COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2014AP2206
2015AP738

Cir. Ct. Nos. 2012CV231
2012CV386

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 2014AP2206

PAUL M. MURPHY, JOHN J. MURPHY REVOCABLE TRUST, BY ROSALIE A. MURPHY, TRUSTEE AND JEROME P. MURPHY REVOCABLE TRUST, BY ROSALIE A. MURPHY, TRUSTEE,

PLAINTIFFS-APPELLANTS,

V.

OCONTO COUNTY DRAINAGE BOARD,

DEFENDANT-RESPONDENT.

NO. 2015AP738

PAUL M. MURPHY, JOHN J. MURPHY, BY ROSALIE A. MURPHY, TRUSTEE AND JEROME P. MURPHY REVOCABLE TRUST, BY ROSALIE A. MURPHY, TRUSTEE,

PLAINTIFFS-APPELLANTS,

V.

OCONTO COUNTY DRAINAGE BOARD,

DEFENDANT-RESPONDENT.

APPEALS from orders of the circuit court for Oconto County: PETER C. DILTZ, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. In these consolidated appeals, Paul Murphy and Rosalie Murphy[1] (the Murphys) appeal circuit court orders affirming the Oconto County Drainage Board's (the Board) decisions to (1) deny the Murphys' maintenance petitions requesting that the Board perform certain drainage activities, and (2) grant suspension petitions filed on behalf of other landowners requesting that the Stiles/Lena Drainage District (the District) conduct no further proceedings and incur no further expenses. The Murphys raise numerous challenges to the Board's decisions on both sets of petitions, claiming, among other things, that they have a "vested right" to drainage and the Board was biased against them. Under certiorari review, we conclude the Board acted appropriately: contrary to the Murphys' assertions, the Board's decisions were not contrary to law or arbitrary or unreasonable, and its decision on the maintenance petition was supported by substantial evidence. Accordingly, we affirm the circuit court's orders.

[1] In the various actions giving rise to these appeals, Rosalie Murphy is acting on behalf of John J. Murphy, the John J. Murphy Revocable Trust, and the Jerome P. Murphy Revocable Trust.

BACKGROUND

¶2 The District was established by order of the Oconto County Circuit Court in 1918. *See* ***Town of Stiles v. Stiles/Lena Drainage Dist.***, 2010 WI App 87, ¶2, 327 Wis. 2d 491, 787 N.W.2d 876. Drainage districts are special purpose districts formed to drain land, primarily for agricultural use. *See* Note, WIS. ADMIN. CODE ch. ATCP 48.[2] Lands within a district are drained by common drains that traverse individual property lines. ***Id.*** A drainage board oversees district operations and may levy assessments against landowners within the drainage district for the design, construction and maintenance of district drains, and to pay for district operating costs. ***Id.***; *see also* WIS. STAT. §§ 88.23, 88.35.[3]

¶3 As we explained in a prior appeal involving the District, the District endured long periods of dormancy after construction of the three primary drainage ditches in the 1920s. *See* ***Town of Stiles***, 327 Wis. 2d 491, ¶¶2-3. In 2001, the District remapped its boundaries, conducted a benefits reassessment, and prepared plans to bring the District into compliance with new administrative regulations from the State of Wisconsin. ***Id.***, ¶3. Pursuant to these efforts, the District hired a firm to develop preliminary drainage specifications, which were to be sent to the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP)

[2] All references to WIS. ADMIN. CODE ch. ATCP 48 are to the April 2013 version. None of the administrative code provisions cited in this opinion have changed during the time periods relevant to these appeals.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. This was the operative version of the statutes at the time all petitions at issue in these appeals were filed before the Board.

for approval.[4] DATCP conditionally approved the specifications on June 26, 2007.

¶4 On August 6, 2007, various landowners petitioned the circuit court for dissolution of the District. ***Id.***, ¶4. Charles Kehl and Jeff Sagen, who were later appointed to the District board in 2009 and 2011, respectively, were among the dissolution petitioners.[5] Following a public hearing in 2008, the circuit court ordered the District dissolved pursuant to WIS. STAT. § 88.82, which requires a finding, among other things, that "the public welfare will be promoted by dissolution." ***Town of Stiles***, 327 Wis. 2d 491, ¶9; *see also* § 88.82(3). The court acknowledged the District provided beneficial drainage and would require future maintenance, but concluded municipalities within the District could provide effective drainage and dissolution would foster accord between the District and affected landowners. ***Town of Stiles***, 327 Wis. 2d 491, ¶9. We reversed on appeal, concluding the circuit court's "public welfare" determination could not withstand scrutiny. ***Id.***, ¶¶17-19.

¶5 Following this court's decision, the Murphys filed several maintenance petitions in the circuit court. Paul Murphy signed a pro se maintenance petition on March 14, 2011, which was followed by a joint pro se maintenance petition from John and Jerome Murphy on April 26, 2011. On September 20, 2011, the Murphys, having retained counsel, filed a joint petition

[4] By December 31, 2000, every county drainage board was required to adopt complete specifications for each drainage district under that board's jurisdiction. WIS. ADMIN. CODE § ATCP 48.20(1). DATCP must approve the specifications before the county drainage board adopts them. ***Id.***

[5] On March 17, 2011, the Board voted to increase the number of its members from three to five.

that was more specific and detailed. In totality, the petitions requested that the District perform maintenance on ditch numbers one and two and ditch lateral number two, correcting any violations of state law and restoring proper drainage of District lands. One of the petitions contemplated it would take at least five years to bring the District into compliance with DATCP specifications.

¶6 On October 19, 2011, and November 21, 2011, District landowners submitted, through their attorney, petitions to suspend the District pursuant to WIS. STAT. § 88.81. Becky Dietzler circulated petitions and obtained fifty-nine signatures from landowners with confirmed benefits[6] in the District, which signatures she certified on August 29, 2011, the same day she was sworn in as a newly appointed Board member. Kehl and Sagen added their signatures to the suspension petitions on January 15, 2013, and February 19, 2013, respectively.

¶7 In January 2012, the Murphys filed in the circuit court a petition for a writ of mandamus to require the Board to respond to their maintenance petitions. The Murphys observed that, by rule, the Board was required to respond in writing to the petitions within sixty days of their filing. *See* WIS. ADMIN. CODE § ATCP 48.45(1)(c). On April 18, 2012, the parties stipulated that the Board would provide a written response to the three maintenance petitions within the next forty-five days. The parties further stipulated the Board would take no formal actions on other pending petitions, including the suspension petitions, until ordered by the circuit court. This effectively stayed further proceedings until the Board resolved the maintenance petitions.

[6] "Benefits" means "all pecuniary advantages accruing to lands from the construction of the drain." WIS. STAT. § 88.01(1).

¶8 On May 21, 2012, the Board denied the Murphys' maintenance petitions. The Board gave "due consideration" to the existence of other pending petitions before the Board, including the petitions to suspend the District. The Board stated, "It preliminarily appears to the Board that the suspension petition was signed by the requisite 67% or more of the landowners receiving confirmed benefits from the District." The Board noted that if the statutory prerequisites to suspension were met, it was required by statute to suspend District operations. *See* WIS. STAT. § 88.81(2). Given the outstanding suspension petitions, the Board found it not "prudent to undertake a multiple year compliance plan with associated significant expense going forward." The Board noted that a firm it hired to assess the cost of complying with the Murphy petitions had estimated the engineering work alone could cost as much as $70,000. The Board further noted that if it subsequently granted the suspension petitions, the suspension petitioners would be statutorily required "to pay for the entirety of any maintenance program adopted by the Board going forward over the next five, ten or fifteen years." The Board found this would place an "unfair and undue burden" on a majority of District property owners. It also found the costs of any such maintenance plan would "far exceed benefits conferred to District property owners."

¶9 The Board noted other factors that contributed to its denial of the Murphys' maintenance petitions. First, the Board concluded that, based on an inspection by Board members Kehl, Sagen and Dietzler in December 2011, "the drainage systems reasonably operate and accomplish their intended objectives," including draining properties within the District under normal circumstances. The Board noted the Murphys were "actively involved in Board affairs for many years," with either John or Rosalie Murphy serving as Board chair between 1995 and 2011, and that "[d]espite holding Board leadership positions, there were no

maintenance petitions filed or plans developed during their tenure on the Board." Second, the Board found that portions of John Murphy's drain were obstructed as the result of a "problematic forestry operation" on his property that affected downstream landowners, including Paul Murphy. Finally, it found that Jerome Murphy had attached an unapproved and unmaintained private drain to the District drain on his and the adjoining property.

¶10 The Murphys filed a motion for reconsideration on June 21, 2012. They argued the Board applied the wrong legal standard when it determined the District provided adequate drainage. Instead, the Murphys argued that under WIS. ADMIN. CODE § ATCP 48.26(3), District drains were required to conform to DATCP specifications. The Murphys claimed the cost of complying with this mandate was "irrelevant and inaccurate" because the Board had failed to create a statutorily required fund for maintenance and repair, the Board could spread out projects or borrow the necessary funds, and the Board had overestimated the necessary engineering costs. The Murphys claimed the Board's findings regarding the problems on John and Jerome Murphys' properties were also "irrelevant and inaccurate."

¶11 The Board denied the motion for reconsideration on September 24, 2012. It addressed only the Murphys' claim that it applied the wrong legal standard. The Board provided an extensive history of its activities between 2001 and 2007 and concluded the specifications DATCP approved in 2007 had not been properly approved by the Board. The Board therefore deemed WIS. ADMIN. CODE § ATCP 48.26(3) inapplicable and concluded its only duty was to ensure

that drains were generally in good condition under WIS. STAT. § 88.63(1m).[7] The Board reiterated that given the pending petitions for suspension, which it deemed "facially valid," it could "not conceive of any reasonable or cost effective reason to commission further engineering work and to conduct public hearings in an effort to, at this late date, correctly adopt and file governing District specifications."

¶12 Having decided the Murphys' maintenance petitions, the Board filed a motion in the circuit court on May 31, 2013, for relief from the stay to consider the suspension petitions. The circuit court granted the motion, but limited the Board to determining whether the procedural prerequisites to suspension had been satisfied. The Board was prohibited from issuing an order suspending District operations until authorized by the court. In September 2013, the Board provided notice to affected landowners that it had scheduled a public hearing on the sufficiency of the suspension petitions for October 5, 2013.

¶13 At the October 5 hearing, the Murphys appeared by their attorney, Erika Bierma. When the hearing was opened for public comment, Bierma raised several objections to the sufficiency of the signatures on the suspension petitions. First, she argued that any signatures by "agents" who had not filed proof of agency with the Board under WIS. STAT. § 88.04(1) were required to be struck; Bierma asserted these signatures represented 23.94% of the confirmed benefits in the District. Second, Bierma asserted that approximately two-tenths of one percent of the confirmed benefits involved the signature of a person who no longer owned

[7] The Board acknowledged that, under this reasoning, the District was not in compliance with WIS. ADMIN. CODE § ATCP 48.20(1), and it labeled this longstanding noncompliance a "serious regulatory oversight by the Board."

the land. Third, Bierma asserted 12.28% of the confirmed benefits involved the signature of a person without any notation as to the parcels or parcel numbers. Finally, Bierma argued that under WIS. STAT. § 8.40, a valid petition required the signature of the circulator, which was lacking on petitions that had been signed by owners representing 13.40% of the confirmed benefits.[8] Given these objections, Bierma argued the petitions did not satisfy the requirement that they be signed by landowners representing sixty-seven percent of the confirmed District benefits. A written statement setting forth these objections was sent to the Board the day before the hearing.

¶14 After other landowners spoke in favor of the suspension petitions, Kehl was called on to explain how the Board had determined the petitions' sufficiency. Kehl explained in detail how he calculated the percentage of confirmed benefits in the District associated with each signator based on previous assessments. He stated he had "kicked a few people out" because they no longer owned property in the District. The documents on which Kehl relied were admitted as exhibits at the hearing. After other Board members questioned Kehl regarding the process, the Board voted unanimously to "accept the signatures o[n] the petitions as being valid signatures of the benefited district land owners." The Board also unanimously voted that: (1) the petitions were signed by landowners representing 80.58% of the confirmed benefits in the District; (2) there were no current projects that would be affected by suspension; and (3) when appropriate,

[8] Although the Murphys submitted detailed spreadsheets representing the alleged deficiencies of signatures in each of these four categories, they failed to specify whether they believed these deficiencies cumulatively rendered the signature total insufficient, and they failed to state what percentage of the "confirmed benefits" were represented by valid signatures.

the Board would issue a suspension order, provided the petitioners pay for the cost of the hearing.

¶15 By letter dated November 26, 2013, the Board responded to the objections the Murphys raised at the October 5 hearing. The Board made clear it did not believe such a response was necessary "because the objections did not implicate the veracity or legal sufficiency of the petitions submitted to the Board." Nonetheless, the Board "procured a number of documents from benefitted District landowners and petition circulators to satisfy the Murphy concerns," including: (1) corporate agency acknowledgments from suspension petition signators reflecting they had due capacity and authority to sign the petitions; (2) co-owner acknowledgments signed by individuals with an interest in District property indicating the signator had full authority and consent to sign the petitions on behalf of the other owners; (3) verifications of signature from petition signators for whom there was no petition circulator; and (4) affidavits from petition circulators describing the manner in which the petitions were circulated. The Board supplemented the record with these documents at its November 20, 2013 meeting. The letter concluded with the Board stressing that the additional documents "do not in any way, shape or form add a single signature to the suspension petitions." The circuit court's stay was eventually lifted and the Board issued a suspension order on June 10, 2014.

¶16 Meanwhile, the Murphys had petitioned for certiorari review of the Board's decision denying their maintenance petition. The circuit court identified the "crux of this matter" as the District's "conflicting mandatory duties" to maintain drains according to adopted specifications under WIS. ADMIN. CODE § ATCP 48.26(3) and to grant a suspension petition if the statutory prerequisites under WIS. STAT. § 88.81(2) were met. The court concluded it was

irrelevant whether District specifications were properly adopted in 2007, as "even if … the specifications were validly enacted, … the Board would still be facing the unenviable situation of having two mutually conflicting mandatory duties to choose from." The court determined the Board properly recognized that "granting the Murphy petitions could create a specific current project which arguably did not yet exist," producing significant expense for the suspension petitioners and debt for the District. Using the certiorari methodology, the circuit court affirmed the Board's decision, concluding "its ultimate decision was reasonable based upon the evidence before it and the Board acted within its jurisdiction and according to law."

¶17 The Murphys also petitioned for certiorari review of the Board's decision to grant the suspension petitions. The Murphys challenged the Board's finding that the signatures on the petitions represented a sufficient percentage of the District's confirmed benefits, argued the Murphys' previously filed maintenance petitions constituted a "specific current project" under the suspension statute, and asserted the Board impermissibly acted as both factfinder and advocate at the hearing. The circuit court concluded it was within the Board's authority to amend, modify or correct documents under WIS. STAT. § 88.032(2), which included the authority to "verify the capacity of signers by procuring authorizations and affidavits regarding agency after the Murphys raised those concerns at the October 5[th] suspension hearing." However, the court also determined such efforts were not required, as WIS. STAT. § 88.04(1) contemplated an informal process for obtaining agency authorization. In addition, the court rejected the Murphys' arguments that their maintenance petitions constituted a specific current project under the suspension statute, reasoning "a race to file petitions [does not] … create a vested right that qualifies under [WIS. STAT.]

§ 88.81(3)." In sum, the circuit court concluded the Board followed the law and was not biased in granting the suspension petitions.

DISCUSSION

¶18 When reviewing a decision in a certiorari proceeding, our standard of review is the same as that of the circuit court. ***State ex rel. Norway Sanitary Dist. No. 1 v. Racine Cty. Drainage Bd. of Comm'rs***, 220 Wis. 2d 595, 605, 583 N.W.2d 437 (Ct. App. 1998). We accord the Board's decisions a presumption of validity. *See* ***Edward Kraemer & Sons v. Sauk Cty. Bd. of Adjustment***, 183 Wis. 2d 1, 8, 515 N.W.2d 256 (1994). Our review is limited to: (1) whether the Board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the Board could reasonably make the determinations in question. ***Ottman v. Town of Primrose***, 2011 WI 18, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411. We review the Board's decisions, not the circuit court's decisions, *see* ***Bratcher v. Housing Auth.***, 2010 WI App 97, ¶10, 327 Wis. 2d 183, 787 N.W.2d 418, and decide the merits of these matters independently of the circuit court, *see* ***Norway Sanitary Dist. No. 1***, 220 Wis. 2d at 605.

¶19 We emphasize that the scope of certiorari review is quite constrained. The Murphys' appellate briefs present numerous, sometimes overlapping challenges to the Board's decisions on the maintenance and suspension petitions. However, the Murphys frequently are unclear regarding the precise certiorari criteria on which their challenges are based. Indeed, at times the Murphys appear to shift between certiorari standards mid-argument. The Murphys have the burden of overcoming the presumption of correctness to which the

Board's decisions are entitled. *See* ***Ottman***, 332 Wis. 2d 3, ¶50. Due to this lack of clarity in the Murphys' briefing, we have taken the liberty of placing the Murphys' arguments, as we discern them, into the most-applicable certiorari standard.

¶20 Before addressing the specific issues the Murphys raise, we must review some basic principles of drainage law—in particular, the procedural requirements relevant to maintenance and suspension petitions. Drainage districts in the abstract are governed by WIS. STAT. ch. 88. When such a district is created, the circuit court appoints a three-member board, WIS. STAT. § 88.17(1), which possesses the powers and duties specified in WIS. STAT. §§ 88.21 to 88.24 and elsewhere. Board members serve three-year terms, with one position expiring annually on a rotating basis, subject to court appointment of a successor. Subsecs. 88.17(1), (2d), (2t). As occurred with the District here, the number of board members may be increased to five, with a corresponding change in the length of terms. Subsec. 88.17(2).

¶21 As the Murphys have emphasized throughout these proceedings, "[i]t is the duty of the drainage board to maintain in good condition the drains in all districts under the board's jurisdiction and to repair such drains when necessary." WIS. STAT. § 88.63(1m). This duty requires that drains be restored "as nearly as practicable to the same condition as when originally constructed or subsequently improved … and [includes] such routine operations as from time to time may be required to remove obstructions and preserve the efficiency of the drains." Subsec. 88.63(1g). A board's obligation to repair and maintain drains, however, does not encompass "substantial or material alteration, enlargement or extension of the drainage system of the district." ***Id.***

¶22 DATCP has a substantial role in the operation of drainage districts, and it is authorized to "perform any functions related to drainage districts that the department considers appropriate," including rulemaking. *See* WIS. STAT. § 88.11(1m), (6). DATCP has established, by rule, a procedure for landowners within a district to file a maintenance petition, by which the landowner can request the restoration, repair, maintenance or modification of a district drain to conform to previously established specifications. *See* WIS. ADMIN. CODE § ATCP 48.45(1)(a)1. The petitioner must identify the grounds for the petition and the action requested of the drainage board, and the board may request further information from the landowner if reasonably necessary. WIS. ADMIN. CODE § ATCP 48.45(1)(b). The regulation also governs the nature and timeliness of the board's response, *see infra* ¶29, and it provides for landowner recourse to DATCP in certain situations upon an unfavorable ruling.[9] *See* WIS. ADMIN. CODE § 48.45(1)(c), (1)(d).

¶23 A supermajority of district landowners may also petition to suspend drainage district operations under WIS. STAT. § 88.81, or to dissolve the district entirely under WIS. STAT. § 88.82.[10] While the prior appeal to this court concerning the District involved dissolution proceedings, the present case involves suspension petitions.[11] A suspension order directs that "no more work be done in

[9] It is unnecessary for a landowner aggrieved by a board's decision to seek DATCP review prior to commencing a certiorari action. *See* Note, WIS. ADMIN. CODE § 48.45(1)(d).

[10] *But see infra* ¶50 n.18 (noting statutory change effectively curtailing new suspension petitions).

[11] For this reason, the Murphys' references to our opinion in that case throughout their briefs carry little weight. With the exception of the signature requirement, the legal standards governing dissolution and suspension are different, including most notably a "public welfare" inquiry in dissolution proceedings that is not required for suspension. *Compare* WIS. STAT. § 88.81(2) *with* WIS. STAT. § 88.82(3).

or expense incurred on behalf of the district." Subsec. 88.81(2). A suspension order does not dissolve the district or in any way affect existing contracts, and the district remains liable for all existing debts and must "continue to levy such additional assessments for costs as are necessary to meet existing obligations." ***Id.*** The order continues in effect until the drainage board grants a like application "requesting that work be continued." Subsec. 88.81(4).

¶24 A suspension petition is initiated by the owners of land representing sixty-seven percent or more of the confirmed benefits in a drainage district. WIS. STAT. § 88.81(1)(b). Upon receiving the petition, the drainage board must fix a time and place for a hearing on the petition and give notice to affected landowners. Para. 88.81(1)(c). The board must issue a suspension order upon making the following three findings: (1) that the petition is signed by owners representing the required percentage of confirmed benefits in the district; (2) that the notice of hearing was properly given; and (3) that the petitioners have paid or will pay both the costs of the hearing and all expenses incurred in connection with "specific current projects whose completion would be affected" by the suspension order. Subsecs. 88.81(2), (3).

I. Maintenance Petitions

¶25 The Murphys challenge the Board's denial of their maintenance petitions on three grounds. First, they argue the Board used an invalid legal rationale to deny their petitions, and was, in fact, required to grant the petitions because the Murphys have a "vested" interest in drainage, both generally and with respect to the specifications approved by DATCP in 2007. We regard this as a challenge to the legal standards the Board used in deciding the Murphys' maintenance petitions. Second, the Murphys claim the Board ignored credible

evidence and lacked substantial evidence to deny their maintenance petitions. Third, the Murphys argue the Board's decision was arbitrary because the Board was not impartial and "demonstrate[d] a predisposition to deny any petition that require[d] the District to do more work."

A. The Board proceeded on a correct theory of law.

¶26 The Murphys first argue the Board's decision to deny their maintenance petitions was not supported by an adequate legal rationale and was, in fact, contrary to law because it curtailed the Murphys' "vested right" to drainage of their lands. They argue the Board unlawfully denied their maintenance petitions based on the presumed validity of the after-filed suspension petitions. They also argue that despite the suspension petitions, the Board was required to address their maintenance petitions and ensure adequate drainage because those matters were "existing obligations" under the suspension statute. *See* WIS. STAT. § 88.81(2).[12]

¶27 We first address the Murphys' assertion that the Board's reliance on the fact of the suspension petitions' filing was contrary to law. The Murphys frame this argument in numerous ways, but the central contention is that the Board was required to decide the maintenance petitions first, because they were filed before the suspension petitions. The Murphys argue it was unlawful for the Board to consider the effect that granting their petition would have on the suspension petitions or those petitioners, and they correctly note that no provision in the

[12] This represents a slight change in the argument presented to the circuit court. There, the Murphys argued the maintenance petitions constituted a "specific current project" under WIS. STAT. § 88.81(3).

suspension statute, WIS. STAT. § 88.81, explicitly provides for a stay of other proceedings upon a suspension petition's filing.

¶28 That omission, however, does not mean the Board could not reasonably consider the long-term consequences of granting the maintenance petitions. No provision in either WIS. STAT. ch. 88 or WIS. ADMIN. CODE ch. ATCP 48 explicitly requires maintenance petitions to be given priority over other district matters. Those authorities also do not prohibit the Board from considering the impact that granting the relief requested by a maintenance petition would have on the remainder of the District. Indeed, the regulation authorizing maintenance petitions does not in any way restrict a board's rationale for denying a petition. Rather, the relevant code provision simply requires a board to explain the reason for its refusal to take action. *See* WIS. ADMIN. CODE § ATCP 48.45(1)(c)2. A board's decision is reviewable by certiorari or, if the matter concerns an alleged violation of law, the petitioner may seek DATCP review. *See* WIS. STAT. § 88.09; WIS. ADMIN. CODE § ATCP 48.45(1)(d).

¶29 It is true that a drainage board is required, by rule, to provide a written response to a complete maintenance petition within sixty days of the petition's filing. *See* WIS. ADMIN. CODE § ATCP 48.45(1)(c). At best, the Murphys can show that the Board did not comply with this requirement. However, they provide no authority for the proposition that the remedy for this breach of protocol was to grant their maintenance petitions. The Murphys properly resorted to the circuit court for a writ of mandamus to compel the Board to act. *See* ***Moore v. Stahowiak***, 212 Wis. 2d 744, 747, 569 N.W.2d 711 (Ct. App. 1997) (describing standard governing the issuance of a writ of mandamus). As part of that litigation, the parties stipulated that the Board would provide a response to the petitions by roughly the end of May 2012. The Murphys have not

advanced an argument that, given this stipulation, the Board's failure to act within sixty days of the maintenance petitions' filing is relevant to our review.

¶30 The Board did not sit idle after the Murphys filed their petitions. In December 2011, Board members contacted a DATCP drainage engineer and also conducted their own physical inspection of the District's drainage systems. The Board stated these activities occurred because even though drainage specifications had been developed years earlier (regardless of whether they were validly enacted), the Board did not possess a compliance plan describing in detail the engineering work necessary to provide drainage in accordance with those specifications. Board members consulted with a firm in March 2012 to review the specifications and determine the scope of work and estimated cost of granting the Murphys' maintenance requests. According to that firm, the engineering work alone could consume seventeen weeks and would cost between $49,000 and $70,000. The Board concluded the actual maintenance work would be "significant and costly." This consideration was particularly significant in light of the Board's observations that the District had "no operating, maintenance or repair funds, and an initial special assessment and/or loan would have to be secured to fund just the preliminary engineering work."

¶31 Thus, the reality is that at the time of the Board's response to the Murphys' maintenance petitions, the Board was aware that providing drainage in accordance with DATCP specifications would involve substantial and costly work. The Board also knew it would have to soon decide suspension petitions filed on behalf of an apparent supermajority of District landowners, who would be required to pay the full cost of work attendant to the maintenance petitions if the suspension petitions were granted. *See* WIS. STAT. § 88.81(3). Under these circumstances, we cannot conclude the Board erred as a legal matter when it considered the effect

that granting the maintenance petitions would have on the pending suspension petitions and the petitioning landowners.

¶32 The Murphys argue the Board nonetheless lacked authority to "ignore duties imposed by the statutes and administrative rules." They correctly observe that drainage districts are creatures of the legislature and, as such, have only those powers delegated to them by statute (or administrative rules promulgated pursuant to statute). *See* ***Haug v. Wallace Lake Sanitary Dist.***, 130 Wis. 2d 347, 351, 387 N.W.2d 133 (Ct. App. 1986). Aside from the Murphys' contention that the Board ignored its duty to provide adequate drainage (a topic we address shortly, *see infra* ¶¶36-40), they are not clear about what specific duty the Board ignored.[13]

¶33 Instead, the Murphys argue "[p]icking and choosing between mandatory duties is not among the Board's powers." The Board's only "mandatory duty" as it pertains to the maintenance petition was to respond to it, either by explaining what action it would take or by explaining its refusal to take action. *See* WIS. ADMIN. CODE § ATCP 48.45(1)(c). The Board chose to do the latter, which was within its discretion. This is particularly notable because the Board has no such discretion when responding to a suspension petition. If a drainage board makes the requisite findings under WIS. STAT. § 88.81(2), it is *required* to issue a suspension order, and the petitioning landowners are required to pay the expenses associated with "specific current projects whose completion would be affected by the drainage board order." Subsec. 88.81(3).

[13] The Murphys may be suggesting the Board failed to timely respond to their petitions for maintenance, but again, there is no authority for the proposition that the remedy for that oversight was the granting of their petitions. *See supra* ¶29.

¶34 The Murphys also argue the suspension provisions in WIS. STAT. ch. 88 provide a "wholly *prospective* remedy" and do not affect existing proceedings. To the extent the Murphys intend this to mean the Board was required to give priority to their maintenance petitions, we have already rejected that argument. *See supra* ¶¶28-31. Independent of that, the Murphys also appear to argue that the Board erred in denying their maintenance petitions because, as a matter of law, their petitions and/or their "vested right to drainage" constituted "existing obligations" under WIS. STAT. § 88.81(2) that would have been unaffected by a suspension order.

¶35 The Murphys take the "existing obligations" language in WIS. STAT. § 88.81(2) out of context.[14] The full statutory sentence is as follows: "The district remains liable for all its debts existing at the time of issuance of the drainage board order suspending operations, *and the board shall continue to levy such additional assessments for costs as are necessary to meet existing obligations*." Subsec. 88.81(2) (emphasis added). Considered in context, it is clear the "existing obligations" language on which the Murphys rely refers not to all amorphous "obligations" of a drainage district, but rather to specific debts that

[14] WISCONSIN STAT. § 88.81(2) states, in its entirety:

> **(2)** If after the hearing the drainage board finds that the petition is signed by the required number of owners, that notice of the hearing was properly given, and that the conditions of sub. (3) have been met, it shall issue an order directing that no more work be done in or expense incurred on behalf of the district. The order does not dissolve the district or in any way affect existing contracts. The district remains liable for all its debts existing at the time of issuance of the drainage board order suspending operations, and the board shall continue to levy such additional assessments for costs as are necessary to meet existing obligations.

exist at the time the suspension order issues. The sentence's second independent clause relates to the first independent clause in that the second clause provides a *mechanism* by which a district board may avoid defaulting on debts for which it remains liable under the first clause. This interpretation is buttressed by the sentence immediately preceding the sentence quoted above, which specifically excludes "existing contracts" from the scope of suspension. ***Id.***

¶36 That being said, we also conclude the Murphys do not have a "vested" right to the drainage they seek, under the authorities they cite. The Murphys rely on a prefatory note to WIS. ADMIN. CODE § ATCP ch. 48, which states:

> Landowners in a drainage district have certain rights and responsibilities prescribed by ch. 88, Stats., and this chapter. Drainage rights are based on drain specifications formally established by the circuit court (or by a county drainage board under this chapter). … The county drainage board must comply with procedures designed to protect landowner rights.

Note, WIS. ADMIN. CODE ch. ATCP 48. The Murphys believe this note, in conjunction with WIS. ADMIN. CODE § 48.26(3), *see infra* ¶39, confers upon them a vested right to drainage based on the previously adopted DATCP specifications—a right that cannot be affected by a suspension order issued under WIS. STAT. § 88.81.

¶37 The Murphys rely on ***Lake Bluff Housing Partners v. City of South Milwaukee***, 197 Wis. 2d 157, 540 N.W.2d 189 (1995), for the proposition that they are denied an existing property right to drainage when "[t]he Board … change[s] the rules of the game after the fact by entertaining a subsequently filed suspension petition." ***Lake Bluff*** was a zoning case holding that a writ of mandamus requiring a municipality to grant a building permit on the basis of

"vested rights" cannot issue unless the developer "submit[s] an application for a building permit [that] conform[s] to the zoning or building code requirements in effect at the time of the application." ***Lake Bluff***, 197 Wis. 2d at 177, 182. The Murphys fail to explain why, precisely, the Board was required to grant their maintenance petitions under ***Lake Bluff***, as there is no permit process associated with drainage, the Murphys have never had drainage conforming to DATCP specifications, and District landowners have apparently never been subject to assessments for the costs necessary to fully bring the District into compliance with DATCP specifications. Accordingly, we deem the Murphys' argument conclusory and inadequately developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶38 Even assuming one can obtain a "vested" property right in drainage (a matter we do not decide), the Board argues that, under the existing case law, the Murphys would be required to demonstrate "substantial investments made by them in reliance on their claimed rights to maintenance." The Board cites another zoning case, ***Town of Cross Plains v. Kitt's Field of Dreams Korner, Inc.***, 2009 WI App 142, 321 Wis. 2d 671, 775 N.W.2d 283, in which an adult entertainment establishment claimed it had a vested interest in adult entertainment activities for purposes of determining whether there was a valid nonconforming use that predated an ordinance amendment regulating such activity. ***Id.***, ¶12. We observed that "Wisconsin case law has consistently treated the owner's reasonable reliance [on the existing law] as a critical factor in deciding whether there is a vested right." ***Id.***, ¶40. The Murphys have not argued they have in any way relied on the drainage contemplated by DATCP specifications, nor have they responded to the Board's argument that proof of such reliance is necessary to obtain a vested right.

See ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶39 The Murphys also argue that, regardless of whether they had a "vested right" to drainage, the Board was obligated to provide drainage in accordance with the previously adopted DATCP specifications. The Murphys derive this conclusion from WIS. ADMIN. CODE § 48.26(3), which states in relevant part:

> **(3)** DISTRICT DRAINS MUST CONFORM TO SPECIFICATIONS. A county drainage board shall restore, repair, maintain and, if necessary, modify district drains so that each district drain conforms to the specifications formally established for that drain by court order, or by county drainage board action under s. ATCP 48.20 or 48.21.

In light of this subsection, the Murphys contend the Board was required to grant their motion for reconsideration, which posited that the Board had used the wrong legal standard in its May 21, 2012 decision by concluding that the District's systems operated reasonably well and adequately drained District lands. Put another way, the Murphys believe "effective" drainage is insufficient; they desire the drainage contemplated by DATCP specifications.[15]

[15] The Murphys contend the Board failed to respond to their appellate argument in this regard, and the Board has therefore forfeited the issue. The Board's appellate brief on the maintenance issue does state, in a footnote, that it will not address the substance of the Murphys' argument that the specifications were validly adopted by the Board. However, as the remainder of the Board's brief makes clear, the Board declined address this issue because, even assuming DATCP specifications were validly enacted, the Board nonetheless applied a proper legal standard when it denied the maintenance petitions on the basis of the pending suspension petitions. As set forth herein, *see supra* ¶¶28-31 and *infra* ¶40, we agree with the Board. Because the Board's appellate argument is that the circuit court should be affirmed regardless of whether the specifications were validly adopted, we conclude the Murphys are not entitled to reversal on the basis of forfeiture or waiver of an appellate issue.

¶40 The District denied the reconsideration motion on the ground that the specifications DATCP approved in 2007 were not properly adopted by the Board. The Board concluded there was insufficient opportunity for public input prior to DATCP approval. The circuit court, addressing the Murphys' argument that the Board had acted contrary to law, concluded that even if the specifications were duly enacted by the Board and created a duty under WIS. ADMIN. CODE § 48.26(3) to provide such drainage, the Board was still facing the "unenviable situation" of deciding whether to initiate prolonged and costly drainage improvements at the same time that an apparent supermajority of those benefited by drainage were petitioning to suspend District operations. Although we independently review the Board's decision, we agree with the circuit court's rationale. *See supra*, ¶¶28-31. Even if the Board validly adopted DATCP specifications, under the circumstances of this case we cannot conclude the Board acted contrary to any law by denying the Murphys' maintenance petitions.

¶41 As a final variation on the foregoing arguments, the Murphys contend the Board's duty to maintain District drains is absolute and, as such, the maintenance petitions cannot be denied simply because compliance would be expensive. The Murphys observe that under WIS. STAT. § 88.63(2), the Board is required to establish a fund equivalent to five percent of the confirmed benefits currently in the District for the payment of costs of maintenance and repair. "Maintenance and repair" under WIS. STAT. § 88.63(1g) means "restoration of a drain or any part thereof as nearly as practicable to the same condition as when originally constructed or subsequently improved." "Maintenance and repair" does not encompass "substantial or material alteration, enlargement or extension of the drainage system of the district." ***Id.***

¶42 Here, it is undisputed that District drainage has *never* conformed to DATCP specifications. Thus, the drains have never been "subsequently improved" to conform to those specifications such that the District would be obligated to establish a fund to maintain them at that level. Further, the Board at least implicitly concluded bringing the District into compliance would involve more than "maintenance and repair" as that phrase is defined by WIS. STAT. § 88.63(1g). Barring such actual improvements, the fund need only have consisted of amounts necessary to maintain the drains "as nearly as practicable to the same condition as when originally constructed" or otherwise subsequently improved. *See* § 88.63(1)(g), (2). Whatever the Board's financial status, it did conclude that the District's drains performed effectively.

B. Substantial evidence supports the Board's denial of the maintenance petitions.

¶43 The Murphys contend that, even if the Board was merely required to provide adequate drainage, its finding that the drainage systems "reasonably operate and accomplish their intended objectives" was not supported by substantial evidence. "Substantial evidence" is evidence of such convincing power that reasonable persons could reach the same decision as the Board. *See* ***Oneida Seven Generations Corp. v. City of Green Bay***, 2015 WI 50, ¶43, 362 Wis. 2d 290, 865 N.W.2d 162 (citing ***Clark v. Waupaca Cty. Bd. of Adjustment***, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994)). "Substantial evidence" is less than a preponderance of the evidence, ***id.***, ¶44 (citing ***Smith v. City of Milwaukee***, 2014 WI App 95, ¶22, 356 Wis. 2d 779, 854 N.W.2d 857), but "more than 'a mere scintilla' of evidence and more than 'conjecture and speculation,'" ***id.*** (quoting ***Gehin v. Wisconsin Group Ins. Bd.***, 2005 WI 16, ¶48, 278 Wis. 2d 111, 692 N.W.2d 572).

¶44 The Murphys assert the Board ignored a professional drainage inspection by George Howlett during the planning activities in 2007.[16] They argue the Board was required to accept Howlett's evaluation of the condition of the drainage system and his recommendations for improvement because his report constituted "competent, unimpeached, and uncontradicted evidence" under ***Rosen v. City of Milwaukee***, 72 Wis. 2d 653, 242 N.W.2d 681 (1976), and its progeny. *See* ***Rosen***, 72 Wis. 2d at 662. The Murphys argue the Board members' own inspection of the drainage system in December 2011 was not credible evidence because it was done in winter conditions when there was little water flow, the members are not drainage professionals, and the members were "opposed to undertaking drainage projects."

¶45 We reject the Murphys' arguments and conclude the Board's decision to deny the maintenance petitions was supported by substantial evidence. Howlett's report was written more than five years before the Board denied the Murphys' maintenance petitions. The Board members' inspection was much more recent, and the members were able to observe firsthand drainage conditions on District lands. The Murphys are correct that the Board members did not author a written report memorializing their findings, nor did the Board's findings reflect the kind of technical expertise one would expect of a drainage engineer. However, there is no requirement that the Board's decision be supported by expert opinion,

[16] This report was referenced in the first appeal involving the District. *See* ***Town of Stiles v. Stiles/Lena Drainage Dist.***, 2010 WI App 87, ¶3, 327 Wis. 2d 491, 787 N.W.2d 876. The Murphys seem to believe this court made a credibility finding as to the veracity of the contents of that report. This court does not make credibility findings. ***Rucker v. DILHR***, 101 Wis. 2d 285, 290, 304 N.W.2d 169 (Ct. App. 1981). Rather, the circuit court in that case, in apparent reliance on the Howlett report, determined future maintenance would be required "or there will be a heavy price to pay." ***Town of Stiles***, 327 Wis. 2d 491, ¶9.

and the absence of such technical expertise does not render the Board members' observations incredible or unreliable as a matter of law. Indeed, WIS. STAT. § 88.63(1m) provides, in part, "The board may hire an inspector or authorize one or more owners of land in the drainage district to make the inspection or members of the board may themselves make the inspection." Any challenge regarding the timing or adequacy of the Board's inspection goes to the weight of the evidence in considering the condition of the drainage system and is not reviewable by certiorari. *See* ***Ottman***, 332 Wis. 2d 3, ¶53 ("A certiorari court may not substitute its view of the evidence for that of the municipality.").[17]

C. The Board's decision was not arbitrary or unreasonable.

¶46 The Murphys next argue the Board's decision was impermissibly biased, and they were therefore denied their due process right to have an impartial body decide their maintenance petitions. *See* ***Marris v. City of Cedarburg***, 176 Wis. 2d 14, 24-25, 498 N.W.2d 842 (1993). The Board was required to "engage in fact-finding and then make a decision based on the application of those facts" to the applicable legal standard. *See* ***id.*** at 26. The Murphys' right to such a determination was violated if a Board member harbored bias or prejudged the facts or application of the law, or if there was an impermissibly high risk of bias. ***Keen***

[17] This assumes, of course, that the Board's findings with respect to the adequacy of the drainage conditions within the District were findings of fact. To the extent the Board's decision concerned policy or legislative judgments regarding the quality of the drainage and how that should be accomplished, such determinations are entrusted to the Board's discretion. On certiorari review, the Murphys could not raise a substantial evidence challenge to these policy judgments. *See* ***Ottman v. Town of Primrose***, 2011 WI 18, ¶52, 332 Wis. 2d 3, 796 N.W.2d 411 ("If the municipality applied the correct legal standards and reached a decision that is not arbitrary, oppressive, or unreasonable, we will not upset a municipality's discretionary determination.").

v. Dane Cty. Bd. of Supervisors, 2004 WI App 26, ¶14, 269 Wis. 2d 488, 676 N.W.2d 154.

¶47 The Murphys provide scant detail regarding what they believe demonstrates bias or prejudgment on the part of the Board. Their brief-in-chief only refers to the "fact that three of the current five Board members have filed petitions to either dissolve or suspend the Board." The Murphys clarify in their reply brief that they object to Kehl's, Sagen's and Dietzler's participation in deciding the maintenance petitions. They reason that Kehl and Sagen were impermissibly biased because they earlier petitioned for dissolution, while Dietzler, prior to her appointment, circulated suspension petitions.

¶48 The Murphys rely on ***Keen***, in which we concluded a zoning decision in favor of a gravel mining operation was invalid as evidencing an impermissibly high risk of bias because one of the board members became an advocate for the operation by writing a letter in support of the project, which letter was included in the applicant's submission. ***Id.***, ¶15. However, as our supreme court made clear in ***Marris***, a board member's mere opinions on subjects that touch on issues before the board "should not necessarily disqualify the member from hearing a … matter." ***Marris***, 176 Wis. 2d at 26. Especially germane to this case, the court stated: "Since they are purposefully selected from the local area and reflect community values and preferences regarding land use, zoning board members will be familiar with local conditions and the people of the community and can be expected to have opinions about local zoning issues." ***Id.*** (footnote omitted). In the context of this case, the legislature has provided that "[o]wnership of or interest in lands sought to be drained does not disqualify a person from acting as a member of the drainage board." WIS. STAT. § 88.17(4). Furthermore, it enacted a statute specifically describing what constitutes a conflict of interest for

drainage board members. *See* WIS. STAT. § 88.20 (in general, prohibiting self-dealing with the drainage district).

¶49 We conclude the Board members' activities with respect to the maintenance petition do not meet the ***Marris*** standard for bias. The dissolution petition had been resolved well before the maintenance petitions were decided, so Kehl's and Sagen's support for that matter is inconsequential. Their support for the suspension petitions did not occur until after the maintenance petitions had been denied. While Dietzler's participation in securing signatures for the suspension petition was hardly ideal given the Board's rationale for denying the maintenance petitions, such activity was not prohibited by statute. The fact that it occurred prior to Dietzler's appointment by the circuit court—and was therefore presumably known to the circuit court—compels the conclusion that Dietzler did not prejudge the matter. In short, there is nothing in the record, and certainly nothing cited by the Murphys, demonstrating the decision on the Murphys' maintenance petitions was the product of impermissible bias or an improper rationale. Rather, the Board's decision shows it acted with the interests of an apparent supermajority of District landowners in mind.

II. Suspension Petitions

¶50 The Murphys also appeal the Board's decision to grant the suspension petitions. They first argue the Board erred in finding that the requisite number of landowners signed the petitions, asserting the Board could not, as a matter of law, (1) consider signatures of an "agent" without a separate filing setting forth the agent's authority, and (2) consider signatures on petition pages that were not signed by the circulator. Second, the Murphys argue the Board lacked statutory authority to supplement the record, at least not without additional

notice and a hearing. Third, they assert the Board erred by concluding there were no "existing obligations" that would have prohibited the entry of a suspension order. Fourth, in their reply brief, the Murphys contend recent changes to WIS. STAT. ch. 88 require reversal of the Board's action in granting the suspension petitions.[18] We regard all of these as challenges to the Board's application of the correct legal standard. Finally, the Murphys assert the Board was biased and improperly acted as an advocate rather than a factfinder. We regard this as a challenge that the Board's decision was arbitrary and unreasonable.

A. The Board proceeded on a correct theory of law.

¶51 The Murphys first contend the Board erred by concluding that "owners of land representing 67% or more of the confirmed benefits in a drainage district" had signed the suspension petitions, a condition necessary to suspend the District. *See* WIS. STAT. § 88.81(1)(b), (2). The Murphys reason that, pursuant to WIS. STAT. § 88.04(1), any person who signed the suspension petitions in an agency capacity was required to file with the Board a document demonstrating that authority. The Murphys assert that 23.94% of the confirmed District benefits involved the signature of an "agent" and any such signatures cannot be counted as

[18] The Murphys observe that WIS. STAT. ch. 88 was amended in 2015 to prohibit new suspension petitions on or after July 14, 2015. *See* WIS. STAT. § 88.81 (2013-14), *amended by* 2015 Wis. Act 55, § 2596g (eff. July 14, 2015) (adding subsection (5)). They argue that, given the revisions, the Board is required to make a finding that the public welfare will not be promoted by the reinstatement of district operations, *see* 2015 Wis. Act 55, § 2596i, and that the contrary proposition is a matter of issue preclusion given our earlier opinion concerning dissolution of the District. We decline to address this argument for several reasons. Most notably, the argument was first developed in the Murphys' reply brief. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256 (appellate courts do not consider arguments raised for the first time in a reply brief). In addition, our task on certiorari review is to review the Board's decisions, which predate the amendments to ch. 88. Accordingly, the effect of those amendments is a matter beyond the scope of our review and irrelevant to our analysis.

a matter of law without such an individual having filed a form as required by § 88.04(1). Second, the Murphys argue that pursuant to WIS. STAT. § 8.40(2), each page of a suspension petition requires the name of the circulator. The Murphys assert signatures comprising 13.40% of the District's confirmed benefits were invalid on this ground.

¶52 Beginning with the Murphys' latter argument, we reject their attempt to insert WIS. STAT. § 8.40(2) into the drainage statutes. Subsection 8.40(2) states that the certification of a qualified elector "shall appear at the bottom of each separate sheet of each petition specified in sub (1)." Subsection 8.40(1), in turn, applies to "each separate sheet of each petition for an election, including a referendum." A suspension petition filed under WIS. STAT. § 88.81 is not a petition for an election or a referendum. The Murphys also invoke WIS. STAT. § 9.20(2), which requires that direct legislation petitions requesting that a city or village adopt a proposed ordinance or resolution conform to § 8.40. *See* § 9.20(1). Suspension petitions under WIS. STAT. § 88.81 are not direct legislation petitions, and the Murphys acknowledge the § 8.40(2) certification requirement is not found anywhere in WIS. STAT. ch. 88. Whatever the merits of the Murphys' assertion that it is a "commonsense requirement to ensure the accuracy and authenticity of the signatures," the legislature chose not to impose such a requirement for petitions under ch. 88.

¶53 We turn, then, to the Murphys' assertion that the suspension petition signatures were inadequate in number given their belief that nearly twenty-four percent of signatures on the petitions were made by "agents." WISCONSIN STAT. § 88.04(1) provides that "[a]ny person entitled to sign a petition to the court or the drainage board under this chapter may sign through an agent." The statute goes on to state that the "authority of the agent shall be in writing and shall be filed with

the drainage board but need not be acknowledged, sealed or witnessed." ***Id.*** "Agent" is not defined, but the Murphys assert the statute covers a plethora of situations, such as when persons sign for a business, on behalf of multiple owners, or in a representative capacity (i.e., an estate or guardianship).

¶54 The Board responds that "the Murphys read too much into [WIS. STAT. § 88.04(1)'s] generalized rules." The Board argues the statute is limited to natural persons because legal entities such as businesses not only "may" sign through an agent, but *must* sign through an agent. According to the Board, agency under § 88.04(1) is limited "to individuals, for example, [who] have formal powers of attorney in place, or those situations where a father, for example, who owns District lands wants some other family member to sign on his behalf." The Board believes this interpretation is in line with the remainder of the statute, *see* § 88.04(2) (allowing guardian or next of kin to sign petitions on behalf of minors or individuals adjudicated incompetent), and the law of implied agency, *see* ***Mared Indus., Inc. v. Mansfield***, 2005 WI 5, ¶31, 277 Wis. 2d 350, 690 N.W.2d 835.

¶55 The Board also argues that even if a filing of agency authorization was required under WIS. STAT. § 88.04(1), the Board nonetheless cured any deficiencies by supplementing the record under WIS. STAT. § 88.032(2). That subsection provides, in relevant part, that "[a]ny document or paper filed or entered in a proceeding before the drainage board may at any time be amended, modified or corrected by the drainage board as the facts warrant and upon such notice as the drainage board orders." The Board notes that following the October 5, 2013 suspension hearing, the Board advised the Murphys it had obtained corporate agency and co-owner acknowledgements, even though it did not believe such documents were legally required. The Murphys find this

supplementation of the record inadequate because it was done without notice to the Murphys and they believe the agency forms the Board used were inadequate.

¶56 We generally agree with the Board's interpretation of WIS. STAT. § 88.04(1) as not requiring an agency filing under all the circumstances argued by the Murphys. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting ***Seider v. O'Connell***, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659). In general, statutory language is given its common, ordinary and accepted meaning. ***Id.*** "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46.

¶57 We first conclude WIS. STAT. § 88.04(1) does not apply to legal entities like those proposed by the Murphys (i.e., businesses, associations, and partnerships). Subsection 88.04(1) provides that any *person* entitled to sign a drainage petition may sign through an agent. "Person" includes "all partnerships, associations and bodies politic or corporate." WIS. STAT. § 990.01(26). Business entities that own land within the District are entitled to sign a drainage petition, just as any individual would be. Corporations and similar entities, however, cannot physically sign a petition; an individual must do it for them. This does not mean the individual, if someone with authority to act on behalf of the entity (such as an officer or director), is necessarily signing as an "agent" of the entity under § 88.04(1); rather, the person's signature represents that of the entity itself. *See* ***City of Kiel v. Frank Shoe Mfg. Co.***, 245 Wis. 292, 297, 14 N.W.2d 164 (1944) (Corporate officers and directors are agents in the sense that they act for the

corporation, but as "the only human agency through which a corporation can act," the officer is also the "alter ego of the corporation."). This is contrasted with instances in which a business entity signs through an agent who would not normally be able to legally bind the entity. In addition, it would be unreasonable to interpret § 88.04(1) as requiring that businesses and like entities file an agency authorization with the Board for each individual already legally entitled to act as the entity's alter ego in order for their petition signature to be valid.

¶58 We also conclude WIS. STAT. § 88.04(1) has no application where one of multiple property owners signs a petition under WIS. STAT. ch. 88. One owner is entitled to take unilateral actions affecting a property under common ownership, barring another owner's objection. *See* ***O'Connell v. O'Connell***, 2005 WI App 51, ¶15, 279 Wis. 2d 406, 694 N.W.2d 429 (holding that "Wisconsin does not require that other tenants approve" of improvements to real property and that, in the absence of evidence to the contrary, it "may be presumed that an act by one co-tenant favorable to all was done either with the knowledge and assent" of the other owners or they thereafter ratified it); *cf.* ***Winston v. Minkin***, 63 Wis. 2d 46, 51, 216 N.W.2d 38 (1974) ("The signing of the [listing] contract by but one of the co-owners of the property involved is sufficient to bind the subscriber thereto to payment of the commission previously agreed to."). "[A] statute does not abrogate a rule of common law unless the abrogation is clearly expressed and leaves no doubt of the legislature's intent." ***Fuchsgruber v. Custom Accessories, Inc.***, 2001 WI 81, ¶25, 244 Wis. 2d 758, 628 N.W.2d 833. Nothing in § 88.04(1) demonstrates the legislature's intent to abrogate the common law rule set forth above.

¶59 Having concluded that WIS. STAT. § 88.04(1) does not require an agency filing where a business or similar entity or one of multiple owners of a

single property signs a petition, we need not further determine whether an agency filing was required under other circumstances identified by the Murphys (i.e., individuals signing in a representative capacity). The Murphys' claim is that under their interpretation of the statute, signatures representing 23.94% of the confirmed benefits in the District are invalid under § 88.04(1). That, however, is the total percentage under all of the three "categories" (i.e., businesses, co-owners, and those acting in a representative capacity) the Murphys propose under their interpretation of § 88.04(1). The Murphys do not explain what percentage of confirmed benefits in the District is attributable to each individual category. As a result, even if the Murphys are correct that those acting in a representative capacity are "agents" under § 88.04(1), they fail to demonstrate the number of signatures fell below the sixty-seven percent threshold established by WIS. STAT. § 88.81(1)(b), given our conclusion that § 88.04(1) does not apply to business entities or co-owners.

¶60 In any event, we also conclude the Board acted within its authority and according to law by taking additional efforts to satisfy itself that the concerns expressed by the Murphys regarding the total percentage of confirmed benefits represented in the petitions were unfounded. We reach this conclusion without regard to the Board's argument that its posthearing conduct accomplished a permissible amendment, modification, or correction of the petitions under WIS. STAT. § 88.032(2). Rather, as a creature of the legislature, the Board, like a municipal body, has such powers as are "expressly conferred upon [it] by the legislature or are necessarily implied from the powers conferred." *See* ***Willow***

Creek Ranch, L.L.C. v. Town of Shelby, 2000 WI 56, ¶17, 235 Wis. 2d 409, 611 N.W.2d 693.[19]

¶61 It is the Board's duty upon receipt of a suspension petition to fix a time and place for a public hearing on the petition. *See* WIS. STAT. § 88.81(1)(c). The statutes require that any objections to the sufficiency or legality of a petition be set forth clearly, in detail, and in writing prior the hearing. *See* WIS. STAT. § 88.05(2)(b)6. As this case illustrates, given this statutory procedure, a district board may not have sufficient time to conduct a thorough and detailed analysis of any objections prior to the hearing on a petition. This, coupled with the fact that nothing in the suspension statute or elsewhere precludes a board from taking further action to address objections raised at the hearing after reaching a decision, persuades us that the authority to do so is implied within the statutory authority given to the Board to consider suspension petitions.

¶62 The Murphys next assert the Board erred by granting the suspension petitions because the Murphys' maintenance petitions and the Board's duty to provide drainage according to DATCP specifications were "existing obligations" that fell outside the scope of suspension orders. As an initial matter, we note the maintenance petitions were decided long before the suspension petitions, and therefore, even under the Murphys' interpretation of WIS. STAT. § 88.81(2), the maintenance petitions themselves could not have been an "existing obligation" at the time the suspension petitions were granted. But more generally, this argument

[19] For this reason, contrary to the Murphys' argument, we conclude the Board's posthearing powers are not strictly confined to amendment, modification, or correction of documents under WIS. STAT. § 88.032. That provision does not prohibit the Board from taking other actions consistent with its implied powers.

tracks the argument the Murphys made with respect to their maintenance petitions, and we reject it for the reasons previously stated. *See supra* ¶¶34-42.

B. The Board's decision was not arbitrary or unreasonable.

¶63 The Murphys generally reprise the same bias arguments associated with their maintenance petitions, which we have rejected. *See supra* ¶¶46-49. However, they highlight Dietzler's participation in the matter as a circulator of the suspension petitions, and note that Dietzler also seconded the motion to suspend at the October 5, 2013 hearing. The Murphys argue that under ***Guthrie v. WERC***, 111 Wis. 2d 447, 331 N.W.2d 331 (1983), fundamental fairness required that Dietzler take "no part" in the decision. *See* ***id.*** at 459 (quoting ***Trans World Airlines, Inc. v. Civil Aeronautics Bd.***, 254 F.2d 90, 91 (D.C. Cir. 1958)). While, again, the better course would have been for Dietzler to abstain from participating, there was no contemporaneous objection to her participation at the October 5 hearing. Further, the Board vote to suspend was unanimous, and upon finding the requirements under WIS. STAT. § 88.81(2) were satisfied, the Board had no choice but to suspend the District. Under these circumstances, we conclude Dietzler's participation was inconsequential and did not run afoul of the constitutional guarantee of due process.

¶64 The Murphys also argue Board members acted as proponents of the suspension petitions in addition to their role as factfinders. The Murphys apparently draw this conclusion because the attorney who filed the suspension petitions on behalf of the District landowners did not appear at the suspension hearing to argue the petitions satisfied the standards under WIS. STAT. § 88.81. The transcript of the October 5, 2013 hearing demonstrates it was not an adversary hearing. Rather, the Board simply treated it as an opportunity for public comment

on the petitions, and attorney Bierma (the Murphys' counsel) was given the same opportunity to speak as members of the public. At the hearing, Kehl explained he had taken the initial responsibility to determine the sufficiency of the petitions on the Board's behalf. Kehl explained his methodology and conclusions, and other Board members questioned him regarding these matters before the Board voted. These circumstances do not demonstrate that any Board member impermissibly acted as both advocate and factfinder, but rather they dealt with the pending suspension petitions in the manner required of the Board.

¶65 Finally, the Murphys suggest the Board's decision to address their objections after the conclusion of the suspension hearing somehow demonstrates bias. We agree with the circuit court's analysis that the Board's investigation into the Murphys' concerns during the "dead time" between the October 5, 2013 hearing and the lifting of the stay was "not only allowable and reasonable" but "commendable." Indeed, our review of the totality of the substantial record in this case demonstrates the Board acted in an appropriate deliberative fashion even while navigating highly contentious issues. The Board's conclusions were reasonable based on the evidence before it, and there is insufficient evidence of bias to warrant reversal on that basis.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).