

MINUTES OF VIRTUAL / CONFERENCE CALL MEETING
MAPLE RIVER WATER RESOURCE DISTRICT
ORIGINATING AT THE CASS COUNTY HIGHWAY DEPARTMENT
WEST FARGO, NORTH DAKOTA
AUGUST 3, 2023

A virtual / conference call meeting of the Maple River Water Resource District was held on August 3, 2023, at 8:00 a.m.

Present were Rodger Olson, Chairman; Gerald Melvin, Manager; Chad Miller, Manager; Carol Harbeke Lewis, Secretary-Treasurer; Nina Stone, Accountant; Melissa Hinkemeyer, Administrative Assistant; Sean M. Fredricks, Ohnstad Twichell, P.C.; Kurt Lysne, Alexa Ducioame, Brady Woodard and Levi Hanson, Moore Engineering, Inc.; Mike Opat, Houston Engineering, Inc.; Duane Breitling, Cass County Commissioner; Tom Soucy, Cass County Highway Department; Doug VanMeter, North Dakota Soybean Processors, LLC; Terry Kensok, Gill Township property owner; and Sidney Steinweg, Davenport Township property owner.

Agenda

It was moved by Manager Melvin, seconded by Manager Miller and unanimously carried to approve the order of the agenda, as presented.

Minutes

It was moved by Manager Melvin and seconded by Manager Miller to approve the minutes of the July 16 and 17, 2023, meetings. Upon roll call vote, the motion carried unanimously.

Wheatland Channel – Grand Farm crossings in the NE 1/4 of Section 8 in Everest Township

Sean Fredricks updated the Board on the Grand Farm crossings in the NE 1/4 of Section 8 in Everest Township regarding the Wheatland Channel.

A motion was made by Manager Melvin and seconded by Manager Miller to approve and authorize the Chairman to sign the following regarding Grand Farm crossings over Wheatland Channel in the NE 1/4 of Section 8 in Everest Township:

- *Access Agreement* with Grand Farm Research and Education Initiative, Inc.
- *Release of Easement*

Upon roll call vote, the motion carried unanimously.

Wheatland Channel – tree removal and channel cleanout north of I-94

Discussion was held on a tree removal and channel cleanout project on the Wheatland Channel north of I-94. Brady Woodard discussed a quote from a contractor to remove the trees in the area. He has also discussed the potential project with adjacent property owners. The property owners are coordinating with the contractor on stockpiling the trees that will be removed from the channel as part of the project to avoid additional costs for disposal of the trees. Mr. Woodard said he is contacting contractors to provide an estimate on the channel cleanout portion of the project. The Board discussed methods to prevent regrowth of the trees.

It was moved by Manager Melvin and seconded by Manager Miller to approve and authorize the Chairman to sign the *Agreement* with Pro Landscapers LLC for tree removal services, not to exceed \$51,700, and authorize Moore Engineering, Inc. to obtain quotes from contractors for a channel cleanout regarding the Wheatland Channel north of I-94. Upon roll call vote, the motion carried unanimously.

Drain #34 Channel Improvement Project No. 2022-01

Levi Hanson updated the Board on right of way acquisition regarding Drain #34 Channel Improvement Project No. 2022-01.

A motion was made by Manager Melvin and seconded by Manager Miller to approve *Purchase Agreements* with the following regarding Drain #34 Channel Improvement Project No. 2022-01:

- Elaine J. Swenson
- Clark Erickson
- Horne Family Limited Partnership, as amended

Upon roll call vote, the motion carried unanimously.

Drain #37 Improvement Project No. 2022-01

Mr. Hanson updated the Board on right of way acquisition regarding Drain #37 Improvement Project No. 2022-01.

A motion was made by Manager Melvin and seconded by Manager Miller to approve *Purchase Agreements* with the following regarding Drain #37 Improvement Project No. 2022-01:

- Huber Myhre Family Farm LLLP
- Lucille Johnson, as amended

Upon roll call vote, the motion carried unanimously.

Drain #39 Improvement Project No. 2023-01

Kurt Lysne reported Moore Engineering, Inc. continues to work on the final design for Drain #39 Improvement Project No. 2023-01. Once the final design is complete and permits are received, the Board can proceed with construction of the project.

Drain #46 – inspection and crossing in Section 28 of Rochester Township

Mr. Woodard discussed improving the Drain #46 crossing in Section 28 of Rochester Township for improved access to adjacent properties for agricultural equipment. The Board discussed the proposed improvements to the crossing and asked Mr. Woodard to contact the adjacent property owners to inquire if the proposed improvements would be sufficient for access to property in Section 28 of Rochester Township.

A motion was made by Manager Miller and seconded by Manager Melvin to authorize Moore Engineering, Inc. to obtain quotes from contractors and to hire a contractor to stabilize the bottom of the Drain #46 crossing in Section 28 of Rochester Township. Upon roll call vote, the motion carried unanimously.

Drain #62 – North Dakota Soybean Processors, LLC

Tom Soucy reported the Drain #62 relocation project in Section 33 of Casselton Township related to access to the North Dakota Soybean Processors, LLC facility is ongoing and is going well.

Drain #62 – Section 32 in Casselton Township

Mr. Woodard stated there is sediment impeding drainage in the Drain #62 channel in Section 32 of Casselton Township and he suggested surveying the channel.

A motion was made by Manager Miller and seconded by Manager Melvin to authorize Moore Engineering, Inc. to survey the Drain #62 channel in Section 32 of Casselton Township and bring the information to a future meeting for the Board’s consideration. Upon roll call vote, the motion carried unanimously.

Woody vegetation in legal assessment drains

Mr. Woodard discussed a quote from a contractor to remove woody material from various Maple River Water Resource District facilities. The Board indicated the tree stumps remaining should be sealed to prevent regrowth. Mr. Woodard said he will reach out to the townships, as necessary.

It was moved by Manager Melvin and seconded by Manager Miller to approve and authorize the Chairman to sign the *Agreement* with Pro Landscapers LLC regarding removal of woody vegetation from various Maple River Water Resource District facilities, including sealing the stumps of the removed trees to prevent regrowth. Upon roll call vote, the motion carried unanimously.

Cornell Township Drainage Improvement District No. 80

Mr. Lysne updated the Board on Cornell Township Drainage Improvement District No. 80. The petitioners are reviewing alternatives and associated cost estimates. The legal assessment district formation process will proceed once the petitioners select a preferred alternative. Brief discussion was held on cost-share for the project.

The Board is in the process of developing the Cornell Township Improvement District No. 80 Project, a project that will require development of an assessment district to finance

and fund design and construction. As the Board develops the project and proposed assessment district further, in cooperation with the Barnes County Water Resource District, the Board will engage landowners and other interested parties. Manager Miller leases and farms property in the vicinity of the project and some of that property may be within the project assessment district. With that in mind, Manager Miller noted his potential conflict and asked the Board's attorney, Sean Fredricks, how to address the issue.

Mr. Fredricks explained the conflict analysis the Board should conduct regarding Manager Miller's potential conflict. Section 44-04-22 of the North Dakota Century Code provides the relevant standard. That statute provides:

A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to the body of which that person is a member, and may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.

Mr. Fredricks indicated the North Dakota Supreme Court and the Attorney General's Office have taken a narrow view of situations where a public official can abstain from participating in a matter. A public official must have a "direct and substantial personal or pecuniary interest" in the matter. The mere appearance of a conflict is not enough to allow the public official to refrain from participating. The North Dakota Supreme Court adopted a "rule of necessity" that requires public officials to participate in matters before their respective boards. The public policy rationale is that public officials have a duty to vote on issues before them and cannot avoid participation simply to avoid the appearance of impropriety.

The Section 44-04-22 test requires a multi-step analysis. First, a public official concerned about a conflict of interest should confer with the Board's attorney to determine if a "direct and substantial personal or pecuniary interest" conflict exists under Section 44-04-22. If the public official's review with the governing entity's attorney is not dispositive, the remainder of the governing entity's Board should vote to determine if a conflict exists by a majority vote. If the remaining members conclude a conflict does exist (or if the member and the Board's attorney concludes a conflict exists), the remainder of the Board should next vote on whether or not the public official should "participate in or vote on that particular matter" In other words, even if a conflict does exist (even if the official does have a "direct and substantial personal or pecuniary interest" in the matter), if the governing entity concludes the public official should still participate despite the conflict, the official must participate and cannot abstain.

In this instance, Mr. Fredricks indicated Manager Miller's lease and farming interests in the assessment district area likely rise to a "direct and substantial personal or pecuniary interest" for Manager Miller. However, the Board could still require Manager Miller to participate in project-related matters. The Board noted that Manager Miller is familiar with

the area and with the proposed project, and they do not believe his personal interest in land within the proposed assessment district would impact Manager Miller's judgment. Manager Melvin moved to conclude that Manager Miller does have a technical conflict but to require Manager Miller to continue to participate in discussions and voting in all assessment district and project-related matters. Chairman Olson seconded the motion. Upon roll call vote, Chairman Olson and Manager Melvin voted in favor of the motion. Manager Miller abstained. The motion carried.

There is an additional conflict statute specific to water resource districts, Section 61-16-08.1 of the Century Code, that provides the County Commission with discretionary authority to appoint alternate water managers if a full-time member has a conflict. However, that statute was effectively superseded by Section 44-04-22 when the Legislature adopted Section 44-04-22 in 1995 (Section 61-16-08.1 went into effect in 1985). Section 61-16-08.1 does not provide a definition for what qualifies as a "conflict of interest" and does not provide a mandatory process; rather, the legislative history of Section 61-16-08.1 indicates the Legislature approved that statute to provide a process for water managers to avoid situations where they are not comfortable voting on a matter and the process under Section 61-16-08.1 is not mandatory. Conversely, the process under Section 44-04-22 is mandatory for conflict situations, provides a detailed test for determining if a conflict exists, and provides a detailed process for a Board to proceed even if a conflict does exist. The Legislature enacted Section 44-04-22 after passing the vague and optional Section 61-16-08.1 and, therefore, the process under Section 44-04-22 controls all conflict matters.

In light of the Board's motion, Manager Miller must participate in all votes regarding the Cornell Township Improvement District No. 80 Project.

Davenport Flood Risk Reduction Project

Mr. Hanson updated the Board on right of way acquisition regarding the Davenport Flood Risk Reduction Project. Mr. Fredricks reviewed appraisals / just compensation amounts.

A motion was made by Manager Melvin and seconded by Manager Miller to approve the appraisals / just compensation amounts presented and authorize the Water Resource District Attorney, Engineer and staff to proceed with formal negotiations with the following regarding right of way for the Davenport Flood Risk Reduction Project:

- Ronald K. Geerdes, Patricia Lou Geerdes and Gina Marie Stanford
- Darla M. Jelen and Juli L. Dyre
- Sonja Ann Johnson

Upon roll call vote, the motion carried unanimously.

Sidney Steinweg inquired about the possibility of levee alignment changes for the Davenport Flood Risk Reduction Project. Mr. Lysne indicated the current levee alignment is the most cost effective and practical alignment that meets FEMA standards.

Ms. Ducioame reported an *Application to Construct* has been submitted to the North Dakota Department of Water Resources for the project. Feedback from FEMA regarding the Conditional Letter of Map Revision (CLOMR) submitted for the project is anticipated to be received soon.

Regional Conservation Partnership Program – Upper Maple River Watershed

Mr. Lysne updated the Board on the RCPP – Upper Maple River Watershed Plan. An on-site meeting was held recently with area property owners and the Natural Resources Conservation Service to further discuss the Plan and the design features in the Plan.

Application to Install a Subsurface Water Management System No. 202319 for Chris Walberg in the NE 1/4 of Section 25 of Leonard Township

The Board next reviewed *Application to Install a Subsurface Water Management System No. 202319*, filed July 24, 2023, by Applicant Chris Walberg. Under the Application, Applicant seeks to install a 142-acre drain tile system in the NE 1/4 of Section 25 in Leonard Township, Cass County, North Dakota. The project will include a single pump outlet located in the northeast corner of the NE 1/4 in Section 25; the pump will discharge into a natural drain in the road ditch at the intersection of 52nd Street SE and 157th Avenue SE; the discharge will flow north, under 52nd Street in the natural drain, into Cass County Drain No. 39 in the southeast corner of Section 24.

According to records submitted by Applicant, Christopher and Sarah Walberg own the NE 1/4 of Section 25 in Leonard Township.

Manager Miller moved, and Manager Melvin seconded the motion, to approve *Application to Install a Subsurface Water Management System No. 202319*, filed July 24, 2023, for Chris Walberg regarding a proposed tile system in the NE 1/4 of Section 25 in Leonard Township; and to authorize the Secretary-Treasurer to sign *Subsurface Water Management Permit No. 202319*, subject to the following conditions:

1. Applicant will install and maintain erosion protection at any and all outlets into Leonard Township's road right of way.
2. Applicant will install and maintain erosion protection at any and all outlets into the natural drain in the NE 1/4 of Section 25.
3. Applicant will re-establish any areas disturbed installing or maintaining Applicant's tile system.
4. Applicant will turn off any pump outlets and otherwise close all outlets during "critical flood periods," as determined by the Maple River Water Resource District.
5. Applicant will not install Applicant's tile system within 20 feet, on either side, of any rural water lines Cass Rural Water Users District has in the NE 1/4 of Section 25 in Leonard Township under any blanket easements, or otherwise beyond the Water Users District's existing easement(s).

6. Applicant must apply for an amendment to *Subsurface Water Management Permit No. 202319* in advance of any proposed alterations to outlet locations, the addition of any outlets, or improvements or modifications to the tile system that could increase the capacity or drainage area of the tile system.

Upon roll call vote, the motion carried unanimously.

Under Section 61-32-03.1, the Board cannot attach any additional conditions to Applicant's permit. However, for Applicant's protection, and to ensure protection of Applicant's tile system, the Board will recommend that Applicant comply with the following:

1. The Board recommends that Applicant obtain written consent from the Leonard Township Board to discharge into any of the Township's road right of way.
2. The Board recommends that Applicant obtain all other necessary and requisite licenses, permits, registrations, and/or approvals from all applicable federal, state, county, and municipal governments, and any other applicable governmental entities.

The Board will provide copies of the Board's *Notice of Decision, Subsurface Water Management Permit No. 202319*, and Applicant's downstream flow map to the Department of Water Resources, Leonard Township, and Cass Rural Water Users District. Applicant's detailed project design map is an exempt record, and the Board will not provide copies to any third parties.

Bills

It was moved by Manager Melvin and seconded by Manager Miller to approve payment of the wire transfers and electronic funds transfers, as presented. Upon roll call vote, the following Managers voted in favor: Olson, Melvin and Miller. The Chairman declared the motion passed.

Secretary-Treasurer position / office staffing

Brief discussion was held on the Secretary and Treasurer positions and future office staffing needs upon retirement of the current Secretary-Treasurer towards the end of the year. A motion was made by Manager Miller and seconded by Manager Melvin to name Melissa Hinkemeyer as Secretary and Nina Stone as Treasurer of the Maple River Water Resource District upon retirement of the current Secretary-Treasurer and to begin the process of advertising for two support staff positions. Upon roll call vote, the motion carried unanimously.

Adjournment

There being no further business for the Board to consider, it was moved by Manager Melvin, seconded by Manager Miller and unanimously carried to adjourn the meeting.

APPROVED:

Rodger Olson
Chairman

ATTEST:

Carol Harbeke Lewis
Secretary-Treasurer