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Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0352

Zutz Farms, et al.,
Appellants,

vs.

Middle Snake Tamarac Rivers Watershed District,
Respondent,

Christian Erickson,
Respondent.

Filed January 13, 2025
Affirmed
Connolly, Judge

Marshall County District Court
File No. 45-CV-22-58

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Kaitlyn N. Bjornson, Brink Lawyers, P.A., Hallock, Minnesota (for respondent Middle Snake Tamarac Rivers Watershed District)

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Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Ede, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

On appeal from the district court's order affirming respondent-watershed district's approval of a permit to install drain tile on respondent-applicant's farmland, appellant-landowners argue that the decision to grant the permit was unreasonable because the decision was premised upon unlawful irregularities in the permit process, unsupported by record evidence, and arbitrary and capricious. We affirm.

FACTS

The facts of this case are largely undisputed. Respondent Christian Erickson rents, from his father, 140 acres of farmland (the "farmland") that is located in the southeast quarter of section 36, Comstock Township, Marshall County. The farmland is in the Middle Snake Tamarac Rivers watershed. Respondent Middle Snake Tamarac Rivers Watershed District (MSTRWD) is the regional governmental unit responsible for managing and protecting the water resources of this watershed.

On April 23, 2021, Erickson filed an application with the MSTRWD board of managers, seeking permit #21-051 (the permit), which would allow him to install drain tile in the farmland. The drain tile would drain water from the farmland by gravity flow into a county ditch in the southwest corner of the farmland. The drain tile was alleged to be necessary to increase agricultural production.

Pursuant to the permit, the southwest corner of the farmland would drain along the following route: First, the water from the drain tile would flow into a public county highway ditch in the southwest corner of the quarter section. Second, the water would flow

through a state highway ditch, which runs along the south half of the southwest quarter of section 36, and the southeast quarter of section 35; the southeast quarter of section 35 is owned by appellant Douglas Safar. Third, the water would flow into a public offtake ditch that runs through lots 1 and 2, the south half of the northeast quarter, and the northwest quarter of section 2. Fourth, the water would flow into a private ditch system in the southwest quarter of section 2, which is owned by appellants Dustin and Shelly Kalt. Fifth, the water would flow into the north inlet ditch of the Agassiz Valley Water Resource Management Project (AVWRM project), which is a watershed impoundment designed to receive flood water. The north inlet ditch runs through a portion of the north half of section 10, which is owned by MSTRWD; appellant Zutz Farms owns property adjacent to the north inlet ditch. Sixth, and finally, the water would flow into Judicial Ditch #25-1.

Under the proposed drainage route, water is metered by at least three different culverts before it reaches the public offtake ditch and private ditch system. But at the time Erickson applied for the permit, approximately 48 acres of the farmland sought to be drain tiled were located outside the benefited area of Judicial Ditch #25-1. As a result, Erickson's permit application was tabled on May 3, 2021, due to his need to petition the 48 acres into the benefited area of Judicial Ditch #25-1, as well as his need to gather downstream-landowner signatures on his application.

On July 6, 2021, Erickson requested to withdraw his permit application until he petitioned the 48 acres of the farmland into the benefited area of Judicial Ditch #25-1, which he did, on his father's behalf, at the July 6 meeting. MSTRWD then gave Erickson's petition to Tony Nordby of Houston Engineering, Inc., for review. In his opinion letter

dated August 18, 2021, Nordby supported granting Erickson's application for permit #21-0251 with the 48 acres added to the benefited area. Erickson's petition to add 48 acres of the farmland into the benefited area of Judicial Ditch #25-1 was then approved on September 7, 2021. That decision was not appealed.

After the approval of the addition of the 48 acres, Erickson's application for the permit was again considered by MSTRWD on September 20, 2021. And Erickson's permit application was again tabled "until downstream landowners sign[ed] off on the permit or . . . Erickson [found] another way to drain the water." Several of the downstream landowners signed Erickson's permit application, but Safar and the Kalts declined.

MSTRWD sent letters to appellants informing them that it received Erickson's permit application, and that they would be given the opportunity to provide comment at the next meeting. Appellants subsequently provided written objections to the permit. Based on this opposition, MSTRWD voted to deny Erickson's permit application on October 4, 2021, pending an adequate outlet.

Erickson moved for reconsideration at the next meeting on October 18, 2021. In support of his request, Erickson claimed that "[e]xcess water that the ditch of . . . Safar and . . . Kalt is receiving . . . can be attributed to Zutz Farms having diked an offtake ditch." Erickson also requested that MSTRWD delay his reconsideration request for 30-45 days so that he could hire an engineering firm to provide "a professional opinion as to the adequacy of the offtake ditch." MSTRWD addressed Erickson's request for reconsideration at its meeting on November 1, 2021, and decided to schedule a meeting on

Erickson's request for December 6, 2021, to accommodate Erickson's efforts to hire an engineering firm and to provide notice to interested parties.

Erickson hired Nate Dalager of HDR Engineering to prepare an opinion as to the adequacy of the outlets proposed in the permit application. Dalager determined "the offtake and private drainage system to be an adequate outlet for the proposed tile system outlet." He also recommended that MSTRWD "require that the tile system be operable (gated), in order to disable the discharge as an additional safeguard." And Dalager suggested that "the tile system should not be operated if the downstream private drainage system between the outlet and [the AVWRM project] North Inlet Ditch, is backing up into adjacent fields."

Counsel for appellants wrote to MSTRWD on December 5, 2021, opposing the permit due to "flooding and crop loss as a result of the inefficiency of [Judicial Ditch #]25-1." Although MSTRWD considered this correspondence to be untimely, copies of the letter were distributed to each board member at the December 6, 2021 meeting. MSTRWD then upheld the denial of the permit and tabled the request for reconsideration so that it could review appellants' attorney's correspondence.

On December 17, 2021, counsel for appellants requested "an additional 30-45 days to allow for adequate time [to] review and respond to the materials" recently received related to the permit application. Three days later, at the next meeting, MSTRWD again tabled reconsideration of the permit until the next board meeting scheduled for February 7, 2022. MSTRWD also sent counsel for appellants a letter stating that it "agreed to table and recess reconsideration" of the permit until February 7, 2022, in light of the request for

an additional 30-45 days to review information. And the letter stated that MSTRWD "is willing to accept any new information until the end of the workday on Friday, January 28, 2022," but that it "will not consider any new submittals received after this date and time."

On December 20, 2021, and January 14, 2022, counsel for appellants sent data requests to MSTRWD, to which MSTRWD responded. On January 28, 2022, at about 6:30 p.m., counsel for appellants submitted a memo to MSTRWD from Emmons & Olivier Resources, Inc. (EOR) regarding "Preliminary Assessment of Data Adequacy." In a letter accompanying the memo, counsel for appellant stated that the memo was "NOT EOR's formal response assessment regarding" the permit, and that it was not a formal engineering opinion regarding the adequacy of the proposed outlet for the disputed permit. Counsel for appellants also requested that MSTRWD table reconsideration of the permit application until February 22, 2022, to allow EOR more time to review data provided by MSTRWD on January 24, 2022.

Despite the untimeliness of appellants' counsel's January 28, 2022, correspondence, EOR's memo was provided to MSTRWD for review prior to the scheduled meeting on February 7, 2022. And prior to this meeting, MSTRWD's staff made written findings and recommendations related to Erickson's permit application. In these findings, MSTRWD's staff addressed the dike on the property owned by Zutz Farms and stated that the dike "appears to be a bigger issue" because it has "exacerbated the flow and alleged flooding onto the properties." The findings also stated that Zutz Farms constructed the dike without the proper permit. Based on these findings, and the information provided before the February 7, 2022 meeting, MSTRWD's staff recommended that the permit be approved

"with the condition that a shutoff gate be installed so that the system is operable, and that no tile discharge is allowed during flooding or freezing conditions."

MSTRWD approved Erickson's permit application at the February 7, 2022 meeting, and made nine findings supporting its decision. The permit was approved on the condition that an operable gate be included as part of the tiling discharge outlet.

In March 2022, appellants filed a petition for declaratory relief in district court. Following a bench trial on a stipulated record, the district court determined that there was a question of material fact regarding whether Erickson's permit constituted "reasonable use." The district court, therefore, remanded the matter to MSTRWD "for specific findings" on whether granting the permit application constitutes a reasonable use.

On remand, appellants' counsel requested that MSTRWD consider numerous factors, including appellants' trial memorandum, when making its findings on reasonable use. MSTRWD then considered the reasonable-use issue without taking additional submissions. And after analyzing the factors outlined in the court's order, MSTRWD determined that (1) there is a reasonable necessity for the proposed drainage; (2) reasonable care was taken to avoid injury; (3) the permitted drain tile will provide a benefit to the drained lands with negligible change or harm to the receiving properties downstream; and (4) the permitted tile system is reasonable and aids the natural system to its reasonable carrying capacity. MSTRWD also adopted its original findings and order when the permit was initially granted. These findings noted the unpermitted levee on Zutz Farm's property that appeared to contribute to any flooding on appellants' land. Finally, MSTRWD considered that appellants failed to provide evidence of their claims in a timely manner.

MSTRWD, therefore, issued the permit. The district court subsequently affirmed the decision to grant the permit because it was supported by record evidence and was not arbitrary and capricious. This appeal follows.

DECISION

We note, at the outset, that it is appropriate to clarify the proper standard of review to be applied in this case. The parties assert that we are to review MSTRWD's decision pursuant to the Minnesota Administrative Procedure Act (MAPA). *See* Minn. Stat. §§ 14.001-.69 (2022). MAPA permits judicial review of an agency's final decision in a "'contested case.'" *Eneh v. Minn. Dep't of Health*, 906 N.W.2d 611, 613 (Minn. App. 2019). But MSTRWD's permit decision was not a decision in a contested case. A contested case under MAPA is a proceeding initiated by "[a]n agency . . . when one is required by law." Minn. Stat. § 14.57. The term "agency" does not include a watershed district; it is limited to governmental entities with statewide jurisdiction. *Compare* Minn. Stat. § 14.02, subd. 2 (defining "agency" as "any state officer, board, commission, bureau, division, department, or tribunal . . ., having a *statewide* jurisdiction and authorized . . . to adjudicate contested cases" (emphasis added)), *with* Minn. Stat. § 103D.225, subds. 2, 6 (2022) (providing for the establishment of watershed districts, and stating that a watershed district is "a political subdivision of the state").

There are mechanisms in chapter 103D for appealing certain actions to "the board." *See, e.g.*, Minn. Stat. § 103D.537(a)-(b) (2022). And "[a] decision of the board on appeal is subject to judicial review under sections 14.63 to 14.69." Minn. Stat. § 103D.537(c) (2022); *see also In re Midway Pro Bowl Relocation Benefits Claim*, 930 N.W.2d 7, 10-11

(Minn. App. 2019) (applying MAPA to a city even though a city is not a statewide agency because the claim was based on a statute that expressly incorporated MAPA), *aff'd*, 937 N.W.2d 423 (Minn. 2020). But chapter 103D defines "Board" as "the Board of Water and Soil Resources." Minn. Stat. § 103D.011, subd. 5 (2022). Conversely, chapter 103D defines "Managers" as "the board of managers of a watershed district." *Id.*, subd. 15 (2022). And under the statute, "an interested party may appeal a permit decision or order made by the *managers* by a declaratory judgment action brought under chapter 555." *Id.* § 103D.537(a) (emphasis added).

Here, consistent with section 103D.537(a), this appeal involves a challenge to a permit decision made by MSTRWD's board of managers and was brought under chapter 555. As such, MAPA is not applicable to this case.

Having concluded that MAPA is not applicable here, we now address the proper scope and standard of review. We review decisions of a watershed district's board of managers independent of the findings and conclusions of the district court. *Goerke Fam. P'ship v. Lac qui Parle-Yellow Bank Watershed Dist.*, 857 N.W.2d 50, 55 (Minn. App. 2014). In reviewing such a decision, the applicable standard of review is whether the decision was reasonable. *Id.* "This standard has been expressed in various ways: Is there a reasonable basis for the decision? Or is the decision unreasonable, arbitrary or capricious? Or is the decision reasonably debatable? The nature of the matter under review has a bearing on what is reasonable." *Id.* (citation and quotations omitted). When a permit is granted, "the inquiry is more judicial because the decision involves 'applying specific

standards to a particular individual use."' *Id.* (quoting *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 417 (Minn. 1981)).

I.

In light of the appropriate standard of review, we construe appellants' argument to be an argument that we should reverse MSTRWD's decision because it was unreasonable due to seven alleged unlawful or irregular procedures in MSTRWD's process. *See In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008) ("Whether a local zoning body's decision is reasonable is measured against the standards set forth in the applicable ordinance."); *Alexandria Lake Coal., Inc. v. Douglas Cnty.*, 348 N.W.2d 369, 371 (Minn. App. 1984) (considering challenge based on procedural irregularities). Although respondents disagree, MSTRWD argues first that appellants' unlawful-procedure argument is not properly before us because it was raised "for the first time in their post-trial brief and the district court did not consider it." Assuming, without deciding, that appellants' argument is properly before us, we conclude, for the reasons set forth below, that appellants' argument fails on the merits.

1. Withdrawal and resubmission of Erickson's permit application

Appellants argue that the MSTRWD's decision is based upon unlawful procedure because the MSTRWD considered Erickson's permit application even though he withdrew the application in July 2021, and never resubmitted it. We disagree. The minutes of the July 6, 2021, meeting state that "Erickson requested to withdraw [his permit application] *until* he has Petitioned the benefited area of JD #25-1." (Emphasis added.) The word "until" indicates that MSTRWD anticipated that it would consider Erickson's permit

application after his other petition was granted. In addition, appellants fail to cite any cases with circumstances similar to those presented here in which a party was required to refile a permit application after unilaterally withdrawing it. As such, it was within MSTRWD's discretion to consider the permit application without another formal filing.

Moreover, appellants are entitled to relief only if they can demonstrate that they were prejudiced by the alleged error. *Palladium Holdings, LLC v. Zuni Mortg. Loan Tr. 2006-OA1*, 775 N.W.2d 167, 178 (Minn. App. 2009), *rev. denied* (Minn. Jan. 27, 2010) ("An appealing party bears the burden of demonstrating both error and prejudice."). Appellants cannot satisfy this burden. Appellants make no argument in their main brief demonstrating that they were prejudiced by MSTRWD's consideration of Erickson's permit application after he withdrew the application and then did not refile it. And the record reflects that appellants had notice throughout the proceedings of Erickson's permit application. Furthermore, the permit application was repeatedly tabled over the course of several months, which provided appellants with ample time to respond to it. Thus, appellants are not entitled to relief on this issue.

2. MSTRWD's January 28, 2022, deadline to submit materials

Appellants argue that they are entitled to relief because MSTRWD set an "arbitrary" deadline of January 28, 2022, with no "specific time" of day, after which no new information related to Erickson's permit application could be submitted. But MSTRWD's amended rules provide that MSTRWD "shall decide the Permit issue on reconsideration within one-hundred twenty (120) days of the request for reconsideration." The record reflects that Erickson moved for reconsideration of his permit request at the October 18,

2021 hearing. Because the February 7, 2022 meeting was the last meeting before the 120-day time-period expired, a January 28, 2022 deadline on which to submit materials for consideration was reasonable to allow MSTRWD time to review the submitted materials. Moreover, the parties were informed by letter on December 21, 2021, that MSTRWD "is willing to accept any new information until the end of the workday on Friday, January 28, 2022," but that it "will not consider any new submittals received after this date and time." Although the letter did not state an exact time, the language "end of the workday" commonly means 4:30 or 5:00 p.m. And, despite their untimeliness, MSTRWD considered appellants' submissions from EOR. Accordingly, appellants are unable to demonstrate that they are entitled to relief based on the deadline set by MSTRWD to submit materials.

3. MSTRWD's alleged untimely response to appellants' information requests

Appellants argue that they are entitled to relief because MSTRWD failed "to timely provide necessary information to [a]ppellants," which "prejudiced [a]ppellants' ability to oppose the Permit Application." But as addressed above, MSTRWD was required to consider Erickson's reconsideration request in early February. Moreover, despite being apprised of Erickson's reconsideration request at the time it was made, appellants failed to request information until December 2021, and January 2022. And appellants fail to cite any rule or authority requiring MSTRWD to respond to requests for information within a certain time period before a scheduled meeting. Thus, appellants are unable to show that MSTRWD's response to appellants' request for information was unreasonable.

4. MSTRWD's alleged failure to consider the EOR report

Appellants argue that they are entitled to relief because MSTRWD's failure to consider the EOR report was unreasonable. We disagree. The record reflects that counsel for appellants was untimely in submitting the EOR report. And the record reflects that MSTRWD considered this report despite its untimely submission. Therefore, appellants' claim that MSTRWD failed to consider the report lacks merit.

5. MSTRWD's focus on the alleged dike instead of the EOR memo

Appellants claim that irregularities in the proceedings were further demonstrated by MSTRWD's focus on the alleged dike on the property owned by Zutz Farms rather than focusing on the more substantive concerns raised in the EOR memo. But appellants' counsel acknowledged in a letter to MSTRWD that EOR's memo was "NOT EOR's formal response assessment regarding [the p]ermit," and that it was not a formal engineering opinion regarding the adequacy of the proposed outlet for the disputed permit. As such, it was reasonable for MSTRWD to decline to give more weight to EOR's memo. Moreover, it was well within MSTRWD's discretion to consider the alleged dike in making its decision, particularly in light of evidence in the record indicating that the dike adversely affected water drainage. Appellants cannot show that either MSTRWD's consideration of the alleged dike, or the weight given EOR's memo, was unreasonable.

6. MSTRWD's refusal to accept any arguments or evidence on remand

Appellants contend that MSTRWD's refusal to accept or consider any additional arguments or evidence from appellants on the reasonable-use doctrine on remand constitutes an unreasonable irregularity in the procedure of this case. But in remanding the

case to MSTRWD to consider reasonable use, the district court never instructed MSTRWD to consider additional arguments or evidence, or otherwise reopen the record. Moreover, appellants point to no rule or law requiring MSTRWD to consider additional arguments or evidence on remand when considering reasonable use. Nor have appellants demonstrated that MSTRWD has regularly considered additional arguments or evidence when a matter is remanded to consider only reasonable use. Thus, appellants have not shown that they are entitled to relief on this issue.

7. Written consent of the downstream landowners

Finally, appellants contend that MSTRWD's decision was unreasonable and unlawful because it granted the permit application after ignoring its own rule requiring written consent of the downstream landowners. To support their position, appellants cite MSTRWD's amended rules, which state that "[a]n application for a subsurface tile drainage or lift station Permit must meet the following requirements: A. Written consent of owners affected by the proposed work must be obtained and be indicated in the application."

MSTRWD contends that the "landowner signature requirement is one of notice, not one of substance." This argument is persuasive. As MSTRWD points out, if "MSTRWD required all downstream landowners (even remote ones) to sign off on a permit application, it would allow any single downstream landowner to veto a project for any arbitrary reason." Moreover, the record here reflects that Erickson obtained written consent of the downstream landowners who were willing to consent to his permit application, and the nonconsenting landowners clearly had notice of the permit application. Under these

circumstances, appellants cannot show that Erickson's failure to obtain their signatures consenting to his permit application rendered the procedure irregular or unlawful. Therefore, we conclude that appellants have not shown that MSTRWD's decision was unreasonable based upon unlawful or irregular procedures.

II.

Appellants argue that MSTRWD's decision is unreasonable because there is a lack of evidence supporting MSTRWD's (1) initial findings, and (2) "supplemental findings that Erickson's drainage of water qualified as reasonable use." *See Stadsvold*, 754 N.W.2d at 332 (noting review based on "whether the evidence could reasonably support or justify the determination"). These arguments are addressed in turn.

1. MSTRWD's initial findings

In granting the permit, MSTRWD made nine findings, and later considered and referenced these findings when making its findings on reasonable use. Appellants challenge several of these findings, claiming that defects in the findings demonstrate that MSTRWD's decision is unreasonable. We disagree.

MSTRWD's first finding states:

> Nordby, PE and . . . Dalager, PE have both provided their respective professional opinions that the public offtake and private ditch system in Section 2 Comstock Strip has sufficient hydraulic capacity for the proposed drain tile, and that the proposed drain tile will not unreasonably harm or burden the downstream properties in question.

Appellants argue that this finding is unsupported by record evidence because "neither Nordby, Dalager, nor [MSTRWD] considered the criticisms and deficiencies

raised by the EOR" memo. But a lack of agreement with the EOR memo does not mean that it was not considered. And the EOR memo was not a formal engineering opinion regarding the adequacy of the proposed outlet for the disputed permit. As such, MSTRWD's decision not to credit the memo was reasonable. Moreover, both Nordby and Dalager provided opinions that the approval of the permit would not unreasonably harm or burden appellants' properties. MSTRWD's first finding is supported by the record.

Next, appellants challenge MSTRWD's third finding, which states: "Water discharged from the proposed tile outlet must overflow approximately [one] channel mile downstream and through at least [three] different culverts that will ultimately meter flows prior to entering the public offtake and private ditch system." Appellants argue that MSTRWD "cited no record evidence about the effects of 'metering' the flow of water from the Project." But this argument fails to show that the finding is not supported by the record because the finding does not address the effects of "metering" the flow of water; it simply states that the three different culverts meter water flowage before entering the public offtake and private ditch system. Only if this specific finding addressed the "effects" of metering the water flow from the project would there need to be record evidence on this point supporting the finding.

Moreover, there is evidence in the record to support the finding. The directional flow of water discharge from Erickson's property is in the record, and Erickson's request for reconsideration notes that "[t]he water from Sec. 36 is metered through [three] culverts before it reaches the offtake ditch on [Highway 1], from there it goes through a very well maintained private ditch." MSTRWD staff recommendations also state that water

discharged from Erickson's property flows through three culverts that metered water flows. And there is ample evidence in the record addressing the need to meter water flowing from Erickson's property to address potential flooding issues. Indeed, MSTRWD specifically conditioned the permit grant on Erickson's installation of "a shutoff gate" to be "operated during flooding conditions." Therefore, appellants are unable to show that MSTRWD's third finding is unsupported by the record.

Appellants further claim that there is no record evidence to support MSTRWD's sixth finding, which states: "The privately owned ditch portion of the public offtake and private ditch system in Section 2 Comstock Strip is an improved natural waterway that is not farmed through and has been improved since the construction of the AVWRM Project." We disagree. Erickson's permit reconsideration form states that "[f]rom the proposed outlet, tiled water will flow West in the north CSAH #2 ditch, then continue West in the Hwy #1 ditch to a 4' x 8' Box, then south under Hwy #1 into an improved waterway that is not farmed." This form also states that "[d]rainage for the landowners in Section 2 has been . . . improved since the construction of the AVRWM [project] impoundment and inlet ditch." Moreover, Dalager's recommendation states that Erickson's permit application "requests a permit to discharge tile outlet flows further downstream through a privately held drainage system that has been improved." And staff recommendations provided to the MSTRWD are consistent with MSTRWD's finding. As such, there is evidence in the record to support MSTRWD's sixth finding.

Finally, appellants contend that MSTRWD's eighth finding is unsupported by record evidence. This finding states: "The Minnesota Department of Transportation

[(MNDOT)] has indicated in writing that [the illegal dike on Zutz Farm's property] needs to be removed. Once removed, [appellants'] complaints that the subject private ditch is an inadequate outlet should be moot."

A review of the record indicates that MSTRWD's eighth finding is supported by the record. In a letter dated February 3, 2022, MNDOT informed MSTRWD's engineering technician that it was "made aware" of a levee constructed on Zutz Farms' property, that the "levee was not authorized or permitted," making it "illegal," and that the levee "must be removed." Moreover, in his written request for reconsideration, Erickson stated that "[e]xcess water that the ditch of . . . Safar and . . . Kalt is receiving . . . can be attributed to Zutz Farms having diked an offtake ditch." Additionally, MSTRWD's written staff findings address the illegal ditch at length, noting that "the Zutzs constructed the dike across the opening of a MNDOT offtake ditch located on the west side of Hwy #1," and that no "permit was applied for, or granted, for the dike to be built." The written findings further state that "Zutz Farms has exacerbated . . . flow and alleged flooding . . . by the construction of a dike on their property." And the written findings indicate that, based on Dalager's report, the removal of the dike would alleviate flooding concerns related to Erickson's permit application. Accordingly, appellants have not shown that MSTRWD's eighth finding, or any other of its nine initial findings, are unsupported by record evidence.

2. MSTRWD's findings on reasonable use

Appellants argue that MSTRWD's findings on reasonable use are unsupported by the record. This doctrine provides that a landowner may divert surface water to another's land, even if some of the water would not have naturally gone to the other's land, if:

> (a) there is a reasonable necessity for such drainage;
> (b) reasonable care be taken to avoid unnecessary injury to the land receiving the burden;
> (c) the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden;
> (d) where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of a practicable drain, a reasonable and feasible artificial drainage system is adopted.

Kral v. Boesch, 557 N.W.2d 597, 599 (Minn. App. 1996) (quotation omitted). "No one factor or circumstance is controlling and what is reasonable use is a fact question to be resolved depending on the facts of each case." *Id.*

Here, in addressing the first reasonable-use criterion, reasonable necessity, MSTRWD found that there is "a lack of adequate drainage" on Erickson's property, and that the permit was sought to "increase agricultural crop production" in light of the inadequate drainage. Appellants argue that this finding lacks record support because "Erickson offered no evidence that the drainage proposed in the Permit Application would actually increase his agricultural crop production, and, if so, by how much," and that "Erickson likewise failed to provide any evidence for why drainage was 'reasonably necessary' to increase his agricultural production over other possible alternatives."

We are not persuaded. In *Goerke*, this court noted that, with respect to the permit application, the watershed board found that "[t]here is a reasonable necessity for such drainage" because "[e]vidence was presented which shows the land to be tiled is in need of additional drainage to improve its crop output." 857 N.W.2d at 56. This court also noted that the watershed board found that "[n]o evidence was presented which disputed the

need for additional drainage." *Id.* Consequently, this court determined that there "was a reasonable basis for the [watershed] board's decision to grant [the] permit for [the] proposed drainage system." *Id.*

Here, Erickson's permit application states that the permit was necessary to increase agricultural production. Similar to *Goerke*, Erickson's permit application is evidence that drain tile is necessary for adequate drainage to improve crop production. *See id.* Moreover, MSTRWD found that it "has generally accepted the need for increased crop production as an acceptable reason for granting a drainage permit, provided there is an adequate outlet for the proposed drainage project," and this finding is supported by its mission statement. Furthermore, as in *Goerke*, appellants presented no evidence disputing Erickson's need for the additional drainage. *See id.* Although Erickson does not state how the drain tile would increase crop production, this court in *Goerke* determined, in circumstances similar to those presented here, that there was a reasonable basis for the watershed district to grant the applicant's permit for the proposed drainage system based on the need to "improve crop output."[1] *Id.* As such, there is a reasonable basis for MSTRWD's decision that there was a reasonable necessity for the proposed drain tile.

With respect to the second criterion, MSTRWD found that reasonable care was taken to avoid injury because "[t]he conditions of [the] permit . . . state, 'CONDITIONS: A shut off gate must be installed to prevent flows during flooding or freezing conditions.

[1] We note that, even if reasonable necessity is not established by simply asserting that the permit is necessary to "Increase Ag. Production," reasonable necessity is just one factor to be considered in the reasonable-use analysis. *See Kral*, 557 N.W.2d at 599.

No discharging of water during flooding or freezing conditions.'" Appellants challenge this finding, arguing that, "[d]espite [a]ppellants' pointing to countervailing evidence, [MSTRWD] failed to acknowledge it." But appellants' challenge amounts to an argument that the record supports an alternative finding, which is not a sufficient basis to disturb MSTRWD's finding if it is otherwise supported by record evidence. *See In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 223 (Minn. 2021) (stating that a reviewing court will not disturb a district court's finding simply because the record might also support alternative findings).

Moreover, in Nordby's report, he concluded that Erickson's permit application

> will be governed by the tailwater elevation on the gravity tile outlet, limiting the ability to drain during flooding conditions. During non-flooding conditions the north inlet channel of [the AVWRM project] and [Judicial Ditch #] 25-1 will have capacity to convey this subsurface water with negligible change in drainage abilities to the existing benefited landowners.

Based in part on Nordby's report, MSTRWD determined that, but for flooding conditions, drainage from Erickson's land would be adequate if the permit were approved. MSTRWD then conditioned the permit on the installation of a shut-off gate that would prevent drainage during flooding or freezing conditions to alleviate potential drainage problems during flooding conditions. Although the EOR memo may have raised doubts concerning Nordby's report, EOR's memo was "NOT EOR's formal response assessment regarding [the p]ermit," and it was not a formal engineering opinion regarding the adequacy of the proposed outlet for the disputed permit. And MSTRWD was free to reject evidence that otherwise conflicted with evidence supporting the grant of the permit.

Therefore, record evidence supports MSTRWD's finding that reasonable care was taken to avoid unnecessary injury to appellants' land.

Appellants further argue that MSTRWD failed to identify "evidence that the benefit reasonably outweighed the gravity of harm." In addressing this reasonable-use factor, MSTRWD found that two engineers determined that the proposed drain tile would have a negligible burden on appellants' land and that any burden on appellants' land would be mitigated by the instillation of an operable gate to limit and prevent the discharge of water during flooding conditions. MSTWRD also found that "despite the opportunity that was provided, [appellants] did not issue any evidence of harm to their land prior to MSTRWD granting th[e] permit." And in discussing reasonable necessity, MSTRWD found that the permit was necessary to increase agricultural production on Erickson's land. MSTRWD, therefore, determined that "[t]here is evidence in the record to suggest that the permitted tile will provide a drainage benefit to the drained lands with a negligible change to the drainage abilities of the properties downstream."

Appellants contend that MSTRWD's findings are unsupported by the record because (1) Erickson offered no evidence that the permitted tile would increase crop production; (2) the EOR memo raised concerns related to the engineers' reports supporting the grant of the permit; (3) appellants "offered several statements" supporting their position that the permitted tile would harm their land; and (4) appellants were refused the opportunity to present evidence supporting their claim that the permitted tile would harm their land. But as we addressed above, the arguments made by appellants do not provide a basis to reverse. And the record reflects that, other than their bald assertions, appellants

provided no evidentiary support for their claim that the permitted drain tile would harm their land. Thus, appellants have failed to meet their burden of showing that MSTRWD's findings with respect to this reasonable-use factor are unsupported by record evidence.

In sum, MSTRWD's findings related to reasonable necessity, reasonable care to avoid injury, and whether the benefit of granting the permit is outweighed by any harm to appellants, are supported by the record. MSTRWD also found that "[t]here is evidence in the record that indicates that the permitted tile system is reasonable and aids the natural system to its reasonable carrying capacity." And MSTRWD made findings related to other factors that it deemed relevant, including its original findings addressing the illegal levee on Zutz Farms' land, and appellants' failure to provide evidence of their claims in a timely manner. These factors are supported by the record and are not challenged on appeal.[2] Accordingly, appellants have not shown that MSTRWD's decision was unreasonable because it lacked record support.

III.

Appellants' final contention is that MSTRWD's decision was arbitrary and capricious. A decision is arbitrary and capricious if it is an exercise of will, rather than judgment. *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. App. 2001), *rev. denied* (Minn. Nov. 13, 2001). "Even if the [local authority's] decision is

[2] In their reply brief, appellants contend that MSTRWD's "reliance on other factors have no bearing on whether its findings lacked substantial evidence." But appellants' challenge to these factors is made for the first time in their reply brief and, we therefore decline to consider it. *See Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010) (recognizing that raising issues for the first time in a reply brief is "not proper practice and is not to be permitted").

debatable, so long as there is a rational basis for what it does, the courts do not interfere." *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 180 (Minn. 2006) (quotation omitted). The party challenging the decision bears the burden of proving it was legally insufficient or factually unsupported. *Sagstetter v. City of St. Paul*, 529 N.W.2d 488, 491 (Minn. App. 1995).

Appellants argue that the following irregularities in MSTRWD's procedure "strongly suggest that [MSTRWD] acted arbitrarily and capriciously": (1) "arbitrarily" setting the January 28, 2022, deadline to submit new information; (2) "unilaterally" applying the "specific cut-off time by which [new] submissions were to be received"; (3) "slow-walk[ing] its responses to [a]ppellants' information requests"; and (4) "invent[ing] rules and policies to selectively apply on-the-fly to [a]ppellants, while selectively choosing to ignore [MSTRWD's] actual rules that, if applied, would have resulted in denial of the Permit Application." We disagree.

As explained above, the January 28, 2022, deadline was based on MSTRWD's own rule that requests for reconsideration be heard within 120 days of the request. Moreover, the deadline to submit new materials was established to allow MSTRWD time to review the materials. Furthermore, appellants fail to point to any evidence that MSTRWD's response time to appellants' January 14, 2022, requests for information was abnormal or in violation of a procedural rule or norm. And appellants point to no other alleged procedural irregularity that departed from MSTRWD's procedural norms. Consequently, appellants are unable to substantiate any of the alleged irregularities that would suggest that MSTRWD acted arbitrarily or capriciously.

Appellants also contend that MSTRWD "acted arbitrarily and capriciously in that it failed to consider important aspects of the Permit Application, focusing instead on matters that had nothing to do with the Permit Application itself." To support their position, appellants refer to some "internal notes" provided by a MSTRWD engineering technician alleging that Erickson's costs of legal representation and construction were increased by appellants' requests for a two-week extension to provide EOR's formal analysis. And appellants claim that the engineering technician "ignored any substantive analysis of the actual drainage proposed by the Permit Application itself, instead choosing to focus on the alleged 'dike.'" Appellants argue that "[t]hese considerations were entirely unrelated to [MSTRWD's] decisions on the Permit Application," and that MSTRWD's reliance on these considerations rendered the permit decision arbitrary and capricious.

We disagree. There is nothing in MSTRWD's findings indicating that MSTRWD considered Erickson's costs of legal representation or construction in granting the permit. Instead, the findings indicate that MSTRWD focused on the relevant issue before it—whether it was necessary for Erickson to install drain tile to improve crop production, and whether the drain-tile installation would adversely affect the downstream landowners. And despite appellants' argument to the contrary, MSTRWD's consideration of the illegal dike on Zutz Farms' property was a relevant consideration because, as MSTRWD found, the dike "appears to contribute to any flooding of the [a]ppellants' land." The record reflects that MSTRWD considered all the evidence presented, and there is a rational connection between the facts found by MSTRWD and its decision to grant the permit. *See Mendota*

Golf, 708 N.W.2d at 180. Accordingly, appellants have not shown that MSTRWD's decision is arbitrary or capricious.

Affirmed.