion issues during high water flows. From 2013 to 2016, the drainage authority met numerous times to examine and resolve competing recommendations for repair or improvement of CD 24. During that timeframe, a drainage engineer appointed by the drainage authority and employed by I+S Group, Inc. (ISG), inspected CD 24 and concluded that the ditch needed a more robust outlet rate control structure to address persistent erosion. The ISG engineer also concluded that much of the upstream portion of the waterway was not compliant with the 1959 improvement project profile, as some areas within the waterway were "higher than [the] legal grade set in 1959."

---

[1] In its brief, respondent describes a tile system as similar to an urban storm sewer, except that water enters the tile system by a different mechanism.

[2] Respondent defines a waterway as an artificial shallow and wide depression that conveys water across the landscape.

A compliance report from the county drainage inspector identified farms, including Carlson’s farm, where the waterway and protective buffers were significantly out of compliance, requiring repairs in both the upstream and downstream portions of the system; Carlson’s farm abuts the downstream portion of the waterway.

Over several months, the drainage authority held a series of meetings to consider landowner comments on how to address the CD 24 system’s problems. The drainage authority presented repair-only options because a petition for improvement had not yet been developed. Landowners supported immediate repair of the downstream portion of CD 24 that passed through Carlson’s farm. However, at that time, some landowners also advocated that a portion of the upstream, aboveground waterway should be replaced by underground tile—which would constitute an improvement under Minn. Stat. § 103E.215 (2020).

2016 improvement petition

On June 17, 2016, a group of upstream landowners filed a separate formal petition to improve the upstream portion of CD 24.

2016 repair order

On June 27, 2016, the drainage authority issued a final repair order for the downstream section of CD 24, which abuts appellant’s land, and deferred action on the upstream portions until the 2016 improvement petition was adjudicated. The 2016 repair order identified “Option 2” of a June 2016 ISG engineering report as the repairs to be completed. Appellant was not awarded damages in the repair proceeding, and he did not

appeal the repair order to the district court as either a benefits and damages appeal under Minn. Stat. § 103E.091 (2020) or as an establishment appeal under Minn. Stat. § 103E.095.

Carlson's collateral attacks on the 2016 repair order

In June 2017, after construction of the repairs had already begun, Carlson commenced a declaratory judgment action challenging the June 2016 repair order. Shortly after, Carlson filed a motion for a temporary restraining order to stop the repairs, but his motion was denied.

Next, Carlson filed a complaint with the drainage authority that upstream landowners were obstructing the upstream portion of CD 24. Following an evidentiary hearing, the drainage authority issued an order determining that the approved repair and the pending improvement proceeding were the "most appropriate procedures to resolve all of the concerns about the operation and configuration of the system, including the concerns raised by Mr. Carlson." Carlson filed an appeal of the drainage authority's order in district court and later voluntarily dismissed his appeal.

In December 2018, Carlson filed an inverse condemnation petition for mandamus in district court, arguing that (1) the 2016 repair order was invalid, and the drainage authority had taken his property without compensation by constructing repairs that caused both temporary and permanent flooding to his land; and (2) that by including a control structure, the repair had been converted into an improvement. The district court denied Carlson's petition and dismissed it with prejudice. Carlson appealed that order and then voluntarily dismissed his appeal.

Improvement petition proceedings

While the above litigation was pending, the drainage authority conducted proceedings regarding the 2016 improvement petition under Minn. Stat. §§ 103E.241-.341 (2020). At the preliminary hearing, Carlson presented an advisory letter from a professional engineer employed by Sambatek. In the letter, the Sambatek engineer ultimately concluded that she was unable to offer an opinion as to whether either the completed repair or proposed improvement would cause flooding to the drainage ditch system. At no point in the improvement proceedings or in his later appeal to the district court did Carlson present any engineering evidence to support his belief that the repairs or improvements to CD 24 would cause flooding on his property.

Final engineering report

The drainage authority's final engineering report prepared by ISG noted that the 2016 repairs included the construction of two water control structures. The first control structure was "installed at the end of the open ditch to transition flow from the open ditch into the ravine outlet structures," while the second "included a rip rap spillway at the transition of the waterway to the open ditch to restore legal grade and to protect this area from future erosion." According to the engineering report, these outlet controls were designed to provide "enough water storage to slightly reduce peak flow rates from the originally designed system while still providing a free outlet to the waterway areas upstream."

Regarding existing conditions, the final engineering report explained that

> [t]he existing conditions model includes the existing mainline tile, existing Branch B tile, existing waterway (current conditions), and the existing open ditch outlet. It also includes the recent [2016] repairs to the system . . . .

Additionally, the final engineering report addressed the adequacy of the outlet for the proposed improvement:

> With the combination of the 42-inch field crossing outlet structure, 60 inch RCP outlet through the ravine, and rip rap overflows down the ravine for extra erosion control protection, it is the opinion of the Engineer that the outlet for Faribault County Ditch No. 24 is adequate to handle the proposed improvement.

Viewers' report and property owners' reports

Both the viewers' report and property owners' report issued in March 2018 incorporated the post-2016 preexisting conditions identified in the final engineering report instead of the 1959 conditions.

Improvement order

The drainage authority issued a final order establishing an improvement for the upstream section of CD 24 on March 20, 2018.

Expert declaration

In February 2019, the ISG engineer filed a declaration stating that, "[u]ltimately the drainage authority elected to repair only the downstream portion of the system which runs through Carlson['s] and other downstream landowners[s'] properties, pending a decision whether to approve an improvement petition."

The ISG engineer also explained that Carlson had actively participated in discussions regarding the implementation and design of the repairs:

> [Carlson] examined the proposed plans, attended the proposed repair hearings, met with staff, met with myself onsite, attended the preconstruction meeting, and requested modifications.
>
> . . . .
>
> I proposed a 36-inch rate control structure as the best solution. That would have been adequate and well within acceptable design standards. It would not have materially impacted Mr. Carlson's ability to drain his lands, due to the elevation of the overflow structure which was set by design 1 foot lower than any agricultural land to prevent flooding to back up from the structure. However, Mr. Carlson complained vehemently, and we upsized the structure to 42 inches, which is certainly adequate to provide Mr. Carlson the same level of agricultural drainage as he had before the repair, by increasing the capacity at the bottom of the storage area while maintaining an overflow well below Mr. Carlson's property for high flow events.

Carlson's appeal of the improvement order

Carlson appealed the final improvement order in district court under Minn. Stat. § 103E.095, but he did not appeal the benefits and damages determined for the upstream improvement under Minn. Stat. § 103E.091. Although section 103E.095 allows a landowner to present new evidence, Carlson produced no further evidence as to whether the proposed improvement, following the completed repair, would cause flooding to the upstream portion of CD 24. The parties argued the appeal through written briefs due to the COVID-19 pandemic. Based on the administrative record and the parties' briefs, the district court judge issued an order affirming the drainage authority's order approving the improvement. The district court explained:

> In the record, there is a Petition for an Improvement dated June 17, 2016, and a Petition for a Repair dated June 4, 2013. There are two Orders: An Order for an Improvement dated March 20,

> 2018, and an Order for a Repair dated June 27, 2016. . . . Both projects involve the drainage of CD (County Ditch) 24 and are related in that way. However, the Court did not see any statutory authority to suggest that two construction projects for the same drainage system necessarily need to be combined where there are two separate petitions. . . . Plaintiff waived any issues with the Drainage Authority's Order, other than procedural ones. Additionally, Plaintiff did not provide evidence of any defect with the engineering report or with a damage evaluation.

Carlson appeals.

DECISION

I. The district court did not err by affirming the drainage authority's improvement order for the upstream portion of CD 24 that relied on the baseline conditions of the 2016 repair instead of the baseline conditions of the 1959 improvement.

Under Minn. Stat. § 103E.095, subd. 1 (2020), a party may appeal an order establishing a drainage project to the district court. Although under Minn. Stat. § 103E.095, subd. 2 (2020), the findings made by the drainage authority are prima facie evidence of the matters stated in the findings, and the order is prima facie reasonable, appeals to the district court are de novo. *Schwermann v. Reinhart*, 210 N.W.2d 33, 36 (Minn. 1973). The district court shall affirm an appealed order if it is "lawful and reasonable," but should not affirm the order if it is "arbitrary, unlawful, or not supported by the evidence." Minn. Stat. § 103E.095, subd. 2.

On appeals of drainage orders to this court, we review the district court's factual determinations under a "clearly erroneous" standard of review and its legal conclusions de novo, meaning that we are "not bound by the legal conclusions of the district court or the agency itself." *Improvement of Cty. Ditch No. 86, Branch 1, Cty. of Blue Earth v. Phillips*,

614 N.W.2d 756, 760 (Minn. App. 2000), *rev'd on other grounds*, 625 N.W.2d 813 (Minn. 2001). Statutory construction is a question of law, which we review de novo. *Id.*

A. The district court did not err by determining that the drainage authority's order to repair the downstream portion of CD 24 and its order to improve the upstream portion of CD 24 did not need to be combined.

Under the drainage code, ditch system repairs are undertaken "to restore all or part of a drainage system as nearly as practicable to the same hydraulic capacity as originally constructed and subsequently improved, including resloping of ditches and leveling of spoil banks if necessary to prevent further deterioration," realignment to original construction, and routine operations to remove obstructions. Minn. Stat. § 103E.701, subd. 1 (2020). Improvements, in contrast, are undertaken to tile, enlarge, extend, straighten, or deepen an established and constructed drainage system. Minn. Stat. § 103E.215, subd. 2 (2020).

On appeal of the final improvement order in district court under Minn. Stat. § 103E.095, Carlson indicated that he was "narrowing his claim to only appeal a procedural defect and not the substance" of the final improvement order. Specifically, Carlson appears to have argued to the district court that the 2016 repair order and the 2018 improvement order should have been combined as they essentially involved the same project and their bifurcation was not legally authorized. However, the district court denied Carlson's appeal, concluding that the law did not require the drainage authority to combine the two proceedings.

Carlson now argues that the district court erred by determining that the drainage authority lawfully divided work on CD 24 into the 2016 repair order and the 2018

improvement order. He contends that this bifurcation violates precedent established in *Oelke v. Faribault Cty.*, where the Minnesota Supreme Court explained that each distinct type of drainage proceeding has its "own statutory prerequisites for obtaining jurisdiction, and for obvious reasons, one proceeding may not be ordered under a petition for another type of work." 70 N.W.2d 853, 860 (Minn. 1955).

Appellant's argument appears to be another attempt to advance his theory that his land was damaged by the downstream repair work, and that the drainage authority avoided compensating him by proceeding under repair statutes, which, unlike improvement provisions, do not allow for payment of damages.[3] Carlson makes two arguments based on this damages theory. First, he argues that the drainage authority's 2016 repair order violated the statutory requirements for a repair proceeding by including an order for the construction of water control structures, which are not included in the statutory definition of "repair" under Minn. Stat. § 103E.701, subd. 1. Second, Carlson contends that the drainage authority's 2018 improvement order violated the statutory requirements for an improvement proceeding by omitting the construction of the water control structures in its damages assessment, even though the control structures had already been constructed.

We agree with the district court that there is no "statutory authority to suggest that two construction projects for the same drainage system necessarily need to be combined where there are two separate petitions." Additionally, because Carlson missed the 30-day

---

[3] Appellant is incorrect that damages are not payable in connection with ditch repairs. *See* Minn. Stat. § 103E.715, subd. 6(b) (2020) (stating that damages are payable for repairs under Minn. Stat. § 103E.315 (2020)).

deadline to appeal the 2016 repair order to the district court under Minn. Stat. §§ 103E.091, subd. 2(b), .095, subd. 1 (2020), the district court was without jurisdiction to hear any substantive, factual arguments related to the 2016 repair order. *Bongard v. Bongard*, 342 N.W.2d 156, 158 (Minn. App. 1983) ("Time limits on appeals are jurisdictional.") Because of this, and because appellate courts generally will not consider issues raised for the first time on appeal, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), we decline to address Carlson's argument that the drainage authority's 2016 repair order violated the statutory requirements for a repair proceeding.

Finally, Carlson did not appeal the benefits and damages determined for the 2018 upstream improvement, appealing only the establishment of the drainage system improvement under Minn. Stat. § 103E.095. Additionally, he cites no authority to support his argument that *omitting* an already-completed construction project in the damages assessment of an improvement order is in violation of any drainage code statute. And, he identifies no work ordered under the 2018 improvement order that did not meet the definition of an improvement under Minn. Stat. § 103E.215, subd. 2. Therefore, we are unable to detect any violation of the precept in *Oelke* that "one proceeding may not be ordered under a petition for another type of work." 70 N.W.2d at 860.

In sum, we are unaware of any statutory authority that would have required the drainage authority to combine the 2016 repair proceeding and the 2018 improvement proceeding. We therefore conclude that the district court did not err by determining that the proceeding to repair the downstream portion of CD 24 and the proceeding to improve the upstream portion of CD 24 did not need to be combined.

B. We have no basis to conclude that the district court erroneously disregarded Carlson's vested property rights by affirming the drainage authority's 2018 improvement order.

Even if the district court did err by separately issuing the 2016 repair order and the 2018 improvement order—which it did not—there is no evidence in the record to support a conclusion that the district court erroneously disregarded Carlson's vested property rights by affirming the drainage authority's 2018 improvement order.

It is axiomatic that owners of land damaged or benefitted by a drainage system have "a property right in the maintenance of a ditch in the same condition as it was when originally established." *Petition of Jacobson*, 48 N.W.2d 441, 444 (Minn. 1951). "Such a property right cannot be divested or damaged without due process of law." *Id.*; *see also* Minn. Stat. § 103D.521 (2020) ("A person may not be deprived or divested . . . of a previously established beneficial use or right without due process of law.").

Here, Carlson argues that by affirming the drainage authority's 2018 improvement order the district court erroneously ignored his vested rights in the maintenance of CD 24 in its 1959 condition. Specifically, he argues that the drainage authority violated his right to the beneficial use of his property under Minn. Stat. § 103D.521 when it issued the 2018 improvement order that incorporated the baseline conditions existing after the 2016 repair instead of the baseline conditions existing at the time of the 1959 improvement. Carlson contends that the final engineering report, viewers' report, and property owners' report for the 2018 improvement are also "materially erroneous" because they, too, relied on the baseline conditions following the 2016 repair. Carlson's arguments are predicated on his implicit claim that the 2018 improvements will cause CD 24 to dispose of surface waters

from his farm less efficiently than the 1959 version of CD 24 would have done, ultimately causing flooding to his farm. This flooding, Carlson argues, would constitute a taking for which he should be compensated based on his vested rights arising from the 1959 improvement. To state his argument another way, Carlson appears to argue that "[t]he drainage authority is limited to flooding" his property only to the level occurring at the time of the 1959 improvement and that "compensation shall be determined as of the time of the taking" for any flooding occurring beyond that level.

The drainage authority does not dispute that Carlson's vested property rights were established when CD 24 was improved with the construction of the open ditch in 1959. Nor does it dispute Carlson's right to the maintenance of CD 24 according to its condition in 1959 or his right to compensation for any taking of his property. However, the drainage authority argues that the 2018 improvement order in no way affected Carlson's property rights because there is no evidence in the record that the 2018 improvement would reduce the drainage efficiency supplied by CD 24 as it existed following the 1959 improvement.

The evidence in the record supports the drainage authority's argument and contradicts Carlson's argument. In her advisory letter presented at the preliminary hearing, the Sambatek engineer wrote that she lacked data sufficient to determine whether the 2018 improvement would cause any adverse impact. And although Carlson disclosed that a non-engineer technician would testify that the improvement was improperly designed and would flood Carlson's property, Carlson omitted him from the witness list, and that witness did not testify. Further, the ISG engineer opined that Carlson would receive the same drainage after the improvement as he received under the 1959 order:

> The outlet structure is designed to hold back water in the ditch, but does not back up to affect any crop land in the system. The structure affects the elevation of the water in the ditch near it, but by the time you get upstream to the Carlson land there is little effect on the elevation due to the structure.
>
> . . . .
>
> Mr. Carlson did not object to the configuration of this outlet prior to, or at the final repair hearing. There was no occasion to refer the repair to viewers for damage determination, because there were no damages to determine. That determination would have required an engineering opinion that the outlet would cause material flooding to Mr. Carlson, and it was, and still is, my opinion that no such damage would occur.

Finally, the statutory definition of a repair in Minn. Stat. § 103E.701, subd. 1, undermines Carlson's argument. Under subdivision 1, ditch system repairs are undertaken "to restore all or part of a drainage system as nearly as practicable to the same hydraulic capacity as originally constructed and subsequently improved." Assuming that the construction of the 2016 repairs met this definition by restoring the downstream portion of CD 24 to its 1959 hydraulic capacity—an assumption that Carlson neither disputes nor disproves—then we can conclude that the baseline conditions of the 2016 repair were identical to the baseline conditions of the 1959 improvement. Based on this reasoning, whether the drainage authority's 2018 improvement order relied on the baseline conditions of the 2016 repair or those of the 1959 improvement becomes irrelevant.

In sum, because there is no evidence in the record supporting Carlson's argument that the drainage efficiency of CD 24 would be less efficient after the 2018 improvement than it was at the time of the 1959 improvement, there is no basis to conclude that the

district court erroneously disregarded Carlson's vested property rights by affirming the drainage authority's 2018 improvement order.

C. Carlson's challenges to the repair order are time-barred.

Carlson next argues that the 2016 repair order is subject to collateral attacks because its construction was legally unauthorized under Minn. Stat. § 103E.701, subd. 1, which defines "repair." Specifically, he argues that the drainage authority unlawfully included "$200,000 of construction improvements in a repair order when it ha[d] no authority to do so." As already explained above, Carlson failed to appeal the 2016 repair order within the 30-day statutory deadline. Minn. Stat. §§ 103E.091(2)(b), .095(1). Because Carlson missed that deadline, the district court was without jurisdiction to hear any substantive, factual arguments related to the 2016 repair order. *Bongard*, 342 N.W.2d at 158. Because of this, and because appellate courts generally will not consider issues raised for the first time on appeal, *Thiele*, 425 N.W.2d at 582, we decline to address Carlson's arguments on this issue.

Affirmed.