

DRAINAGE MINUTES  
JOINT DISTRICT HAMILTON #105-STORY #1  
JANUARY 18, 2022

The Drainage District Trustees of Hamilton and Story Counties met via Zoom in the Public Meeting Room of the Story County Administration Building to consider the final plans and specifications (on file in the Hamilton and Story County Auditor's Offices) for a project to clean the main open ditch in Joint Drainage District Hamilton #105-Story #1, Story County controlling. Members present were Latifah Faisal, chair, Linda Murken, and Lisa Heddens of Story County and Rick Young, Jerry Kloberdanz, and Dan Campidilli of Hamilton County. Also present were Hamilton County Drainage Clerk Lori Kloberdanz and Story County Assistant Attorney Ethan Anderson, Engineer Darren Moon, County Outreach and Special Projects Manager Leanne Harter, and Drainage Clerk Scott Wall along with Kent Rode of Bolton and Menk and landowner Austin Carlson with his attorney Ryan Haaland.

Faisal called the meeting to order at 9:00 a.m.

Murken moved, seconded by Campidilli, to approve the agenda. Motion carried unanimously (MCU).

Rode went through a summary of the Plans and Specifications for the main open ditch repair project. There are two divisions. The first is the repair itself and the second is the seeding. Rode worked with Story County Vegetation Management Biologist Joe Kooiker to come up with three alternatives for the seeding. They are: using a traditional seeding mix for slopes and ditches and applying it hydraulically, seeding with native grasses and wildflowers using the same application method, and seeding with native seed provided by Story County Conservation. Kooiker believes he can obtain the native seed for a lower cost than an outside contractor. Contractors must bid on all divisions and seeding alternatives. Notice of the project must be published on two consecutive weeks in local newspapers. It will also be distributed via QuestCDN, an electronic plan room, and Bolton and Menk will notify contractors by email from a list of contractors they maintain. Rode is proposing that bids be due on February 10 with bid selection to be made on February 15. The estimated costs are: Division 1 - \$385,000, Seeding Alternate 1 - \$64,875, Seeding Alternate 2 - \$77,850, Seeding Alternate 3 - \$25,950.

Murken asked if native seed provided by Story County would be billed to the district, adding to the cost of Alternate 3.

Rode said yes but that Kooiker is checking into programs that could get that seed at a much cheaper cost or, potentially, at no cost.

Murken said Kooiker has been harvesting seed from Doolittle Prairie which is just a few miles from the ditch so that would be seed that is native to the area.

Rode said the project completion date is May 1, 2023. Giving contractors more time to schedule the project into their workload generally leads to more competitive bids. The projects will use warrants for payment. Rode recommends that the option of paying in 10 installments be offered and asked what the interest rate will be.

Wall said the trustees approve paying in installments and the number of installments when the district is levied. At that time, they know what the highest levies are going to be and can use that as the basis for how many installments are appropriate. Wall and Lori Kloberdanz confirmed that Story and Hamilton Counties are both charging 6% interest.

Murken asked about the timeline for seeding with the project due to be finished in the spring of 2023. Fall seeding is generally better.

Rode said there was some leeway for the seeding to be completed. You can do a dormant seeding between November 1 and March 31 or a spring seeding from April 1 to June 30 for native grasses and March 1 to May 31 or August 10 to September 30 for Alternate A.

Kloberdanz moved, seconded by Heddens, to accept the engineer's final plans and specifications and direct the engineer to proceed with moving towards a bid letting on February 10, 2022 and awarding the contract on February 18, 2022. MCU.

Haaland said he had been retained by Austin and Tarra Carlson. They want more clarification on two items. First is the question of additional right-of-way (ROW) along the open ditch. Is there a defined ROW now and does the district intend to annex land for additional ROW? The engineer's report states that there is a ROW but that it has not been properly described. How can there be a ROW if it is not defined? He cannot tell from the report or the minutes of the previous meeting what the county's stance is on acquiring the ROW as it pertains to Carlson's property. The secondary issue is the original capacity of the ditch. What is it? This is what the trustees must maintain but he could find nothing in the records or the engineer's report that states the original capacity. He is requesting that the trees on the Carlson property be marked to indicate which ones are interfering with the original capacity of the ditch. While he would not expect Bolton and Menk to mark every tree to be removed along several miles of open ditch he would expect them, in his client's case, to mark the trees that must be removed. If there is a lawsuit there will certainly be an engineer on the other side to dispute Bolton and Menk's recommendations.

Haaland said he has advised his clients that, at the end of the day, the county can take the ROW it needs so the outcome is somewhat predetermined but he still wants his questions and concerns answered before that happens.

Rode said his report quotes Code items that give the trustees the authority to set the ROW along the open ditch. Following the establishment of a district per Code Section 468.27 the district is deemed to have acquired by permanent easement in the dimensions shown on the survey and report if one is made. As was commonly not done at the time of establishment those widths were not defined. According to Code Section 468.126 if the records do not define the ROW's the trustees may, at any time, hire a surveyor to define them. His report defines the ROW as 50' on either side of the centerline of the open ditch. He was under the impression that that had been done at the last meeting. If not, it could be done at any time.

Haaland said if you read farther into that Code Section (468.126.8) landowners must be served notice in person in the same manner as is done for lawsuits when ROW is to be acquired. The mailed notice about the public hearing is not sufficient for the acquisition of ROW thus the process to acquire the ROW has not been followed and additional ROW cannot be taken. He does not dispute that the ROW can be taken. He does insist that the correct process be followed and acknowledges that when it is followed the outcome is predetermined and the ROW will be taken.

Rode said he believes the ROW had been set, at the previous meeting, to be 50' on each side of the centerline of the ditch. All landowners were notified of that meeting. He doesn't know what else the district could do short of using certified mail.

Haaland disagreed as the mail is not sufficient for service of notice as defined by 468.126.8. The county can seek legal counsel on this point but the notice should have been served to his clients in person. Let's assume that notice was properly served. There is still the second issue of the capacity of the ditch.

Rode said his job is to restore the ditch to its original condition which is, by definition, a maintenance project. To do that they use the original plans to bring the ditch back, as much as possible, to its condition at the time the district was established.

Haaland said original condition and original capacity are not the same thing.

Rode said if the ditch is brought back to its original condition how is that not restoring it to its original capacity?

Haaland said he is just saying that the trustees have an obligation to prove that the standard in the Code is being met.

Rode agreed and said the trustees are mandated to maintain the facility in its original condition.

Rode said there is a crew from Bolton & Menk scheduled to stake the ROW on the Rechkemmer property (Carlson's neighbor) today. Carlson has asked them not to cross his property at this time so they are not staking the ROW on his property. At the earlier meeting here Rode made clear that all trees within the top-of-bank must be removed but there may be an opportunity for some of the trees outside the ditch to be saved. There may not be much potential on Carlson's property but there is for Rechkemmer's property. Once the ROW is staked Rechkemmer will mark the trees he wants to save and Rode will determine which, if any, of those trees can be kept.

Haaland reiterated that the trustees have a standard to meet when cleaning the district as cited in 468.126. The phrase "shall remove obstructions" is in a separate Code section which is not cited in the report. If that is the Code section the trustees are relying on then we have a different set of analysis and a different set of facts.

Faisal pointed out that the trustees are obligated to follow all of the Code regardless of what is referenced in the engineer's report.

Haaland said he understands that but the trustees need to make clear what Code sections they are using so he can go back to his clients with that information. Code section 468.138 states the trustees shall remove all obstructions which interfere with the flow of the water. It does not include the ROW. This is different from obstructions in the ROW as it applies to Mr. Carlson's property. The issue is establishing that a given tree is an obstruction.

Rode said all of the trees inside the top-of-banks must be removed. While trees outside the top-of-bank do not impede the flow of water the district needs access to the ditch and the trees do obstruct access by construction equipment. That is why the report recommends the removal of all of the trees within the ROW. It gives the district the 15-20' outside the banks needed to operate an excavator and other equipment to perform the work that is necessary to maintain the ditch. Rode is open to compromise. If any of the trees the landowners want saved will not interfere with access to the ditch Rode will work with them to keep those trees.

Haaland agreed with having access to the ditch but disputed the need to take everything within the ROW.

Murken asked if Rode didn't just state that the ROW is being staked today so that a determination can be made about saving some of the trees within that ROW?

Haaland said that Rode had made clear that he wants to remove all of the trees within the ROW.

Rode said that was his position in his report but, due to pushback at the previous meeting, he is open to keeping as many trees as possible without impeding access to the ditch by construction equipment. The trees inside the top-of-bank are an obstruction and a detriment to the function of the ditch and all of them must be removed.

Haaland said if the trustees are relying on 468.138 the report needs to state that the trees within the top-of-bank are an obstruction which impedes the flow of water and he isn't seeing that.

Faisal asked if it was standard practice to regard trees as obstructions.

Rode said it is generally accepted that trees within the top-of-bank are obstructions to the flow of water.

Anderson said that 468.126.1.a states that the trustees may do whatever is necessary, without notice, to maintain the district. If there is a concern about the removal of obstructions the trustees can move today to remove all obstructions per 468.138 and that problem is done. Mr. Carlson needs to accept the fact that this is going to happen. He doesn't have to like it but he is going to have to accept it. Haaland has a point concerning the service of notice. That needs to happen. Haaland has said the service of notice is to ensure that people know what is happening. Carlson was at the last meeting. He is at this meeting. He knows what is happening. To fix a technicality it might be advisable to serve Mr. Carlson and re-hold this meeting in a couple of weeks. Haaland has said he needs clarification on what is happening. Anderson believes what is happening is clear. The ditch is going to be cleaned. Any costs incurred by Haaland's and Carlson's requests, including legal action the district needs to take to defend its actions, will be paid for by the residents of the district, including Mr. Carlson. The trustees have a legal obligation to do this project. Haaland has acknowledged that, whatever objections he raises, however long it takes, whatever it costs, the project will be done. If Mr. Haaland insists on personal service that can be done then we'll come back here and hold this meeting again.

Haaland said he is not insisting on personal service. There are two methods to acquire ROW and one requires personal service. If the trustees are not using that method they must be using the other one which is, essentially, annexation but he sees no evidence of that either. The law has all sorts of requirements that seem onerous but they are still required. He is not insisting on anything. If we serve notice on his client he will gladly sign it. We don't need another meeting.

Murken said she was confused as to just what it is that Haaland wants.

Haaland said what he was asking at the outset was for clarification as to what was going on. The minutes and the process followed so far have not established that. He is also asking for a finding that this is necessary to restore the ditch to its original efficiency or capacity.

Anderson said Carlson wants to keep his trees. Anderson understands that. He would feel the same way in Carlson's place. However, Carlson needs to understand that this is going to happen. There are two roads in front of Mr. Carlson today – delay or acceptance. Acceptance would be in the best interests of everyone in the district but Mr. Carlson will make his own decision. If Haaland files an a priori challenging the actions of the trustees Anderson thinks he will have a hard time showing that the trustees acted illegally or beyond the scope of the statute. Haaland would prevail on the service of notice which would set the project back.

Murken asked if Anderson was advising the trustees to provide public notice to Carlson.

Anderson said yes, and to his neighbor Rechkemmer. The original notice can be tweaked to reference Code Sections 468.27 and 468.126.8. Once that has been done this meeting should be re-held. This will move Rode's proposed timeline back a couple of weeks.

Rode pointed out that the report contains a ROW tabulation (Appendix C) with landowner's names, legal descriptions, and area of ROW to be acquired from each property. The appendix also contains a survey showing the location of the ROW along the open ditch.

Murken asked Anderson if the information in the appendix was sufficient so that the trustees do not have to add additional costs to the project by having a survey done.

Anderson said that should not be necessary. The only step that has not been done is the personal service of notice. It may be prudent to serve the rest of the people in the district as well and they can thank Haaland and Carlson for adding an additional cost to the district through their objections today.

Haaland stated that there are additional costs but that is not the fault of his client or him. It is required by statute. The solution is to write your legislator and request that the Code be changed. We might also look into personal service by publication.

Anderson said he should not have blamed Haaland for the additional costs likely to be incurred as it is a Code requirement. Returning to his statement about notice to everyone he has concerns that if we only notify Carlson and Rechkemmer other district landowners can raise the same objections.

Murken summarized where she believes we are at today. Appendix C of the engineer's report is the survey required by 468.126.8 and Anderson is recommending that we serve everyone in the district with the survey and the report.

Faisal asked if we can personally serve Carlson and serve the rest of the landowners through publication?

Anderson said yes, as long as we have proof of publication and service prior to the next meeting.

Murken said she wanted to be sure the trustees addressed all concerns today so another legal issue doesn't surface at the next meeting.

Anderson said the trustees cannot stop anyone from threatening to sue for any reason. All we can do is respond to the concerns raised today. If we complete the personal service of notice and Carlson decides to litigate then we will litigate.

Haaland said he cannot guarantee that his client will not pursue additional legal action. He will advise his client on possible next steps following this meeting and receipt of the notice and they will go from there.

Anderson said one of the concerns Haaland brought up today was the removal of obstructions. The trustees can address that concern today by moving, within their authority under 468.126.1.a to restore the ditch in its original efficiency or capacity, to remove all obstructions as defined in 468.138.

Murken moved, seconded by Kloberdanz, that the trustees direct that all obstructions, as defined under Code of Iowa Section 468.138, be removed from the Hamilton #105-Story #1 open ditch under their authority as defined in Code of Iowa Section 468.126.1.a. MCU.

Rode asked if the trustees can still approve the plans and specifications today and move forward with the bid letting and award?

Hamilton County said the board had already taken that action.

Rode said he didn't see that the issue with serving notice would affect the bid letting.

Murken said if the service of notice was not complete by the bid letting we would have to delay and reject the bids.

Anderson said that once notice is served the hearing on the engineer's report should be re-held since the notice would concern the contents of that report.

Rode noted that another hearing would require a minimum of 20 days advance notice. That would be have to be prior to January 26.

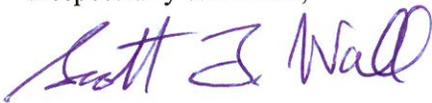
Anderson said he didn't think any additional motions were necessary today.

Murken asked if the meeting on February 15 could include the presentation of the engineer's report and the awarding of a contract? She doesn't want to see this project drag out and incur additional costs to the landowners in this district.

Anderson said he wants to work with Wall and Rode on the notice then see where that puts us on the calendar.

Murken moved, seconded by Young, to adjourn. MCU. Meeting adjourned at 10:15 a.m.

Respectfully submitted,



Scott T. Wall