

MINUTES OF MEETING  
SOUTHEAST CASS WATER RESOURCE DISTRICT  
CASS COUNTY HIGHWAY DEPARTMENT  
WEST FARGO, NORTH DAKOTA  
NOVEMBER 18, 2011

The Southeast Cass Water Resource District met on November 18, 2011, at 9:30 a.m. at the Cass County Highway Department, West Fargo, North Dakota.

Present were Mark Brodshaug, Manager; Dan Jacobson, Manager; Carol Harbeke Lewis, Secretary-Treasurer; Diane Pochardt, Administrative Assistant; Sean M. Fredricks, Attorney for the Board; Jeff Volk, Chris Gross and Mike Opat, Engineers for the Board; Brady Woodard, Moore Engineering, Inc.; Tim Solberg, Cass County Planner; Roger Hagen, Houston Engineering, Inc.; Dean Hornbacher, Wild Rice River Estates; James Carlson, resident in Round Hill; and those whose names appear on the attached roster.

**Resolution of Condolence to the family of Thomas L. Fischer**

It was moved by Manager Jacobson, seconded by Manager Brodshaug and unanimously carried to approve the following Resolution:

RESOLUTION COMMENDING THOMAS L. FISCHER  
FOR HIS SERVICE TO THE COMMUNITY

WHEREAS, Thomas L. Fischer had been a dedicated public servant in the capacity of Manager on the Southeast Cass Water Resource District; and

WHEREAS, he served the residents of Cass County for many years as a leader and as a friend;

NOW THEREFORE BE IT RESOLVED, that the Southeast Cass Water Resource District Board hereby offers its condolences and sympathy to the family of Thomas L. Fischer.

Dated at West Fargo, North Dakota, this 18th day of November, 2011.

**Minutes**

It was moved by Manager Jacobson, seconded by Manager Brodshaug and unanimously carried to approve the minutes of the October 28 (as amended) and November 2, 2011, meetings.

### **Approval of agenda**

It was moved by Manager Brodshaug and seconded by Manager Jacobson to approve the order of the agenda. Upon roll call vote, the motion carried unanimously.

### **Sheyenne River Diversion Channel Improvements Phases I and II**

The Board members toured the Sheyenne River Diversion Channel Improvements Phases I and II Projects yesterday. Sediment has not been removed from the first section of the project as Tom Thompson said it would at the November 2, 2011, meeting.

Sean Fredricks reviewed the claims for liquidated damages against Tom's Backhoe Service, Inc. as set out in his letter dated November 14, 2011, to Chad Engels. Mr. Thompson indicated that an additional off-road truck would be available today and a second one on Monday. He said another long-reach trackhoe and dozer would be brought in Monday to work on Phase II. All equipment would be run by Tom's Backhoe Service, Inc. operators and employees.

Manager Brodshaug said the Board is concerned that they are not finishing the work as they go. Mike Opat and Chris Gross said they went over the claims with the contractor, as set out in the November 14, 2011, letter from Mr. Fredricks and in the letter from Moore Engineering, Inc. to Mr. Thompson dated October 27, 2011. The project completion date was October 15, 2011, but per the contract, due to the high water flows in the project area, the completion date could be extended to March 4, 2012, if the contractor would make a formal request for a time extension. Nothing has been received, which triggers the Water Resource District's right to liquidated damages. Jeff Volk said the Board is very concerned about the contractor getting the work done. Mr. Thompson said he understands the urgency to get the work done, but pointed out that he was out of the area doing flood work and did not see the letter from Moore Engineering, Inc.

After extensive discussion, Mr. Thompson agreed to the concept presented. Joel Fremstad, attorney for Tom's Backhoe Service, Inc., will submit a proposed Change Order to the Board for consideration. The Board scheduled a special meeting to consider / approve the Change Order on November 23, 2011, at 1:30 p.m. at the Cass County Highway Department.

### **Sheyenne-Maple Flood Control District #2 - request for clay and topsoil from Industrial Builders, Inc. to backfill the lot where the Horace Lutheran Church used to stand – conflict analysis**

Sean Fredricks explained the conflict analysis the Board should conduct regarding the request for clay and topsoil from Sheyenne-Maple Flood Control District #2 by Industrial Builders, Inc. to backfill the lot where the Horace Lutheran Church used to stand. Manager Brodshaug voiced concern regarding his involvement in decision-making for purposes of the project in light of potential conflicts, real or perceived. Manager

Brodshaug inquired into whether or not he should vote, or even participate in discussion, regarding the project.

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 . . . . So 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.

The Board went through the following analysis:

**Manager Mark Brodshaug:**

Manager Brodshaug indicated that he may purchase the lot where the Horace Lutheran Church used to stand. Under the Klindt and Larson cases, and under N.D.A.G. 2004-L-10, this creates a legal conflict situation. However, the remaining Board member voted to require Manager Brodshaug to continue to participate.

It was moved by Manager Jacobson and seconded by Manager Brodshaug to charge Industrial Builders, Inc. \$1 per cubic yard for the material taken from the Sheyenne-Maple Flood Control District #2 borrow area north of 52nd Avenue South, as designated by Moore Engineering, to backfill the lot where the Horace Lutheran Church used to stand. Upon roll call vote, the motion carried unanimously.

**Sheyenne-Maple Flood Control District #2 - maintenance of ditches within city limits**

It was moved by Manager Brodshaug and seconded by Manager Jacobson to authorize the City of West Fargo to hire a contractor to clean the ditch on the west side of Sheyenne-Maple Flood Control District #2, north of 40th Avenue South. Upon roll call vote, the motion carried unanimously.

**Sheyenne Diversion Exterior Pump Station - State Water Commission Agreement for Cost Share Reimbursement**

It was moved by Manager Brodshaug and seconded by Manager Jacobson to approve the State Water Commission *Agreement for Cost Share Reimbursement* for the Sheyenne Diversion Exterior Pump Station Project. Upon roll call vote, the motion carried unanimously.

**Wild Rice River Estates bank stabilization**

It was moved by Manager Jacobson and seconded by Manager Brodshaug to approve the engineering contract with Houston Engineering, Inc. on the Wild Rice River Estates bank stabilization project. Upon roll call vote, the motion carried unanimously.

It was moved by Manager Brodshaug and seconded by Manager Jacobson to contribute \$25,000 towards the Wild Rice River Estates bank stabilization project out of the Obligated Rural Sewer Fund 1227. Upon roll call vote, the motion carried unanimously.

**Round Hill Sanitary Sewer Improvement District No. 2010-1**

Brett Bailly updated the Board on the Round Hill Sanitary Sewer Improvement District No. 2010-1. In addition to concerns about the project not being completed in a timely manner, there are also concerns about damaged pavement and drain tile. Mr. Bailly reviewed payments made and retainage to-date, along with proposed liquidated damages. He believes the project could be completed in one to two weeks if they work hard.

It was moved by Manager Jacobson and seconded by Manager Brodshaug to approve the Water Resource District's Engineer's recommendation to withhold Progress Payment No. 3 until the December 2011 meeting, according to Article 14 of the General Conditions of the construction contract for Round Hill Sanitary Sewer Improvement District No. 2010-1. Upon roll call vote, the motion carried unanimously.

**Utility Permit for Ellingson Companies to install rural water under Drain #40 approximately 1/2 mile north of 40th Avenue North**

It was moved by Manager Brodshaug and seconded by Manager Jacobson to deny the *Utility Permit* for Ellingson Companies to install rural water under Drain #40 approximately 1/2 mile north of 40th Avenue North, due to stability issues on Drain #40. Upon roll call vote, the motion carried unanimously.

**Re-delineation of preliminary Digital Flood Insurance Rate Maps (DFIRMs) north of West Fargo**

Tim Solberg discussed the re-delineation of preliminary DFIRMs for the area north of West Fargo and asked the Board to consider cost share for the project. It was moved by Manager Brodshaug and seconded by Manager Jacobson to authorize the Cass County Planner to hire a contractor to re-delineate the preliminary DFRIMs for the area north of West Fargo and to provide 50% cost share, not to exceed a total of \$5,000. Upon roll call vote, the motion carried unanimously.

**Drain #27 Drainage and Flood Control Improvements Project - right-of-way**

It was moved by Manager Jacobson and seconded by Manager Brodshaug to submit an offer, as recommended by the Water Resource District Attorney, in the amount of \$700,000 to John and Elsiné Leseth for right-of-way regarding the Drain #27 Drainage and Flood Control Improvements Project and that they will be responsible for their own attorney fees. Upon roll call vote, the motion carried unanimously.

**Drain #50 – License Agreement with Jeff Knutson and JoAnne Knutson regarding the crossing on Drain #50 in the NE 1/4 of Section 25 in Warren Township**

It was moved by Manager Brodshaug and seconded by Manager Jacobson to approve the *License Agreement* with Jeff Knutson and JoAnne Knutson regarding the crossing on Drain #50 in the NE 1/4 of Section 25 in Warren Township. Upon roll call vote, the motion carried unanimously.

**Ring Dike Cooperation Agreement with Jeffrey Philipp and Melissa Philipp**

It was moved by Manager Jacobson and seconded by Manager Brodshaug to approve the *Ring Dike Cooperation Agreement* for the property located in the NW 1/4 of Section 13 in Warren Township with Jeffrey Philipp and Melissa Philipp. Upon roll call vote, the motion carried unanimously.

**Bills**

It was moved by Manager Jacobson and seconded by Manager Brodshaug to approve payment of Checks #10054 through #10071, and the electronic funds transfers, as presented. Upon roll call vote the following Managers voted in favor: Brodshaug and Jacobson. Vice Chairman Brodshaug declared the motion passed.

**2011 / 2012 Sheyenne River and Wild Rice River Snagging and Clearing Projects - State Water Commission Agreements for Cost Share Reimbursement**

It was moved by Manager Brodshaug and seconded by Manager Jacobson to approve the following:

- State Water Commission *Agreement for Cost Share Reimbursement* on the 2011 / 2012 Sheyenne River Snagging and Clearing Project; and
- State Water Commission *Agreement for Cost Share Reimbursement* on the 2011 / 2012 Wild Rice River Snagging and Clearing Project.

Upon roll call vote, the motion carried unanimously.

**Adjournment**

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

APPROVED:

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Mark Brodshaug  
Vice Chairman

ATTEST:

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Carol Harbeke Lewis  
Secretary-Treasurer