

**MINUTES OF THE SPECIAL MEETING  
OF THE  
BOARD OF MANAGERS  
OF THE  
NINE MILE CREEK WATERSHED DISTRICT**

**WEDNESDAY, MARCH 7, 2019**

**Call to Order**

Chair Peterson called the meeting of the Board of Managers of the Nine Mile Creek Watershed District to order at 5:30 p.m., Wednesday, March 7, 2019, at the Nine Mile Creek Watershed District Office, 12800 Gerard Drive, Eden Prairie, MN 55346.

Managers Present: Bob Cutshall, Erin Hunker, Steve Kloiber, Grace Sheely and Jodi Peterson

Managers Absent: None.

Advisors Present: Randy Anhorn, Michael Welch, Bob Obermeyer, and Lauren Foley

**Administrator's Annual Review Process**

Administrator Anhorn stated that at the February meeting Manager Kloiber and Manager Hunker had volunteered to collect notes on the administrator's performance from the managers. He asked for additional direction on when the review should be completed and what the process may look like.

Manager Kloiber stated that he followed up with each of the Managers individually and noted that he received three reviews thus far, noting that Manager Cutshall did not feel that he had been on the Board long enough to complete a full review.

Administrator Anhorn stated that he can distribute his self-review to the members of the Board as well.

Manager Sheely stated that the previous year she felt that she benefited as a new member by seeing the responses of other Managers and suggested that the information be shared with Manager Cutshall.

The administrator agreed to coordinate the managers' schedule offline to find a time to conduct his review.

### **Minor Plan Amendment**

Administrator Anhorn stated that the building addition staff has been discussing with the managers is not included in the plan. After discussions with legal staff, though, he does not believe that the item needs to be added to the CIP or water management plan.

Attorney Welch stated that as long as the Board is comfortable with the public process, a plan amendment would not be needed. He stated that BWSR is also comfortable with this approach, given that the purpose of the project is administrative.

### **District Permit Review and Decision Making**

Attorney Welch provided a brief overview of the legal framework for the District's permitting program and decisionmaking process for variance requests.

The managers discussed the frequent requests received for variances from the District wetland-buffer requirement. Manager Cutshall asked whether the use of, say, native plants in a buffer could allow for a narrow buffer that provides the same benefits of a wider buffer consisting of, say, turf.

Engineer Obermeyer agreed that could be a good example. He noted that if an applicant were to come in with an enhanced smaller buffer, the Board would consider that it would be getting greater or equal protection from the smaller buffer than it would from the typical buffer.

Manager Cutshall stated that in his mind the width of the buffer would be irrelevant if better protection is being provided in another way.

Engineer Obermeyer stated that in some instances an applicant is requesting a smaller buffer in return for an enhanced water quality element, which is not necessarily comparable.

Attorney Welch agreed that it helps if the applicant is attempting to mitigate and balance what it cannot provide with what it can additionally provide. He stated that if the Managers' decision is based on a rational analysis of facts in the record, it will stand up in court review.

Administrator Anhorn asked how often the buffer is included in the water quality analysis.

Engineer Obermeyer explained that the buffer is not typically included in the water quality analysis.

Manager Sheely asked and Mr. Welch confirmed that a manager can vote in support, against, or abstain on a variance. He noted that the managers can request additional information relevant to the request, as long as the statutory permitting timeframe is met.

Manager Kloiber agreed that in some instances waiting an additional month to consider all the elements may be the best choice.

Engineer Obermeyer explained that if the Board does not feel comfortable approving a variance, the Board could ask questions and possibly continue the request to have additional time for review.

Manager Hunker asked and received confirmation that if the Managers have questions before the meeting after reviewing the Board packet, they could reach out to staff in attempt to obtain some answers prior to the meeting.

Manager Cutshall noted that from the other side, there is cost to developers and applicants when an application is delayed for a month and therefore should not be done on a regular basis. He stated that if Managers are uncomfortable, they should attempt to gain information from staff prior to the regular meeting.

Administrator Anhorn explained that in difficult cases, staff often has the applicant come to the Board for a presentation prior to the permitting decision to provide information on the matter.

Attorney Welch stated that a variance can also be approved with a condition, say that a technical review be done by engineering staff.

Engineer Obermeyer stated that it is a rarity that the District would put a developer behind schedule.

Manager Kloiber agreed but acknowledged that Managers should not feel boxed in because there are options. He stated that there have been times where he was not necessarily in favor of a request but also did not have a definitive fact-based reason to deny the request.

Chair Peterson asked if there is a way for the District to have the interface work better between city approvals and District requirements, such as buffer requirements. She stated that sometimes the District is put in a political bind.

Attorney Welch agreed that it would be helpful to have city planning staff thinking about the District requirements when reviewing land-use projects.

Manager Cutshall asked if the Board can ask for a different type of mitigation. He stated that although it is a different requirement, it would still provide a benefit to the water resource or environment.

Attorney Welch stated that as long as the request is rational and related to the shortfall that is the subject of the variance, that could be an option. He stated that if the two elements are not related, it would be more questionable to require the applicant to do that in return for a variance.

Administrator Anhorn stated staff very often work with applicants to develop mitigation efforts to present to the managers.

Attorney Welch provided information on exceptions, which is a framework in the rules to review projects that provide water-resources benefit but do not comport well with the rules. He stated that the projects holistically improve the water resource but will have impacts on the water resource and therefore will not specifically meet the rules.

Administrator Anhorn stated that the Board recently granted exceptions to Bloomington and to the District itself for projects.

Attorney Welch confirmed that a variance request can be denied, if denied after a rational analysis based on facts in the record. He stated that the watershed rules have been pretty much the same since 2008 and have even become a bit more flexible since that time, so there is little basis for grandfathering project shortfalls from rule requirements.

Manager Kloiber described the Wetland Conservation Act process, which includes attempting to avoid, then minimizing, and replacement, with review by the Technical Evaluation Panel. He stated that the alternative is for a developer to fill the wetland and purchase wetland credits in another region, which does not benefit this District.

Attorney Welch stated that the District cannot give a variance from WCA.

Manager Sheely asked if a stronger rule could be written for higher value wetlands, with less strict requirements for lower quality wetlands.

Attorney Welch confirmed that the District can be stricter than WCA.

Manager Sheely commented that a large part of that would be education, explaining to property owners along the water bodies on why it is important.

Chair Peterson stated that perhaps involving the city planning staff would be a good collaborative effort.

Manager Kloiber explained that previously the District had the member cities complete wetland functions and values assessments to identify high-value wetlands. He stated that an update could be done, and that information could be used to prioritize an educational campaign.

Attorney Welch stated that the District could, in essence, say that high value wetlands cannot be filled in, but the District would be swimming against the tide.

Manager Kloiber stated that the District's requirement of a high replacement ratio for high-value wetlands does not prohibit the impacts but discourages that activity because of the economics.

Manager Sheely stated that she would like additional photo documentation and education. She asked if a case were to have an approved variance for wetland buffer, would that continue with a new property owner.

Manager Kloiber explained that the variance does not transfer with the land; if a new property owner comes in, they would need to meet the rules of the District. He stated that he often has trouble identifying unique circumstances when deciding on variances.

Attorney Welch noted that in a specific example of a previous case, the building was constructed prior to WCA and was not intentionally by the applicant.

Attorney Welch noted that the burden is on the applicant to show that there are no feasible alternatives to the work or circumstances creating the variance.

Manager Sheely stated that it would be helpful to track the locations of variances.

Administrator Anhorn referenced the snow-melt modeling that was done in 2011. He stated that there are similar situations, although some lakes are about two feet higher in elevation than they were in 2011. He noted that Barr Engineering is going to complete a memorandum that can be distributed to member cities to plan for potential snow melt situations.

### **Adjournment**

**It was moved by Manager Kloiber, seconded by Manager Sheely, to adjourn the meeting at 7:15 p.m. Upon a vote, the motion carried.**

Respectfully submitted,

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Erin Hunker, Secretary