STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1370

In the Matter of the Reestablishment of
Big Stone County Ditch 21 Drainage System Records.

Filed September 20, 2021
Reversed; motion granted
Reyes, Judge

Big Stone County Board of Commissioners

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Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this certiorari appeal, relator argues that respondent-drainage authority exceeded its statutory authority, acted arbitrarily or capriciously, and made a decision unsupported by substantial evidence when it ordered reestablishment of drainage records for a drainage ditch in its jurisdiction. Relator also moves to supplement the record on appeal. We grant relator's motion to supplement the record, and we reverse.

FACTS

Legal background

There are several types of drainage proceedings, including improvements, repairs, and record reestablishment. *See Minn. Dep't of Nat. Res. v. Chippewa/Swift Joint Bd. of Comm'rs*, 925 N.W.2d 244, 249 (Minn. 2019) (referring to improvement and repair proceedings). Improvements, which are initiated by petition of "at least 26 percent" of affected landowners, include tiling, enlarging, extending, straightening, or deepening an established and constructed ditch. Minn. Stat. § 103E.215, subds. 2, 4 (2020). Relator the Minnesota Department of Natural Resources (DNR) plays an advisory role in improvement proceedings and must conduct environmental review if required for an improvement. Minn. Stat. § 103E.255 (2020) (requiring the DNR to make preliminary survey report); Minn. Stat. § 116D.04, subd. 2a (2020) (requiring detailed environmental impact statement when "there is potential for significant environmental effects").

In contrast, repairs are initiated either by petition or based on the report of an inspector and 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." Minn. Stat. § 103E.701, subds. 1, 4 (2020). Before conducting a repair, the drainage authority must notify the DNR only "if the repair may affect public waters" or the state is an affected landowner. Minn. Stat. §§ 103E.701, subd. 2 (2020), 103E.715, subd. 3 (2020).

In *In re Petition of Zimmer*, the supreme court concluded that the as-constructed or subsequently improved condition of a ditch, rather than its original design, determines

whether proposed maintenance or changes to the ditch constitute repairs or improvements. 359 N.W.2d 266, 271 (Minn. 1984). However, because many drainage records are more than 100 years old, a record of the as-constructed or subsequently improved condition of some ditches may be lost or incomplete. The statutory record-reestablishment process allows a drainage authority to reestablish those records to recreate a baseline. Minn. Stat. § 103E.101, subd. 4a (2020).

The record-reestablishment process begins by the drainage authority's motion or a landowner petition. Minn. Stat. § 103E.101, subd. 4a(b). The drainage authority must first find that drainage system records establishing certain parameters, such as ditch depth, width, and slope, are "lost, destroyed, or otherwise incomplete." *Id.*, subd. 4a(a). Then, a professional engineer must investigate the existing records and evidence and prepare a report. *Id.* The drainage authority must notify interested parties, including the relator Minnesota Department of Natural Resources, and hold a public hearing regarding record reestablishment. *Id.*, subd. 4a(c). Based on information gathered through the engineer's report and at the public hearing, the drainage authority may then reestablish records. Together with the existing records, the reestablished records must "define the alignment; cross-section; profile; hydraulic structure locations, materials, dimensions, and elevations; and right-of-way of the drainage system." *Id.*, subd. 4a(a).

History of Big Stone County Ditch #21

Big Stone County Ditch #21 (CD21) was designed and constructed around 1917 primarily as a tile ditch. The ditch designs called for CD21's main branch to include 7,300 feet of tile ditch and 700 feet of open ditch. However, the tile system soon failed, becoming

clogged with sand and mud. In December 1919, landowners filed a petition demanding that the "ditch be constructed forthwith strictly in accordance with the plans and specifications and contract on file" to answer to its purpose. The record contains no information regarding a response to this petition by the drainage authority, respondent Big Stone County Board of Commissioners (the board). However, the design engineer's final estimate for CD21, filed on January 5, 1921, indicates that tile was "in place" for the main branch of CD21.

The present dispute

The record contains little information regarding CD21 from 1921 until this action. In 2019, landowners petitioned the board to commence record reestablishment for CD21 in preparation for potential repairs or improvements. The board commissioned Big Stone County Engineer, Todd Larson, to review CD21's records, which Larson found to be incomplete. The board adopted a resolution to reestablish records under Minn. Stat. § 103E.101, subd. 4a (2020). Larson investigated the existing records and evidence and issued a report (engineer's report), concluding that the tile in CD21 had been removed and that CD21 had been "left as open channel." He noted the existing parameters of CD21 and recommended several "repairs," such as widening the ditch bottom to align with the original ditch width and establishing side slopes and buffers per statutory requirements for open ditches.

On July 28, 2020, the board notified the DNR of a public hearing regarding record reestablishment for CD21. The next day, the DNR asked for the engineer's report, which the board provided. On August 17, 2020, the day before the public hearing, the DNR

submitted a public comment letter objecting to record reestablishment. The DNR asserted that (1) the engineer's report did not rely on all available data; (2) all historical records in the board's possession should be part of the record; (3) record reestablishment is improper because the board possesses the original design plans; and (4) any conversion of CD21 to an open ditch did not follow improvement procedures. The DNR did not participate in the public hearing, but the board read its comment letter into the record.

The board issued an order reestablishing records on September 1, 2020. It found that there is no evidence of "significant modifications" to CD21 since its construction, but that the evidence demonstrates that CD21 has "existed as maintained open ditch since at least 1919." It concluded that CD21 had been "repaired" to open ditch, such that CD21's as-constructed or subsequently improved condition was an open ditch. It therefore ordered reestablishment of records regarding CD21 aligning with Larson's findings and recommendations.

The DNR petitioned this court for a writ of certiorari seeking review of the board's order for record reestablishment. On appeal, the DNR argues that the board exceeded its authority, made a decision unsupported by the record, and acted arbitrarily and capriciously by ordering record reestablishment; and that the engineer's report did not comply with statutory requirements. The DNR also moves this court to supplement the record.

DECISION

I. Standard of review

A drainage authority's order to reestablish records is a quasi-judicial decision subject to certiorari review. *Minn. Dept. of Nat. Res. v. Chippewa/Swift Joint Bd. of*

Comm'rs, 925 N.W.2d 244, 250 (Minn. 2019) (*Chippewa/Swift*). On certiorari appeal, we review a local authority's order for issues "affecting the jurisdiction of [the local authority], the regularity of its proceedings, and . . . whether [its] order or determination . . . was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Eneh v. Minnesota Dep't of Health*, 906 N.W.2d 611, 614 (Minn. App. 2018) (quotation omitted).

An agency's ruling is arbitrary if it, among other things, "entirely failed to consider an important aspect of the problem" or "offered an explanation that runs counter to the evidence." *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) (*CARD*). "We will not retry facts or make credibility determinations, and we will uphold the decision if the lower tribunal furnished any legal and substantial basis for the action taken." *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 303-04 (Minn. App. 2007) (quotation omitted).

II. We grant the DNR's motion to supplement the record.

The DNR moves to supplement the record with documents that it argues show that the board failed to consider information relevant to its decision. We agree.

The documents the DNR seeks to add include: (1) handwritten notes referring to CD21 as tile; (2) the county engineer's 2006 letter to landowners regarding whether to abandon CD21, calling it a "tile ditch [that] stopped functioning just a few years after it was put into service"; (3) documents attached to the county engineer's 2006 letter showing

no damages, which are usually associated with open ditches[1]; (4) a 2006 report on ditch repair costs listing costs for 7,300 feet of tile; (5) a letter to a landowner indicating no damages in 2007; and (6) an estimate for highway repairs including "road boring" which the DNR states is usually associated with crossing tile systems, not open ditches (collectively, supplementary documents).

"[T]he record in a certiorari appeal consists of the papers filed, the exhibits, and transcripts." *In re Block*, 727 N.W.2d 166, 176 (Minn. App. 2007) (citing Minn. R. Civ. App. P. 110.01). The government body bears the burden of providing a sufficient record for this court to review on certiorari appeal. *Dokmo v. Indep. Sch. Dist. No. 11*, 459 N.W.2d 671, 676 (Minn. 1990); *see also Trout Unlimited, Inc. v. Minn. Dept. of Ag.*, 528 N.W.2d 903, 907-08 (Minn. App. 1995) (stating that disputed documents available and in possession of agency are part of record and should have been considered by agency), *review denied* (Minn. Apr. 27, 1995).

On certiorari review of a quasi-judicial decision, we usually do not consider materials outside the record developed before the decisionmaker, unless the supplementary materials support the decision below. *Block*, 727 N.W.2d at 176. However, we may consider evidence outside the administrative record "when, among other circumstances, 'the agency failed to consider information relevant to making its decision.'" *In re Air Emissions Permit No. 13700345-101 for PolyMet Mining, Inc.*, 943 N.W.2d 399, 406-07

[1] Landowners whose land is required for an open ditch channel must be paid damages for loss of use of that land. Minn. Stat. § 103E.315, subd. 8(a)(1) (2020). The record considered by the board also reflects that damages have never been assessed for CD21.

(Minn. App. 2020) (*PolyMet I*) (quoting *White v. Minn. Dept. of Nat. Res.*, 567 N.W.2d 724, 735 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997)), *rev'd and remanded on other grounds*, 955 N.W.2d 258 (Minn. 2021) (*PolyMet II*); *see also Crystal Beach Bay Ass'n v. County of Koochiching*, 243 N.W.2d 40, 43 (Minn. 1976) (considering extra-record evidence in appeal from declaratory judgment action in district court based on "inherent power to look beyond the record where the orderly administration of justice commends it"). On review, the Minnesota Supreme Court noted that, when deciding a motion to supplement, the court of appeals may look to federal administrative law, which states that supplementing the record may be appropriate in limited cases when documents should have been considered by the agency. *PolyMet II*, 955 N.W.2d at 269 n.6.

Similarly, in another certiorari appeal, we allowed supplementation of the record when the decisionmaker, the city council, received a relevant letter prior to its decision but a councilmember denied the existence of that letter. *Rostamkhani v. City of St. Paul*, 645 N.W.2d 479, 483-84 (Minn. App. 2002); *see also* Minn. R. Civ. App. P. 110.05 (stating that appellate court may allow supplemental record if material portions of record are omitted or misstated). We did so even though the letter supported reversal of the city council's decision. *Rostamkhani*, 645 N.W.2d at 483-84.

Here, the supplementary documents show that the board and county engineers referred to CD21 as a tile ditch, proposed repairs to CD21 listing costs to repair a tile system, and assessed none of the damages that are typical for open ditches. If CD21 had been "repaired" to an open ditch, the board and engineers would have referred to it as an

open ditch, rather than as a tile ditch that failed. Likewise, it is more likely that the record would reflect damages determinations if CD21 had been repaired to an open ditch.

Further, in its comment letter, the DNR requested that the board make all historical records part of the record at the public hearing, which it did not do. The board had the supplementary documents in its possession, but deemed them irrelevant and consequently did not make them part of the administrative record. But like the city council in *Rostamkhani*, the board should have included the supplementary documents to create a comprehensive record. 645 N.W.2d at 483-84; *Dokmo*, 459 N.W.2d at 676. To deny the motion would allow the board to benefit from its failure to include documents relevant to CD21's construction and history. In sum, because the supplementary documents are probative of whether the board failed to consider evidence relevant to its decision, we grant the DNR's motion to supplement the record. *White*, 567 N.W.2d at 735.

III. The board exceeded its authority, made a decision unsupported by substantial evidence , and acted arbitrarily by ordering record reestablishment.

The DNR asserts that (1) the board lacked authority to conduct the record reestablishment process and (2) the board's conclusion that CD21 was "repaired" to open ditch in 1919 is unsupported by the record and is arbitrary. We agree.

As this court established in *Zimmer*, the as-constructed or subsequently improved condition of a ditch serves as the baseline for future maintenance and changes to a ditch and determines whether the maintenance and changes constitute repairs or improvements. 359 N.W.2d at 271. If the records of the as-constructed or subsequently improved

condition of a ditch are lost or incomplete, the drainage authority may conduct record reestablishment proceedings. Minn. Stat. § 103E.101, subd. 4a(a).

Here, the parties agree that CD21 was designed and constructed as a tile system, that the tile system malfunctioned, and that landowners petitioned to fix CD21. This dispute centers on the board's conclusion that, after the 1919 landowner petition, CD21 was repaired or converted to open ditch but the records of that change are lost, destroyed, or incomplete.

A. The board exceeded its authority by proceeding with record reestablishment.

The board properly commenced the record-reestablishment process after receiving a landowner petition. *Id.*, subd. 4a(b). However, to continue with the record-reestablishment process, the board must conclude that records of the as-constructed or subsequently improved condition of a ditch are "lost, destroyed, or otherwise incomplete." *Id.*, subd. 4a(a). Here, the board possesses the records that define how CD21 was constructed. And, as discussed below, it failed to establish that CD21 was repaired or subsequently improved to open ditch. As a result, it cannot, on this record, conclude that records of CD21's as-constructed or subsequently improved condition are lost, destroyed, or incomplete. It therefore lacked authority to proceed within the record-reestablishment process.

B. The board's conclusion that CD21 was repaired to an open ditch is not supported by substantial evidence and is arbitrary.

The board concluded that CD21 was repaired to open ditch based on: (1) the 1919 landowner petition to have CD21 "answer the purpose" for which it was constructed;

(2) the fact that the board had statutory authority around the time CD21 was constructed to, on its own initiative, make what today would be considered improvements as "repairs"; and (3) its finding that CD21 "has existed" as an open ditch since 1919. But these findings do not support the board's conclusion. In fact, some cut against its conclusion.

First, the board's emphasis on the language of the 1919 landowner petition ignores the landowners' specific request that CD21 be fixed "strictly in accordance" with CD21's original design, which was a tile system. Further, the landowners' request that CD21 "answer the purpose" for which it was constructed mirrors statutory language that refers to the general purpose of ditch-drainage systems. *See, e.g.*, Minn. Gen. Stat. § 5552 (1917) (stating that drainage authority should maintain ditch to "answer its purpose"). The purposes of drainage systems include draining certain shallow lakes and providing flood control. *Id.*, § 5523 (1917). Nothing in the record or statutes suggests that the landowners requested an open ditch rather than a tile ditch to "answer the purpose" for which CD21 was constructed.

Second, it is true that the board had broader authority to conduct more substantial maintenance and changes on its own initiative under historical statutes. *See, e.g.*, Minn. Gen. Stat. § 5552 (1921) (stating that county board must keep ditch in proper repair and may assess costs and benefits of "deepening, widening, and extending . . . [the ditch]" against properties benefitted by the ditch). Similarly, it may well be true that ditch design engineers frequently made in-the-field changes to ditch design in response to unexpected construction conditions. *See* Minn. Gen. Stat. § 6678 (1923) (stating that design engineer may, with board or court approval and "as circumstances may require," modify plans and

specifications); *see also State v. Watts*, 133 N.W. 971, 974 (Minn. 1911) (noting that engineer may make in-field changes to ditch specifications). But that the board and design engineers had authority to alter CD21 does not mean that such alterations took place. The board points to no documents or other evidence showing that it repaired or altered CD21 to open ditch following the 1919 landowners' petition.

Third, even if it is true that CD21 has existed as an open ditch since the early 1900s, that does not mean it was "repaired" to an open ditch in 1919. Instead, its "existence" as an open ditch may result from the failed tile system being left in place for many years.[2]

Not only do these findings not support the board's conclusion that CD21 was repaired to open ditch, other documents in the record contradict that conclusion. The design engineer's final estimate lists that 7,400 feet of tile were in place, 100 feet "over," presumably meaning 100 feet more than the original estimate. This document suggests that CD21 was completed or reconstructed in 1921 *as a tile system after the landowner petition* and undermines any argument that a repair or mid-construction alteration to open ditch occurred at that time.

Additionally, as discussed in part II, the supplementary documents show that the board has called CD21 a tile system, construed "repair" for CD21 to mean tile system repair, and never determined damages typically associated with open ditch systems for

[2] We note that Larson's engineer's report seems to contradict his later declaration on this point. The engineer's report asserts that the tile system was removed. But in his declaration, Larson states that CD21 "exists as an open ditch system, *with the tile that the contractor tried to install a century ago*."

CD21. These documents also contradict the board's conclusion that CD21 was "repaired" to open ditch.

In sum, the board's conclusion that CD21 was "repaired" to an open ditch is not supported by substantial evidence in the record. *Eneh*, 906 N.W.2d at 614. Further, its decision is arbitrary because it failed to consider all the records in its possession and its conclusion runs counter to the comprehensive record. *CARD*, 713 N.W.2d at 832. As a result, the board's finding that records of CD21's as-constructed or subsequently improved condition were lost is likewise not supported by substantial evidence and is arbitrary. Its ultimate decision to reestablish records was, therefore, not supported by substantial evidence and is arbitrary.

IV. We need not address whether the engineer's report complied with Minn. Stat. § 103E.101, subd. 4a(a).

The DNR argues that Larson's engineer's report does not comply with statutory requirements because it fails to include (1) aerial photographs and soil borings or test pits; (2) current culvert dimensions and invert elevation measurements; or (3) LiDAR data.[3] The board argues that the DNR forfeited this argument by failing to raise it in its comment letter. But because we reverse the board's decision on other grounds, we need not address the DNR's argument that the engineer's report did not comply with the statutory criteria.[4]

Reversed; motion granted.

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[3] LiDAR stands for Light Detection and Ranging, which is a remote sensing method used to measure distances.

[4] Nevertheless, we are concerned about the dearth of information supporting the engineer's report. We encourage drainage authority engineers to attach *all* information and data they consider to their reports in record-reestablishment proceedings.