IN THE SUPREME COURT OF IOWA

Supreme Court No. 23-0958
Franklin County Case No. CVCV0501944

MARABELLE ANN 'LE' ABBAS, MARABELLE ABBAS TRUST, MATTHEW ABBAS, HARLAND DUANE ABBAS TRUST, PATRICIA F. HANSON, PATRICIA HANSON, TEN-K FARMS, INC., BRUCE D. REID and LYNETTE MEYER, ROY AND NEVA STOVER TRUST,
Plaintiffs-Appellants
vs.
FRANKLIN COUNTY BOARD OF SUPERVISORS, MIKE NOLTE, GARY McVICKER, CHRIS VANNESS, as Trustees of Drainage District Number 48, and FRANKLIN COUNTY DRAINAGE DISTRICT NUMBER 48,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF FRANKLIN COUNTY
HONORABLE JUDGE RUSTIN DAVENPORT

APPELLANTS' REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

GOODWIN LAW OFFICE, P.C.
Robert W. Goodwin, AT0002986
2211 Philadelphia Street, Suite 101
Ames, Iowa 50010-8767
Phone: (515) 232-7390
Fax: (515) 232-7396
E-mail: goodwinlawoffice@fbx.com
ATTORNEY FOR PLAINTIFFS-APPELLANTS

George A. Cady III, AT0001386
Cady & Rosenberg Law Firm, P.L.C.
9 First Street SW
PO Box 456
Hampton, Iowa 50441
Phone: 641-456-2555
Fax: 641-456-3315
Email: acady@cadylaw.net
Attorney for Defendants/Appellees

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STATEMENT OF FACTS

The facts in this case have been in flux. In 1905, Drainage District 1 (DD1) was established. DD1 put in a 5-mile open ditch across 26,000 acres in Franklin County, Iowa. In 1916, DD1 ceased to be. It no longer existed. In 1916, DD1 left, abandoned, the open ditch. Exhibit 18 P. 1 and Exhibit 1. App. V.I-PP. 490, 493-499.

In 1916, Drainage District 48 (DD48) was established. In 1916, DD48 replaced DD1's northern, upstream, 3.1-mile open ditch with a main tile with dirt cover, and 35 lateral tiles. The ground above the main tile became productive crop ground, which on February 1, 1937 was returned to the county tax rolls by the Franklin County Board of Supervisors. Exhibit 17. App. V.I-P. 488.

In the 1990's, DD48 had a repair project of a shallow surface waterway put above the main tile. That was a failed repair because, with the shallow dirt covering above the main tile, it resulted in blowouts of the main tile due to freeze and thaw. Tr. P. 20 l. 1 to P. 21 l. 11.

In 2017, DD48 removed the existing main tile, above which the ground was able to be farmed or crossed with farm equipment. The main tile was replaced with an open ditch that causes severance damages to the Plaintiffs' property, because farm

equipment cannot cross the open ditch. The Trial Court erred in Ruling that the Plaintiffs cannot recover severance damages on the ground that DD48 has an easement for an open ditch.

Franklin County, in its Statement of Facts, does not accurately recount the record in this case. On page 6 of its Statement of Facts, Franklin County incorrectly says "It was at the time (1916) that the Drainage District changed the number of the district from District 1 to Drainage District 48."

There was not a change of number of the drainage districts. In 1916, DD1 no longer existed, it ceased to exist. In 1916, a new drainage district, DD48, was established.

Donald Etler, the Plaintiffs' drainage engineer and expert witness, testified as follows:

> "And they (landowners) petitioned in 1916, I believe it was, for – to establish a new drainage district. That would be Drainage District 48." Tr. P. 156 ll. 14-16.

DD48's 1990 Engineer's Report, Exhibit 10, on page 1 states:

> "Drainage District No. 1, established 11 years earlier, which was abandoned after the establishment of DD48." App. V.I-P. 290.

The November 2, 1916 Engineer's Report for DD48 attached to Exhibit 18 states:

> "I would recommend that the land within the watershed as marked on the plat, accompanying this report, be formed into a drainage district (DD48) ..." App. V.I-P. 493.

When DD48 was established in 1916, DD48 had the jurisdiction and control of the land in DD48. In accord with what is now Section 468.22, Code of Iowa, the Board "may locate and establish the said district in accordance with the recommendation of the engineer and the report and plans on file". (Emphasis added.)

As Donald Etler, the drainage engineer expert witness for the Plaintiffs, testified and showed in his Report, Exhibit 18 page 2, and the thereto attached Exhibit 1 which is Engineer Mack's Report with the recommendation of Engineer Mack in 1916, and the report and plans on file in 1916, all provide for the abandonment of the north 3.1 miles of open ditch, and replacing it with a main tile line with dirt cover and 35 lateral tiles. App. V.I-PP. 491, 493.

Under Section 468.27, Code of Iowa, DD48 has the right of way for the main tile line and 35 lateral tiles "in the dimensions shown on the (1916) survey and report made" and "the survey, plat, and profile". DD48 does not have an easement for a

ditch because the 1916 survey, report, plat, and profile is for a main tile line with dirt cover and 35 lateral tiles, and is not for the open ditch.

The November 2, 1916 Engineer's Report attached to Exhibit 18 states in pertinent parts as follows:

> "I find that the condition of DD#1 is as described in the petition – inadequate, insufficient and out of repair. The open ditch is not sufficiently deep to efficiently drain much of the land tributary to it.
> I would recommend that the land within the watershed as marked on the plat, accompanying this report be formed into a drainage district and that the main and laterals, with starting point, routes and termini as given below be constructed.
> . . .
> Main Drain
> I would recommend that the main drain of the district follow the main ditch of DD1 throughout its entire length.
> . . .
> I would recommend that the construction work on the main consist of cleaning the old ditch the old ditch from station O to Sta. 92 and laying of tile of the sizes given in the estimate from station 92 to station 255." (Emphasis added.) App. V.I-P. 493.

There was a "surface relief" in 1916 above DD48's main tile. Mr. Etler testified that the "surface relief" area above DD48's main tile in 1916 was not an improvement of DD48 that was to be maintained by DD48. Tr. P. 65 l. 4 to P. 170 l. 14. The "surface relief" was not described in the notice of the establishment of DD48. Tr. P. 165 ll. 16-19. There were no dimensions, grade line, and side slopes

for the "surface relief" which are needed to make it an improvement of DD48. Tr. P. 166 l. 25 to P. 167 l. 18.

Mr. Etler's testimony and his Report, Exhibit 18, show that DD48 abandoned the 3.1 miles of open ditch that DD1 had put in, and DD48 replaced the 3.1 miles of open ditch with a main tile line with dirt cover and 35 lateral tile lines.

> "Exhibit 1 is the full Second Report of Engineer Mack. Sheet 1 of 6 includes his recommendation for the Main Drain (tile) to replace the upper 3 (3.1) miles of the main open ditch with the same tile recommended in the first report ranging in size from 32" to 14"". Exhibit 18, p. 2. App. V.I-P. 491.
>
> "What is telling to me is that for the hearings the engineer has not provided any design information regarding the possible surface drain. He had not provided a bottom width, side slopes, or a complete grade line. He has not provided any information on design capacity and is clearly willing to sacrifice capacity to assure a minimum cover over the tile.
> . . .
> The notice does not mention a surface drain facility as one of the improvements and a surface drain is not noted in the minutes." Exhibit 18, p. 2. App. V.I-P. 491.
>
> "It is my opinion that the district had no surface drain after the 1916 work and that the open ditch was legally filled in over time. It is my opinion that in 1937 the board of supervisors were correct in abandoning the right of way as there was no remaining district facility to occupy it." Exhibit 18, p. 3. App. V.I-P. 492.

DD1 did not have an easement for the right of way of the open ditch in 1905 because Section 468.27, Code of Iowa, did not exist until 1985.

In 1916, DD1 ceased to exist. In 1916, DD1 left and abandoned the open ditch.

In 1916, DD48 was formed. DD48, in 1916, discontinued, abandoned the northern, upstream, 3.1 miles of open ditch of the former DD1, and replaced the 3.1 miles of open ditch with a main tile with dirt cover and 35 lateral tiles.

It is to be noted that the 1985 Law, now in the last paragraph of Section 468.27, Code of Iowa, in pertinent part provides as follows:

> "Following its establishment, the drainage district is deemed to have acquired by permanent easement all right-of-way for drainage ditches, tile lines, settling basins and other improvements, unless acquired by fee, in dimensions shown on the survey and report made in compliance with Sections 468.11 and 468.12 or as shown on the permanent survey, plat, and profile, if one is made." (Emphasis added.)

DD48, under Section 468.27, has never had an easement for a drainage ditch – as was constructed in DD48's 2017 Open Ditch Project – because DD48 never had a survey, report, plat, or profile for a drainage ditch. To the contrary, DD48 only has an easement for a main tile and 35 lateral tiles from its 1916 survey, report, plat, or profile for a main tile and lateral tiles. Again, DD48 abandoned the open ditch of DD1 in 1916 when DD48 replaced the open ditch with a main tile with dirt cover and 35 lateral tiles, and allowed the adjoining landowners to add more fill dirt and row crop the area above the main tile.

The Board of Supervisors returned the land above the main tile back onto the tax rolls in February 1, 1937 because it was productive farm ground. Exhibit 17. App. V.I-P. 488.

The intent of DD48 to abandon the open ditch of former DD1, was shown by the 1916 plans, plats, survey, and report of DD48 to replace the open ditch with a main tile with dirt cover, and 35 lateral tiles. The act of relinquishment of the open ditch was the installation of the main tile, with dirt cover, and 35 lateral tiles, which resulted in more dirt cover with the area above the main tile being productive crop ground.

The County, on page 10 of its Statement of Facts, points out that the appraisers for the county did not consider severance damages for the Plaintiffs' lands except where the construction of DD48's 2017 Open Ditch Project left the ground landlocked.

Ted Frandson, Plaintiffs' Appraiser and expert witness, testified that not only is there severance damages if some ground is landlocked, but there is severance damage to land with a ditch running through the ground without the ground being landlocked. Tr. P. 81 l. 8 to P. 83 l. 3.

The County, on page 11 of its Statement of Facts, cites the case of Hicks v. Franklin County Auditor, 514 N.W.2d 431 (Iowa 1994). The Hicks case involved DD48's 1990 repair project to have a shallow surface waterway above the main tile. The shallow surface waterway was to be farmable. The issue in the Hicks case was whether the project was an improvement or a repair. The Court determined the 1990 project was a repair.

The Hicks case did not have the benefit of the testimony and Exhibit 18 of Donald Etler that explains the formation of DD48 in 1916, and Engineer Mack's Report and Plans to replace the 3.1 miles of open ditch with a main tile, dirt covered, and 35 lateral tiles.

Plaintiffs' Exhibits 10, 11, and 12 pertain to DD48's 1990 shallow surface waterway repair project. It is the unrebutted testimony of Bruce Reid that DD48's engineer, Brent Johnson, in 1990 stated that the shallow surface waterway above the main tile was to be farmable. Tr. P. 17 l. 21 to P 19 l. 25. However, DD48's 1990 shallow surface waterway repair project was a failed repair project. The shallow surface waterway above the main tile was not able to be farmed. It could be crossed with farm equipment, but it was too we to be farmed. Tr. P. 20 l. 1 to P. 21 l. 11.

Hanson and Abbas were not involved in the Hicks case. Reid-Meyer were involved in the Hicks case, which provided compensation to Reid-Meyer for the larger right of way for the repair project of a farmable shallow surface waterway. Reid-Meyer were not paid any severance damages under the Hicks case because the shallow surface waterway was to be farmable with no severance of the land.

Hanson and Abbas, who were not involved in the Hicks case certainly were not paid any severance damages under the Hicks case.

Hanson, Abbas, and Reid-Meyer are entitled to severance damages from DD48's 2017 Open Ditch Project which has severed the Plaintiffs' lands.

The County, on page 11 of its Statement of Facts, states:

> "The Court concluded that there was never a formal action by Drainage District 48 to abandon its rights concerning the area of land that was sued for drainage."

The actual statement of the Trial Court is as follows:

> "Under the current code, Code § 468.29 set forth a formal procedure for dissolution of a drainage district. This section was adopted in 1924. Since the date that this statute has been in effect, no formal action has been taken to dissolve Drainage District No. 48. None of the necessary notices were sent to any of the landowners in the area regarding any relinquishment of rights by the drainage district." App. V.I-P. 228.

The errors of the Trial Court in the above quoted language are as follows:

- There were no formal procedures in place in 1916 for dissolution for DD1.
- Permanent easements for right of way for drainage districts did not exist in 1905 to 1916. It was not until the 1985 Law, which is now the last part of Section 468.27, Code of Iowa, that drainage districts are deemed to have an easement in accord with their survey, report, plat, and profile.
- In 1916, which is before 1924, DD1 ceased to exist. DD1 no longer existed after 1916.
- DD48 was established in 1916.
- The County, in its Statement of Facts on page 6, states:

  "In 1916, the landowners wanted tile lines to drain their water to the ditch (the southern 2.0 miles of ditch) and petitioned to establish a new district which would have been (which is) Drainage District 48." (Emphasis added.)

- Mr. Etler testified that "they (landowners) petitioned in 1916, I believe it was, for – to establish a new drainage district. That would be Drainage District 48." Tr. P. 156 ll. 14-16.

- There has been no effort to dissolve DD48 as stated by the Trial Court.
- DD1 no longer existed in 1916. In 1916, DD1 left and abandoned the open ditch. In 1916, DD48 was formed. In 1916, DD48 discontinued and abandoned the open ditch of the northern, upstream, 3.1 miles of the former DD1. DD48 replaced the open ditch with a main tile with 35 lateral tiles that were covered with dirt and the land above the main tile became productive crop ground.
- DD48 never had a plan, plat, survey, profile, or report to establish a ditch. To the contrary, DD48 in 1916 had a plan, plat, survey, profile, and report to abandon the open ditch, and replace it with a main tile and 35 lateral tiles, which, under Section 468.27, Code of Iowa, gives DD48 an easement for the main tile line and 35 lateral tiles, but <u>not</u> for an open ditch. Tr. P. 164 l. 5 to P. 170 l. 14, Exhibit 18 and its attachments. App. V.I-PP. 490-499.

ARGUMENT

Issue I
THE TRIAL COURT ERRED IN RULING THAT DD1 AND/OR DD48 HAS AN EASEMENT FOR A DITCH RIGHT OF WAY WHICH REDUCES PLAINTIFFS' DAMAGES

Plaintiffs' Reply To County's Argument

On page 14 of its Brief, the County states the easement area that the drainage district acquired in 1906 for the open ditch was always used for drainage purposes up until the present day. That is a misleading statement.

There is a significant difference between a tile line and an open ditch. The land above the tile line can be farmed. An open ditch removes land from being farmed and creates severance damages, and prevents farm equipment from crossing over the open ditch.

In 1916, DD48 abandoned and replaced what had been 3.1 miles of DD1's open ditch with a main tile with dirt cover and 35 lateral tiles. Fill dirt was put in over the main tile. The adjoining landowners, obviously with the knowledge and consent of the Board of Supervisors, completely filled more dirt in the area above the main tile line making it productive crop ground.

The County's Brief, on page 15, cites § 1989-a25, Code of Iowa 1907. § 1989-a25 addresses the situation where an existing drainage district is insufficient

to drain the land tributary thereto. The Board can then establish a new larger drainage district to include the tributary land with the existing drainage district.

In regard to DD1, there is no tributary stream or area that flowed into DD1, to be included with DD1 to have a new larger drainage district.

To the contrary, DD1 ceased to exist in 1916. DD48 was established in 1916. DD48, in 1916, abandoned the north 3.1 miles of open ditch that had been in DD1, and replaced the open ditch with a main tile with dirt cover and 35 lateral tiles.

The controlling issue in this case is whether DD48 in 2017 has a permanent easement for an open ditch across the Plaintiffs' lands. The answer to that question is no. DD48 did not, and does not, have a permanent easement for an open ditch across the Plaintiffs' land. Therefore, the Plaintiffs are entitled to severance damages, and compensation for the taking of additional right of way on both sides of the open ditch.

DD48 does not have a permanent easement across the Plaintiffs' lands because:

- In 1905, DD1 was established. It had an open ditch constructed in 1906 roughly north and south through 26,000 acres.
- In 1916, DD1 ceased to exist. It no longer existed.

- In 1916, landowners petitioned for a new drainage district to be formed, i.e., DD48, with the northern 3.1 miles of open ditch upstream to be abandoned and replaced with a main tile covered with dirt and 35 lateral tiles.
- In 1916, DD48 had a plan, profile, plat, survey, and report for a main tile covered with dirt and 35 lateral tiles.
- In 1916, DD48 did not have a plan, profile, plat, survey and report for an open ditch.
- In 1990, DD48 had a shallow surface waterway repair project that took additional right of way for the farmable surface waterway repair project.
- In 1990, DD48 did not have a plan, profile, plat, survey or report for an open ditch.
- In 1990, DD48 did not pay any severance damages. The land above the main tile was to be farmable, which is not a severance of land.
- In 1985, the last paragraph of Section 468.27, Code of Iowa, came into effect. It provides, in pertinent part, as follows:

"Following its establishment, the drainage district is deemed to have acquired by permanent easement all right of way for drainage district ditches, tile lines … in the dimensions shown on the survey and report made … or as shown on the permanent survey, plat, and profile, if one is made."

- Under Section 468.27, Code of Iowa, DD48 is not deemed to have any easement for right of way of any drainage ditches because DD48 does not have any survey, report, plat, or profile for a drainage ditch. Instead, DD48 is deemed to have an easement for a main tile line and 35 lateral tiles, because the main tile line and lateral tiles are in the survey, report, plat, plan, and profile for DD48.
- Under Section 468.27, Code of Iowa, since DD1 no longer exists, it cannot be deemed to have any easement for an open ditch.
- Moreover, and determinative of the issue, DD48 abandoned the 3.1 miles of open ditch that DD1 had, and replaced it with a main tile line covered with dirt and 35 lateral tiles.

On page 17-18 of its Brief, the County argues that in 1990 DD48 attempted a ditch above the tile line "similar to the one that would have existed following the 1917 construction." That is a misleading statement. In 1916 DD48 did not have a survey, report, plat, or profile for an open ditch nor any surface waterway. Instead,

in 1916, it had a survey report, plat, plan, and profile for a main tile with dirt cover and 35 lateral tiles.

The key and controlling factor in this case is that in 1916 DD48 abandoned the north 3.1 miles of open ditch and replaced it with a main tile line with dirt cover and 35 lateral tiles, and DD48 allowed the area above the main tile line to become productive crop ground. As Mr. Etler testified, the spoil piles from the 1906 excavation were left. When equipment became available, the area above the main tile was filled in, undoubtedly with the knowledge and consent of the Board of Supervisors. Tr. P. 159 l. 1 to P. 160 l. 15; P. 161 ll. 12-14; P. 168 l. 18 to P. 170 l. 14.

> "So these landowners, when – when equipment became available 10 years, 20 years down the road, they privately filled in these surface drains by pushing the spoil dirt – the spoil piles into it.
>
> And this happened, I mean, only 20 years. It happened quite quickly. And I guess what – what confirms this to me then is the affidavit of LaVerne Oleson in Supreme Court case – or the Franklin County district case, where he helped his neighbor, Harley or Ed Hanson, fill in the ditch under the direction of the county engineer, using county equipment, I assume.
>
> Well, the board of supervisors had to have known if the county engineer was filling in this ditch or was okay – authorizing people to fill in the ditch. And the people that were filling the ditch, they're the ones that most were – benefitted from having that surface relief there, and they were filling it in. They were – they were exchanging productive farm ground for – by – or acquiring additional productive farm ground by filling in this ditch.

> The supervisors not – There's nothing in the records of anyone complaining about the surface ditch being filled in. And the landowners certainly would have known; and I – I find it hard to believe, after reading all the minutes from 1929 to 1942, that the board of supervisors would not have known that. There's nothing specific with – regarding 48 in those minutes; but the Board is constantly involved in maintaining drainage district facilities, and they would have known that you don't fill in a surface drain that you have established as a permanent district facility." Tr. P. 169 L. 3 to P. 170 l. 6.

The clear and convincing proof of DD48's intention to abandon the 3.1 miles of DD1's open ditch, is DD48's 1916 plan, profile, plat, survey, and report to replace the 3.1 miles of ditch with a main tile with dirt cover and 35 lateral tiles. The proof of the abandonment of the open ditch is the installation of the main tile line with dirt cover, the 35 lateral tiles, and the area above the main tile line becoming productive crop ground with the knowledge and consent of the Board of Supervisors.

> "We have recognized an established an established highway or right of way may be abandoned by the public and its rights lost. Pearson v. City of Guttenberg, 245 N.W.2d 519, 529 (Iowa 1976); see also 2 Byron K. Elliott & William F. Elliott, The Laws of Roads and Street § 1174, at 1670 (4th ed. 1926). Similarly, rights under an easement may be lost by abandonment. Polk County v. Brown, 260 Iowa 301, 306, 149 N.W.2d 314, 316 (1967). There is a presumption, however, that once a highway is shown to exist, it continues to exist, and any abandonment must be proven by clear and satisfactory evidence. Sterlane v. Fleming, 236 Iowa 480, 483, 18 N.W.2d 159, 161 (1945); 39 Am.Jur.2d Highways, Streets, & Bridges § 158, at 692 (1999).
> . . .
> ; Abandonment occurs because an owner no longer desires to possess the property. Sioux City v. Johnson, 165 N.W.2d 762, 767 (Iowa 1969). In order to prove abandonment, actual acts of relinquishment accompanied by an intention to abandon must be shown. Town of Marne v. Goeken, 259 Iowa

1375, 1382, 147. N.W.2d 218, 224 (1966)." Allamakee County v. Collins Trust, 599 N.W.2d 448, 451 (Iowa 1999).

Summary

In 1916, DD1 ceased to exist. DD1 abandoned and left the 3.1 miles of open ditch apparently to DD48. In 1916, DD48 abandoned, forsook, and renounced the 3.1 miles of open ditch and instead exchanged it for, replaced it with, a main tile with dirt cover and 35 lateral tiles. DD48 does not have an easement for an open ditch, because instead DD48 in 1916 had a survey, report, plat, and profile of a main tile and 35 lateral tiles. DD48 under Section 468.27, Code of Iowa, has a permanent easement for a main tile and 35 lateral tiles. DD48 does not under Section 468.27, Code of Iowa, have an easement for an open ditch.

This Court is respectfully requested to rule that in 1916 DD48 abandoned the 3.1 miles of open ditch of DD1 and replaced the open ditch with a main tile with dirt cover and 35 lateral tiles. In 1916 DD48 filed a plan, plat, survey, profile and report for a main tile with dirt cover and 35 lateral tiles. Therefore, under Section 468.27, Code of Iowa, DD48 has a permanent easement for a main tile and 35 lateral tiles. DD48 did not file a plan, plat, survey, profile or report for an open ditch. Therefore, under Section 468.27, Code of Iowa, DD48 does not have a permanent easement for an open ditch.

The Plaintiffs are entitled to recover severance and damages and damages for the right of way needed for DD48's 2017 Open Ditch Project.

This Court is respectfully requested to hold that the Plaintiffs are entitled to recover severance damages because DD48 has no easement for a ditch and that the Plaintiffs are also entitled to recover damages for the land taken for DD48's 2017 Open Ditch Project.

Issue II
THE TRIAL COURT ERRED IN COMPUTING PLAINTIFFS' DAMAGES WITHOUT A REASONABLE BASIS

Plaintiffs' Reply To County's Argument

As discussed in Issue I above, the Trial Court erred in ruing that DD48 has an easement for an open ditch across the Plaintiffs' properties. DD1 ceased to exist in 1916. DD1 in 1916 left and abandoned the open ditch that it had. DD48 was established in 1916. In 1916 DD48 abandoned the 3.1 miles of open ditch that DD1 had, and replaced it with a main tile covered with dirt and 35 lateral tiles. In 1916 DD48 had a plan, plat, profile, survey, and report for its main tile and 35 lateral tiles. In 1916, DD48 did not have a plan, plat, profile, survey, and report for a ditch. Therefore, now pursuant to Section 468.27, Code of Iowa, DD48 has an easement

for a main tile and 35 lateral tiles. But, DD48 does not have an easement for a ditch because it never had a plan, plat, profile, survey, and report for a ditch.

The open ditch from DD48's 2017 Open Ditch Project causes severance damages to the Plaintiffs' lands, which had productive crop ground above DD48's main tile since at least February 1, 1937, and which was to be farmable after the 1990 repair project that was a failure.

DD48's 2017 Open Ditch Project causes severance damages to the Plaintiffs' lands because (a) it has an open ditch running through the Plaintiffs' farm ground, and (b) it causes the inability to have direct access to lands on the opposite sides of the open ditch, as well as causing point rows and irregular shaped fields, as testified by Plaintiffs' Appraiser and expert witness, Ted Frandson. Tr. P. 82 l. 11 to P. 83 l. 13.

The Plaintiffs are entitled not only to severance damages, but DD48's 2017 Open Ditch Project also taking additional land for the open ditch and right of way on each side of the ditch.

The Trial Court erred in failing to award damages to the Plaintiffs for the entire amounts of acres taken for DD48's 2017 Open Ditch Project. In 1916, DD48

abandoned DD1's 3.1 miles of former open ditch, and instead replaced it with a main tile with dirt cover and 35 lateral tiles.

The Trial Court awarded some severance damage to the Plaintiffs, but the Trial Court used varying percentages of severance damages to Plaintiffs' lands of 9.4%, 4.5%, and 1.98%, when the market typically recognizes 10% reduction in market value when there is a severance.

There is not a reasonable basis for the Trial Court to have used 4.5% severance damage for the Abbas property, and 1.98% severance damage for the Reid-Meyer property when using 9.4% severance damage for the Hanson property.

Contrary to Miller v. Rohling, 720 N.W.2d 562, 572 (Iowa 2006) and Hawkeye Motors Inc. v. McDonald, 541 N.W.2d 914, 917 (Iowa Ct. App. 1995) the Trial Court fails to have a reasonable basis to have the wide disparity of severance damages of 1.98%, 4.5%, and 9.4%. The County does not proffer any reasonable basis for this wide disparity of severance damages. The County simply incorrectly asserts that DD48 has an easement for an open ditch, which has been refuted in Argument I and this Argument II.

It is respectfully submitted that the following damages for the Plaintiffs, on a reasonable basis, as shown in Exhibits 13, 14, and 15, are as follows:

Hanson	$168,000	
Abbas	$221,000	
Reid-Meyer	$221,000	App. V.I-PP. 327, 384, 435.

The County refused to recognize that DD48 in 1916 abandoned the north 3.1 miles of open ditch that DD1 had left and abandoned. In 1916, DD48 abandoned the open ditch and replaced it with a main tile with dirt cover and 35 lateral tiles.

In order to prove abandonment, there must be acts of relinquishment accompanied by intention to abandon. Allamakee County v. Collins Trust, 599 N.W.2d 448, 451 (Iowa 1999), and Town of Marne v. Goeken, 147 N.W.2d 218, 224 (Iowa 1967).

DD48's intention to abandon the north 3.1 miles of the open ditch is the 1916 Engineer's Report to replace the open ditch with a main tile with dirt cover and 35 lateral tiles, which DD48 approved. The acts of relinquishment are the construction of the main tile replacing the open ditch, and DD48 allowing the area above the main tile to be productive crop ground.

Moreover, no severance damages were paid to landowners in 1905.

Mr. Etler testified as follows:

> "the petition was filed for that district shortly after what I call the modern drainage laws were enacted in May 1904. This petition was 1905 and it was Drainage District 1, so it's one of the first in the state – obviously the first in Franklin County." Tr. P. 153 ll. 4-8.

"Q. Was there any indication in the records that any severance damages were even considered?
A. No.
Q. Is there, from your understanding, some reason why severance damages would not have been considered or applicable?
. . .
A. And Engineer Hale said that there was – roughly two-thirds of the watershed was wasteland and not farmable because it was wet, Class I or a Class II ground, he – he called it.
And that meant that even before the ditch was dug, the land was severed by these wet spots. They were farming around the wet spots small areas here and there trying to avoid the – getting stuck in the wet spots.
So when a new ditch was dug into that topography, it would actually reduce the severance problems by – by providing a means to drain the wet spots." Tr. P. 155 l. 4 to P. 156 l. 1.

None of the Plaintiffs, nor any of the landowners, in 1905 were paid for severance damages. Therefore, the case of Hammer v. Ida County, 231 N.W.2d 895, 900 (Iowa 1975) is applicable in our present case. The landowners were not paid for any severance damages.

Regardless, the supervening and controlling factor is that in 1916 DD48 abandoned the 3.1 miles of open ditch, and any easement that might exist for the 3.1 miles of open ditch, and replaced the 3.1 miles of open ditch with a main tile with dirt cover and 35 lateral tiles.

Summary

It is respectfully submitted that the Trial Court should be ordered to award the Plaintiffs the following amounts of damages, as shown in Mr. Frandson's Appraisal Reports, Exhibit 13 third page, Exhibit 14 third page, and Exhibit 15 third page:

Hanson	$168,000	
Abbas	$221,000	
Reid-Meyer	$221,000	App. V.I-PP. 327, 384, 435.

Issue III
THE TRIAL COURT ERRED IN RULING THAT REID-MEYER ARE TO DEED OVER 4.01 ACRES TO DD48 WHICH ARE NOT NEEDED FOR DD48'S 2017 OPEN DITCH PROJECT AND FOR WHICH NO CONDEMNATION PROCEEDING WAS INITIATED

Plaintiffs' Reply To County's Argument

There are 4.01 acres of the Reid-Meyer property that are landlocked by DD48's 2017 Open Ditch Project. Those 4.01 acres are literally severed, which is only one of the sources of severance damages. Tr. P. 82 l. 12 to P. 83 l. 13.

The Trial Court has erred in ruling that Reid-Meyer must convey their 4.01 acres to DD48.

On page 29 of its Brief, the County argues the 4.01 acres would be a public use for DD48 because DD48 could "sell the land and use the money to reduce the need for future assessments to the benefit of all owners in the District."

Reid-Meyer could likewise sell the 4.01 acres, or rent out the 4.01 acres to the adjoining landowner for their own benefit.

For land to be taken by a drainage district, either Section 468.126(6), Code of Iowa, or Chapter 6B Code of Iowa, are required to be followed. Section 468.126(6) provides that "The governing body of the district may, by contractor conveyance, acquire within or without the district, the necessary lands for making repairs or improvements ..." (Emphasis added.)

Section 6B.3(1)(g), Code of Iowa, requires "A showing of the minimum amount of land necessary to achieve the public purpose and the amount of land to be acquired by condemnation for the public improvement."

A condemning authority is only empowered to condemn the minimum amount necessary for the public improvement that is involved. Vittetoe v. Southern Utilities Co., 123 N.W.2d 878, 882 (Iowa 1963).

There is no showing that the Reid-Meyer 4.01 landlocked acres is necessary for DD48's 2017 Open Ditch Project.

Harris v. Board of Trustees of Green Bay Levee and Drainage Dist. No. 2 Lee County, 59 N.W.2d 234 (Iowa 1953) is authority that the landowner's right of recovery is the reduction in the fair and reasonable value of the farm lands and other damages caused by severance. There is no authority that the landowner can be required to convey land to a drainage district unless and until the statutory condemnation proceedings are complied with.

> "Under the law of this state pertaining to condemnation and by all our previous decisions in eminent domain proceedings, this court has said that the plaintiffclaimant was entitled to reimbursement for the difference in the fair and reasonable market value of the farm just before and just after the taking. This, of course, takes into consideration the fair and reasonable market value of the land actually taken, but also includes the reduce value, if any, of the remaining farm lands, and other damages caused by such severance." (Emphasis added.) Harris v. Board of Trustees of Green Bay Levee & Drainage Dist. No. 2 Lee County, 59 N.W.2d 234, 237 (Iowa 1953).

Section 9 of the Constitution of the State of Iowa provides in pertinent part as follows:

> "no person shall be deprived of life, liberty, or property without due process of law".
>
> "It may be conceded that 'due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property whether the proceeding be judicial, administrative, or executive in its nature." Wertz v. City of Ottumwa, 208 N.W. 511, 513 (Iowa 1926).

"The fifth amendment to the United States Constitution provides in part that a person may not 'be deprived of property, without due process of law." Bakken v. City of Council Bluffs, 470 N.W.2d 34, 36 (Iowa 1991).

The Appraiser Report for the County, Exhibit 23 on page 16, in reference to the Reid-Meyer property, states:

"Amount of Right of Way Damage Claim	Amount of Land Severance Damage Claim
$11,302.30 plus interest Since 1-1-17	$36,915.26 plus interest since 1-1-17" App. V.II-P. 44.

The County's Brief, on page 28, says the "commission recommending full payment to Plaintiffs Reid-Meyer, for 4.01 acres" is misleading. The Appraiser Report for the County, Exhibit 23, does not state or recommend that Reid-Meyer must convey their severed 4.01 acres to DD48.

The Trial Court's ruling that Reid-Meyer must convey the 4.01 acres to DD48 is not only in error, but it is clearly unconstitutional. The 4.01 acres of Reid-Meyer cannot be taken from them unless and until there is a proceeding under Section 468.126(6), Code of Iowa, or under Chapter 6 Code of Iowa, both of which include the requirement to show that the taking is necessary for DD48's 2017 Open Ditch Project.

Summary

The Trial Court's ruling that Reid-Meyer are required to convey their 4.01 acres to DD48 should be overruled and reversed.

CONCLUSION

The Plaintiffs are entitled to be compensated for the area taken by DD48's 2017 Open Ditch Project, and for severance damages because (a) DD48 in 1916 abandoned the 3.1 miles of open ditch and replaced it with a main tile with dirt cover and 35 lateral tiles, and (b) DD48 does not have an easement for an open ditch because in 1916 DD48's reports, plans, survey, plat, and profile were for a main tile with dirt cover and 35 lateral tiles, not for an open ditch. So, under Section 468.27, Code of Iowa, DD48 has an easement for a main tile and 35 lateral tiles, but does not have an easement for an open ditch.

The ruling for Reid-Meyer to convey 4.01 acres is unconstitutional and should be overruled and reversed.

REQUEST FOR ORAL ARGUMENT

The Plaintiffs-Appellants reassert their request for oral arguments in this matter.

GOODWIN LAW OFFICE, P.C.
/s/ Robert W. Goodwin
Robert W. Goodwin AT0002986
2211 Philadelphia Street, Suite 101
Ames, Iowa 50010-8767
Telephone: (515) 232-7390
Fax: (515) 232-7396
E-mail: goodwinlawoffice@fbx.com
ATTORNEY FOR PLAINTIFFS-APPELLANTS

ATTORNEY'S COST CERTIFICATE

I certify that the actual cost of reproducing the necessary copies of Plaintiff-Appellant's Reply Brief and Request For Oral Argument consisting of 37 pages was in the sum of $3.70.

GOODWIN LAW OFFICE, P.C.
/s/ Robert W. Goodwin
Robert W. Goodwin AT0002986
2211 Philadelphia Street, Suite 101
Ames, Iowa 50010-8767
(515) 232-7390
(515) 232-7396 (Fax)
E-mail: goodwinlawoffice@fbx.com
ATTORNEY FOR
PLAINTIFFS-APPELLANTS

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This Reply Brief and Request For Oral Argument complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this Reply Brief and Request For Oral Argument contains 7,416 words, excluding the parts of the Reply Brief and Request For Oral Argument exempted by Iowa R. App. P. 6.903(1(g)(1).

2. This Reply Brief and Request For Oral Argument complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Reply Brief and Request For Oral Argument has been prepared in a proportionally spaced typeface using Microsoft Word in Size 14 font.

Dated this 15th day of November, 2023.

GOODWIN LAW OFFICE, P.C.
/s/ Robert W. Goodwin
Robert W. Goodwin AT0002986
2211 Philadelphia Street, Suite 101
Ames, Iowa 50010-8767
(515) 232-7390
(515) 232-7396 (Fax)
E-mail: goodwinlawoffice@fbx.com
ATTORNEY FOR PLAINTIFFS-APPELLANTS

CERTIFICATE OF FILING AND SERVICE

I, Robert W. Goodwin, hereby certify that I electronically filed the foregoing Reply Brief and Request For Oral Argument with the Clerk of the Iowa Supreme Court, on November 15, 2023.

I, Robert W. Goodwin, hereby further certify that on November 15, 2023, I served the foregoing Reply Brief and Request For Oral Argument, by the electronic filing system, to the following attorneys of record:

George A. Cady III, AT0001386
Cady & Rosenberg Law Firm, P.L.C.
9 First Street SW
PO Box 456
Hampton, Iowa 50441
Phone: 641-456-2555
Fax: 641-456-3315
Email: acady@cadylaw.net
Attorney for Defendants/Appellees

GOODWIN LAW OFFICE, P.C.
/s/ Robert W. Goodwin
Robert W. Goodwin AT0002986
2211 Philadelphia Street, Suite 101
Ames, Iowa 50010-8767
(515) 232-7390
(515) 232-7396 (Fax)
E-mail: goodwinlawoffice@fbx.com
ATTORNEY FOR
PLAINTIFFS-APPELLANTS