

STATE OF MICHIGAN
COURT OF APPEALS

EAMON LYNCH AREA PROPERTY OWNER'S
ASSOCIATION,

Plaintiff-Appellant,

v

BERRIEN COUNTY DRAIN COMMISSIONER,

Defendant-Appellee.

UNPUBLISHED
June 18, 2013

No. 306168
Berrien Circuit Court
LC No. 2010-000370-AS

EAMON LYNCH AREA PROPERTY OWNER'S
ASSOCIATION,

Plaintiff-Appellant,

v

BERRIEN COUNTY DRAIN COMMISSIONER,

Defendant-Appellee,

and

BERRIEN COUNTY DRAIN COMMISSION,

Defendant.

No. 306204
Berrien Circuit Court
LC No. 2010-000370-AS

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

This consolidated appeal involves the decision of defendant Berrien County Drain Commissioner to establish Eamon Drain #035 ("the drain"). In Docket No. 306168, plaintiff appeals by leave granted the trial court's denial of its appeal of the board of determination's decision that constructing the drain was necessary. In Docket No. 306204, plaintiff appeals as of right the trial court's order granting summary disposition to defendant pursuant to MCR

2.116(C)(10) on plaintiff's petition for superintending control over defendant regarding the construction of the drain. For the reasons stated in this opinion, we affirm.

On April 9, 2007, Hagar Township filed an application to establish a drainage district. That same day, Hagar Township filed a petition to construct a drain within the proposed drainage district. The proposed drain was to alleviate flooding along Eamon and Lynch Roads. Defendant did not act on the petition or application until 2010 because it first attempted to address the flooding issues by reaching private agreements with the affected property owners. These efforts were unsuccessful. On June 23, 2010, defendant entered an order granting the application to establish a drainage district. On October 5, 2010, after a public hearing, a board of determination found that construction of the drain was necessary for the public health and welfare.

In Docket No. 306168, plaintiff argues that the trial court erred by upholding the board of determination's finding that the drain was necessary for the public health and welfare. The circuit court's review of the board of determination's finding of necessity is subject to appellate review, but this Court's review of the circuit court's decision

is limited to determining whether the circuit court applied the correct legal principles and whether it committed clear error in its factual review by misapprehending or grossly misapplying the substantial evidence test to the agency's factual findings. A decision is clearly erroneous when, on review of the whole record, the appellate court is left with the definite and firm conviction that a mistake was made. [*Fritz v St Joseph Co Drain Comm'r*, 255 Mich App 154, 162; 661 NW2d 605 (2003).]

When reviewing whether the trial court clearly erred in its determination of whether an agency's decision was supported by competent, material, and substantial evidence, we defer to the findings of the agency. *Id.* at 163. "Michigan law dictates that when there is sufficient evidence to support an agency's decision, a court may not substitute its judgment for that of the agency, even if the court would have reached a different result." *Id.*

We find that the trial court did not clearly err when it found that there was competent, material, and substantial evidence to support the board of determination's finding of necessity. Contrary to plaintiff's arguments, there is evidence in the record to show that the public at large was affected by flooding. Although several individuals informed the board that their private residences flooded, there was also evidence that Lynch Road, a public road, often flooded. Plaintiff also argues that the trial court erred by finding that the drain was necessary because the flooding was only temporary. However, plaintiff ignores evidence that the flooding had been occurring for approximately 15 to 25 years. We also reject plaintiff's argument that the board of determination's finding of necessity was erroneous because several individuals who attended the hearing did not favor the construction of the drain. Although not all of the individuals favored the construction of the drain, nearly all of them agreed that some action was necessary to alleviate the flooding problem. "The function of the board of determination is to determine whether a problem exists and whether a certain project is necessary. The board does not determine what is the best solution to the problem." *Grubb Creek Action Comm v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 669-670; 554 NW2d 612 (1996) (internal citation

omitted). Consequently, the trial court did not clearly err when it found that the board of determination's finding of necessity was supported by material, competent, and substantial evidence. See *Fritz*, 255 Mich App at 162.

Next, in Docket No. 306204, plaintiff argues that certain procedures set forth in the Drain Code were not adhered to and, thus, it was entitled to relief. We review de novo the trial court's grant of summary disposition on these claims. See *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Proceedings under the Drain Code, other than condemnation proceedings, are administrative proceedings." *Fritz*, 255 Mich App at 162. "Generally, this Court will presume that an administrative body has acted correctly and that its orders are valid." *Id.* Furthermore, our Supreme Court has ruled that "[w]e . . . are not inclined to reverse proceedings taken under the general drain law absent [a] showing of very substantial faults." *Id.* at 161, quoting *In re Fitch Drain No 129*, 346 Mich 639, 647; 78 NW2d 600 (1956).

Plaintiff's claims also raise questions regarding the requirements of the Drain Code. We review de novo issues of statutory interpretation. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute. *Id.* at 246-247. "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id.* at 247.

Plaintiff first argues that defendant's three-year delay in acting on the petition to construct a drain as well as defendant's three-year delay in acting on the application to establish a drainage district rendered the petition and application stale, thereby depriving defendant of authority to act under the petition and application. There is no section of the Drain Code that provides a penalty for a drain commissioner's failure to act on a petition to construct a drain within a certain period of time. However, our Supreme Court has held that a drain commissioner's failure to timely act on a petition can deprive the drain commissioner of jurisdiction and authority, but only where the delay was not reasonably excused. See, e.g., *Watson v Fox*, 251 Mich 495, 500; 232 NW 213 (1930); *Corning v Potter*, 171 Mich 690, 695; 137 NW 637 (1912). In this case, defendant's delay in acting on the petition was reasonably excused because defendant first attempted to address the flooding problem through agreements with private landowners. When those efforts proved unsuccessful, defendant returned to the petition to construct the drain. Because the three-year delay was reasonably excused, it does not deprive defendant of jurisdiction to take action under the petition. See *Watson*, 251 Mich at 500 (finding delay fatal because no reasonable excuse presented); *Corning*, 171 Mich at 695 (finding explanation that the project would require a large amount of work a reasonable excuse for two-year delay).

Moreover, MCL 280.72, is the only section of the Drain Code that discusses the timing of the drain commissioner's actions taken under a petition. MCL 280.72(1) provides in pertinent part, that "[a]s soon as practicable after the filing of a petition, the commissioner authorized to act on the petition . . . may appoint a board of determination composed of 3 disinterested property owners." Defendant did not appoint the board of determination until approximately three years after the petition was filed. However, as noted, this delay was excused by defendant's attempts to resolve the flooding issue through agreements with private landowners. Thus, there is no indication in the record, nor does plaintiff argue, that defendant's appointment

of the board of determination was not taken “[a]s soon as practicable after the filing of a petition.”

Finally, MCL 280.12 declares, in relevant part, that when a time for taking action or certain procedural steps is specified under the Drain Code, “the specification of time shall be considered directory and not mandatory and failure to take the action or step within the time specified shall not affect the legality and validity of a drain proceeding.” Thus, because violation of any time specification in the Drain Code does not affect the legality and validity of any drain proceeding, any failure on the part of defendant to act within the time constraints would not invalidate the final drain proceedings.

Next, plaintiff argues that defendant’s three-year delay in acting on the application to establish the drainage district deprived defendant of authority and jurisdiction because MCL 280.52 requires that upon filing the application for a new drainage district, the drain commissioner “shall immediately” cause a survey to be made. On the basis of the statute, plaintiff maintains that defendant was deprived of authority to act under the application because it failed to immediately enter the order laying out and designating a drainage district. Thus, plaintiff asks this Court to find that because MCL 280.52 requires that a survey be made immediately after the application to establish a drainage district is filed, the approximately three-year delay between filing the application to establish a drainage district and the order establishing the drainage district deprives defendant of its authority to act under the application.

MCL 280.52 provides, in relevant part, that

[u]pon filing of such application for a new drainage district, the commissioner shall immediately cause a survey to be made by a competent surveyor or engineer to determine the area which would be drained by the proposed drain, and the route and type of construction of the drain or drains most serviceable for that purpose.

First, we note that MCL 280.52 says nothing about a delay in time between applications for the creation of a drainage district and the entry of orders designating a drainage district; rather, the statute focuses on the creation of a survey. Plaintiff makes no argument regarding the timing of the survey in this case. We decline to interpret MCL 280.52 to require a drain commissioner to act immediately on an application to establish a drainage district because the plain language of the statute does not specifically address the designation of a drainage district. Moreover, MCL 280.52 does not provide for any time limit within which to issue an order after an application has been filed. Similarly, the statute does not include any penalty for failure to comply with any time limit, including the directive to “immediately cause a survey to be made.” It is well established that a reviewing court may read nothing into an unambiguous statute that is not within the text of the statute itself. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Therefore, because the plain language of the statute does not support plaintiff’s position, we reject plaintiff’s argument.

Next, plaintiff argues that defendant’s actions were invalid because the petition to construct the drain was filed before the drainage district was established. The petition was filed in 2007; the drainage district was not established until 2010. A drainage district must be established before the drain commissioner may take action to locate, establish, or construct a

drain. See MCL 280.51. After the drainage district is established, a petition to locate, establish, and construct a drain may be filed with the drain commissioner. MCL 280.71. In pertinent part, MCL 280.71 provides:

[a]fter a drainage district has been established and the order therefor filed with the county drain commissioner, a petition to locate, establish and construct a drain may be filed with the commissioner having jurisdiction of the lands designated in such order as constituting the drainage district. Such petition shall ask for the location, establishment and construction of the drain or drains, or any part thereof, as described in said order.

Plaintiff argues that the statute controls the outcome of this case, and that it “must be strictly followed.” Plaintiff asks this Court to find that because the plain language of the statute implies that the petition is to be filed “after a drainage district has been established,” defendant acted without authority.

The parties do not dispute that the procedure set forth in MCL 280.71 was not followed, but our Supreme Court has ruled that strict compliance with the procedures set forth in the Drain Code is not necessary. *In re Fitch Drain No 129*, 346 Mich at 645. Generally, appellate courts are “not inclined to reverse [drain] proceedings . . . absent [a] showing of very substantial faults.” *Elba Twp v Gratiot Co Drain Comm’r*, __ Mich __; __ NW2d __ (2013), slip op at 11, quoting *In re Fitch Drain No 129*, 346 Mich at 647. Further, MCL 280.71 does not provide any type of penalty for filing a petition before the drainage district is established. Where such a penalty is not provided in the statute, we will not read one into the statute. See *Roberts*, 466 Mich at 63. Thus, we reject plaintiff’s argument.

In summary, we find that the violation of the Drain Code was merely technical, and not a “very substantial fault[]”; therefore, we find that plaintiff is not entitled to relief on any of its claims. Although the timing of the procedures set forth in MCL 280.51 and 280.71 were not strictly adhered to, all required steps in the process were undertaken in this case. Defendant created the requisite drainage district by accepting the application to create such a district, accepted the township’s filing of the petition, filed notice of the order establishing the drainage district, and the board of necessity determined that a drain was necessary to alleviate flooding. Because correcting the procedural misstep would have no effect on the substance of the matter, the error identified by plaintiff is technical and not a substantial fault requiring reversal. See, generally, *In re Fitch Drain No 129*, 346 Mich at 644-645, 647.

To support its contrary position, plaintiff relies on *Lake Twp v Millar*, 257 Mich 135, 141-142; 241 NW 237 (1932), where our Supreme Court invalidated an action taken by a drain commissioner when the drain commissioner was authorized by petition to construct a drain, but instead constructed a sewer. In *Lake Twp*, the Court ruled, “[a] drain commissioner may not by mere assumption of authority legally do that which he has no authority to do.” *Id.* at 141. In this case, by contrast, defendant did not take an action that he did not have the authority to undertake, nor did defendant attempt to exceed the authority granted to him by a petition. Rather, the timing of Hagar Township’s actions did not comply with the Drain Code. Thus, unlike the violation of the Drain Code in *Lake Twp*, the violation of the Drain Code in the case at bar was technical and does not warrant reversal.

Finally, plaintiff argues that the approximately three-year delay between the filing of the petition and the board of determination's necessity hearing violated its right to procedural due process. Plaintiff does not argue that notice was not given for the board of determination hearing, nor does plaintiff challenge the adequacy of the notice given before the hearing. Plaintiff simply alleges that the delay deprived plaintiff and other taxpayers of procedural due process. Because plaintiff fails to establish, let alone allege, that the notice given in this case did not comply with the Drain Code, we decline to grant relief. *Barak v Oakland Co Drain Comm'r*, 246 Mich App 591, 601; 633 NW2d 489 (2001).

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra