

LAKE KAMPESKA WATER PROJECT DISTRICT

MINUTES OF MEETING OF BOARD OF DIRECTORS

WATERTOWN, SOUTH DAKOTA

September 2, 2015

12:15 O'CLOCK P.M.

Present at the meeting were the directors, namely: Bradley D. Johnson, John C. Wiles, Paul I. Hinderaker, Doug Modica, Gregory K. Blow, Sarah M. Caron and Mark Messerli. Also present during the meeting were Jack Little, secretary-treasurer Paula R. Newman and members of the public.

Paul I. Hinderaker presided as chairman and Paula R. Newman acted as secretary.

The chairman called for approval of the minutes of the last meeting on July 1, 2015. Upon motion made by Johnson, seconded by Modica, and carried unanimously, the minutes were approved.

The chairman initiated discussion about the matter of the action of Geraldine Adolph versus Grant County Board of Adjustment and Dustin Nelson. He presented the August 11, 2015 letter (a copy is attached to these minutes) from Austin, Hinderaker, Hopper, Strait & Benson LLP, setting forth the District's options for supporting Adolph's suit. During discussion, director Wiles shared a conversation he had with a local dairy farmer who opined that one large confinement operation, if run properly, may pose a smaller threat to area waters than several smaller operations. Discussion was also held about the economic factors that have driven the expansion of such operations. After discussion and upon motion made by Wiles, seconded by Blow, and carried unanimously, with Hinderaker abstaining, the following resolution was adopted:

BE IT RESOLVED by the Board of Directors of Lake Kampeska Water Project District that the District will not make any contribution to Geraldine Adolph's defense fund relative to her suit against the Grant County Board of Adjustment and Dustin Nelson, in connection with conditional a use permit approved for Nelson to construct a confined animal feeding operation in Grant County, South Dakota.

Discussion continued among board members about ways, other than participating in a lawsuit or contributing to legal defense funds, that the District can promote efforts to protect the Big Sioux River and Lake Kampeska. During recent meetings, discussion has been held about the fact that testing must be available quickly in order to detect contamination. SDENR is not staffed for such efforts and nearest certified lab is in Pierre, South Dakota. After discussion and upon

motion made by Wiles, seconded by Blow, and carried unanimously, the following resolution was adopted:

BE IT RESOLVED by the Board of Directors of Lake Kampeska Water Project District that the District will seek from Roger Foote at Upper Big Sioux River Watershed Project a proposed plan, including estimated startup and operating costs, for the creation of a certified lab which will be capable of testing water samples for a variety of contaminants. The proposed geographical scope of the project will be limited to Codington County, South Dakota.

More discussion was held, focused on creation of laws which would penalize offenders who allow contaminants to be discharged into natural bodies of water. After discussion and upon motion made by Wiles, seconded by Caron, and carried unanimously, the following resolution was adopted:

BE IT RESOLVED by the Board of Directors of Lake Kampeska Water Project District that the District is authorized to approach the legislative delegation in Codington County, South Dakota, and the South Dakota Legislative Research Council, for the purpose of promoting new legislation which will create criminal penalties for water pollution supported by test results obtained by a certified testing lab.

Director Johnson led discussion concerning more old business, that being the development of Stoney Point 3rd Addition at Lake Kampeska. He presented a copy of a map of the development which he obtained from the website for the City of Watertown. He described his attendance at a recent city planning commission meeting, during which discussion was held about the development. Johnson expressed concerns about the sufficiency of holding ponds in the development. He said discussion during the meeting included suggestions the proposed ponds would only be adequate for a one-inch rain event. He was also concerned that the drainage off the lots, including lots in the next phase of the development, will cause water to drain into the lake. It is unknown at this point if the holding ponds and grading will cause more or less water to enter the lake. The developer will eventually have to produce detailed design plans to the United States Army Corps of Engineers. Johnson suggested it may be beneficial for the District to have its own expert to analyze the engineering plans. After discussion and upon motion made by Johnson, seconded by Wiles, and carried unanimously, the following resolution was adopted:

BE IT RESOLVED by the Board of Directors of Lake Kampeska Water Project District that the district is authorized to seek a request for proposals from an engineering firm for the purpose of analyzing engineering plans submitted by the developer of the proposed Stoney Point 3rd Addition at Lake Kampeska, when those plans are

submitted for approval by the U. S. Corps of Engineers. The purpose of the analysis is to determine whether the project will have a detrimental environmental impact on Lake Kampeska and wetlands within the development.

There being no further business to come before the meeting, the same was adjourned.

Paula R. Newman
Secretary

**AUSTIN, HINDERAKER, HOPPER,
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(Retired 2004)**

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Board Members
Lake Kampeska Water Project District

RE: Adolph Appeal

Dear Directors:

At our July 1 meeting, Gerry Adolph made a presentation about her appeal of the Grant County Board of Adjustment decision to grant Dustin Nelson a conditional use permit to operate a Class A CAFO in Grant County. The board directed me to analyze pertinent issues raised in the petition and other submissions, and make recommendations to the board for whether and how to proceed.

The first question is purely legal: Does LKWPD have the legal authority to join in the appeal, submit an amicus curiae brief, or provide financial support for petitioners.

46A-18-1. Legislative Findings and Policy. Conservation, management, and development of the state's water resources are vital to the public interest, welfare, convenience, and necessity and require in some circumstances, the creation of water project districts for the purposes of sponsoring and implementing water projects for the conservation, storage, distribution, and utilization of water and for the prudent management of water resources.

46A-18-32. Powers of District. A water project district shall have perpetual existence, unless dissolved, with the following powers:

(1) To sue and be sued;

...

(8) To do and perform all acts herein authorized and all other acts necessary and proper for carrying out and exercising the powers vested in the district.

In my opinion the board has the authority to bring suit, join in the appeal, assist in the appeal and contribute to petitioners legal expense to the extent that the appeal furthers the interest of the district and the public interest of the State of South Dakota.

The initiating petition to establish the Lake Kampeska Water Project District includes the following:

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- A. There is a need in the interest of public health, safety and welfare for creation of Water Project District to accomplish improvement in the district area.
- B. In general terms, the purposes of the contemplated improvements are to protect and enhance the lands, public health and safety, general welfare and economy of the people of the district. The contemplated work will accomplish the following purposes as may be technically and financially feasible upon preparation of detailed plans therefore, but are not necessarily limited to such described purposes if additional purposes are lawful. Maintenance and protective measures such as shoreline erosion control (rip-rap), gabion strips and sediment dams on major tributaries to provide an improved lake for recreational as well as aesthetic purposes.
- C. The work will involve watershed and shoreline erosion control, sediment removal and general lake improvement efforts.
...
- D. The proposed works and programs of activities of the district will be located within the boundaries of the district, and outside the boundaries of the district along the tributaries of Lake Kampeska or in their drainage areas, and may include dams, levies, conservation methods and practices and otherwise. Said works and programs will be operated by the district and funded by general assessments, special assessments, government grants and private contributions.
...

It seems quite clear to me that the Lake Kampeska Water Project District has statutory authority to join, in one way or another, with Gerry Adolph and her appeal, if the board agrees that helping to stop the release of feedlot contamination in the upper Big Sioux is beneficial to the purposes of the Lake Kampeska Water Project.

If the board decided to participate, it needs to decide what form the participation should take. I don't know how the district could "join" in the appeal; it seems to me that the easiest thing for the board to do is to offer financial support to Adolph, and somehow publicize that support to assure that the Grant County officials know our position.

Attached for each of you is a copy of Adolph's Petition, appealing the conditional use permit to operate the Nelson Class A Concentrated Animal Feeding Operation (CAFO). The Petitioners request is set forth in paragraph 17,

Petitioners request that this Court review the Decision under the writ of certiorari set forth by statute (including under SDCL 11-2-62), review the Decision under a less deferential or *de novo* standard of review for the reasons set forth in this Petition or for other reasons, reverse the Decision, issue a writ of mandamus to the Board ordering the relief set forth in this Petition, remand this matter to the Board for their disposition as requested in this Petition, and otherwise grant Petitioners the relief requested in this Petition.

The South Dakota Supreme Court filed its Opinion in Grant County Concerned Citizens and Timothy A. Tyler, Plaintiffs and Appellants, v. Grant County Board of Adjustment, Thomas Adler, Lorelei Brandt, David Forrette, Richard Hansen, Nancy Johnson, Gary Lindeman, Doug Stengel, Geoff Street, and Teton, LLC, Defendants and Appellees. In this Opinion the Court clarified its Standard of Review.

Our review of a board of adjustment's decision is limited. "Any person...aggrieved by any decision of the board of adjustment...may present to a court of record a petition...setting forth that the decision is

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illegal...specifying the grounds of the illegality.” SDCL 11-2-61 “Upon the presentation of the petition, the court may allow a writ of certiorari directed to the board of adjustment to review the decision...” SDCL 11-2-62. “The review upon writ of certiorari cannot be extended further than to determine whether the...board...has regularly pursued (its) authority...” SDCL 21-31-8. “With a writ of certiorari, we do not review whether the (board’s) decision is right or wrong.” *Duffy v. Cir. Ct.*, 7th *Jud. Cir.*, 2004 S.D. 19, ¶ 33, 676 N.W.2d 126, 138. “A board’s actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law.” *Jensen v. Turner Cnty. Bd. Of Adj’t*, 2007 S.D. 28, ¶ 4, 730 N.W.2d 411, 413 (quoting *Elliott v. Bd. Of Cnty. Comm’rs*, 2005 S.D. 92, ¶ 14, 703 N.W.2d 361, 367).

This decision clarifying the standard of review, impacts the Adolph Petition which alleges that any of the following five bases independently requires reversal of the Decision under the writ of certiorari standard:

- a. The Board arbitrarily or willfully disregarded undisputed proof;
- b. The Board’s decision was based on fraud;
- c. The Board exceeded its jurisdiction;
- d. The Board failed to regularly pursue its authority; or
- e. The Board engaged in any act forbidden by law or neglected to do any act required by law.

The Petition was dated July 8, 2015. The Grant County Concerned Citizens Opinion was filed June 24, 2015.

So, what is the strength of Adolph’s Petition? Will it prevail on appeal? I can only answer that litigation is always unpredictable. One of my former associates said, as he left the practice of law,

“The only times I absolutely knew what the law was, some Judge told me I was wrong.”

The board’s decision whether to support the Adolph Opinion needs to be taken up for discussion at a meeting as soon as possible.

Very truly yours,

Paul

Paul I. Hinderaker
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PIH/rk
Enc.