

MINUTES OF THE DEKALB COUNTY DRAINAGE BOARD MEETING OF OCTOBER 24, 2019

Chairman Randall J. Deetz called the regular meeting of the DeKalb County Drainage Board to order at 8:30 a.m., Thursday October 24th, 2019. Answering roll call was Randall J. Deetz; Michael E. Krehl; Donald D. Grogg; Jacqueline R. Rowan and William 'Bill' Hartman.

ALSO PRESENT: Drainage Board Attorney Shannon Kruse; Administrative Assistant Brenda Myers; Surveyor Mike Kline and staff member Nate Frye.

IN ATTENDANCE: John & Rebecca Fortman; Jim Deetz; Neal Blythe; Ronald 'Bud' Creager; Roger Steinman; Donna Colburn

APPROVAL OF MINUTES: A motion was made by Jacqueline Rowan to approve the Minutes of October 17th, 2019 as standard minutes as taken by the DeKalb County Drainage Board, seconded by Bill Hartman, motion carried.

INFORMATIONAL: Present is John and Rebecca Fortman looking for an update and what they can expect to happen with the flooding problem on County Road 19/County Road 68 with the *E. P. Griffin Drain Number 224-00-0*. The last time they were in they were horribly flooded and while they have been dry for the past few months, they are wondering if this is going to become a reservoir with sand bags again in the spring.

Chairman Deetz said there hasn't been any discussions regarding this drain so he too would ask for an update on the plan for this drain.

Surveyor Mike Kline said this has not come up on the list, after moving through the first five (on the reconstruction list) the Board will need to prioritize the next phase of reconstruction projects. It's up to the Board what they want done Mike said.

Rebecca Fortman said the biggest concern at this point is with having to run electrical power out to where a pump is supposed to go and the ground is going to freeze; this is a public safety concern, there are twenty families who are blocked off potentially from any resources in DeKalb County such as an ambulance/fire truck, etcetera.

Chairman Deetz stated that public safety is very important to everyone and in looking at the list in the next phase that is something they would look at.

Mike Krehl said he thought with the last meeting a pump was being ordered because this was a safety issue with the roads.

Mike Kline said he looked at that but he wasn't sure that was going to work so he was looking at the alternate of trying to get the end of the open drain cleared and putting pipe in. Mike said he will continue to look at the options in this location.

Chairman Deetz stated that in May of 2019 the Board agreed (by motion) to put this drain in the red so a pump could be purchased if that was a solution; it isn't wise to purchase a pump and do all that it entails if it isn't the best long-term solution. Even if this were towards the top of the list now, they (landowners) need to be prepared this coming spring with whatever needs necessary because with the timeframe of holding a hearing and all that is involved, even if this were to be fast-tracked they (the county) would not be able to get this fixed by next spring.

Bill Hartman said that he is in favor of reconstruction rather than the pump, the pump was a short-term fix that may not work as was stated. Bill said this drain needs to be moved up rather quickly because of the road closing; we can't have that road closed.

SURVEYORS REPORT: Mike Kline said he is bidding out the *Eric Morris Drain Number 416-00-0* and one of the bidders in the past has provided a property bond for any contracts that he was issued; in order to allow him to do this with a property bond, the

Drainage Board would have to approve that prior to bids being accepted. Mike said in the past he has had property bonds at one and one-half the times what the bid is and normally he asks for it to be one and one-quarter times what the bid is because if for some reason the contractor doesn't finish the project and we have to hire someone else, we know they would be higher and plus there would be paperwork necessary in order to get this done.

Drainage Board Attorney Shannon Kruse stated that the bond could not be less than the bid.

Mike Kline said he would inform Gene Clifford.

The consensus of the Board was to allow the property bond at one and one-quarter percent.

Don Grogg moved to accept and approve a property bond from Clifford Excavating for a bid on the Eric Morris Drain Number 416-00-0 project at one and one-quarter percent (1¼%), seconded by Bill Hartman, motion carried.

UTILITY PERMIT REQUEST – INDIANA MICHIGAN POWER: Surveyor Mike Kline presented a utility permit request on behalf of Indiana Michigan Power for a project starting at intersection of County Road 59 and County Road 56, going west until five (5') feet short of County Road 55 for replacement of poles, wires and equipment.

The county regulated drain involved: *Daniel Hursey Drain Number 48-00-0*

Don Grogg moved that the Board approve the Utility Permit for drain crossings in regard to the above drain and to authorize the Chairman to sign on behalf of the Board, seconded by Mike Krehl, motion carried.

GUY PLATTER DRAIN NUMBER 112-00-0: Mike Kline said that he is prepared to present the assessment roll and the plans and cost estimate along with his surveyor's report for the Guy Platter drain reconstruction project. Mike said he would like to get this set up for a public hearing because anything that happens within the State Highway is paid by them. Mike said he has sent emails but the State Highway hasn't gotten back to him but his guess is that they will opt for open cut because it's cheaper but Mike said that is no reason to hold up the hearing.

Chairman Deetz asked the administrative assistant what the earliest date was that a hearing could be held and she answered December 12th.

Bill Hartman said that Ed Yoder is wanting to get this done.

Mike Kline noted as shown on his plans, they will bottom dip a portion of the open drain and he can drop the existing tile about one and one half feet (1½'), currently it is sixteen inch (16") tile but this will then all be twenty-four inch (24") tile to the structure on the north side of the road where the lateral comes in; that is currently fifteen inch (15") tile all going to eighteen inch (18") tile, and he will be able to get an additional two feet (2') of additional cover over the tile he said. Mike said he needs to pick up some grade in the future on this and also he needs grade because he has done calculations on 'this' and when trying to get that to drain this will help in the future when that portion gets redone; that is not part of this but being planned for the future. This will go to County Road 75 where they will put a new drop structure in, they will be two feet (2') lower so they will have grade then if they need to go on in the future.

Nate said the highway is looking to replace a culvert in the summer further up and the one on the county ditch (*based on the survey of culverts*) is in desperate need of

replacement so they are looking to getting that coordinated with the highway at the same time.

Don Grogg moved that the Board receive the Surveyor's report after having reviewed proposed assessments and having established a proposed schedule of assessments, authorizes the hearing to be held on Thursday December 12th, 2019 at 9:00 a.m., in the Commissioner's Court and with notices sent and published as required by the Drainage Code, seconded by Bill Hartman, motion carried.

WILLIAM BICKEL DRAIN NUMBER 133-00-0: Mike Kline stated that he has talked to Randy Sexton (Noble County Surveyor) and gave him the maps, assessment sheets, the estimate and he will look those over and then when his Board meets next week he will get back with Brenda to set up a hearing. Mike said he still has to talk to LaGrange County to see when the culvert pipe is going to be delivered so we can get that installed; the culvert pipe and all the ditching work will be paid from the maintenance fund and the LaGrange Highway department will pay for the pipe. Mike said he will have to advertise this for bids being over the \$75,000.00 threshold.

Mike Krehl questioned if Mike Kline was waiting for Randy to get back to him before moving forward with a Joint meeting, and wanted to know if that is next.

It was stated that this is a Joint Board so if Noble/LaGrange are wanting to have a meeting we will then schedule, if they don't, it would take a formal letter from those adjoining counties stating that they have no interest and waive their rights to being present.

PRIORITY LIST: Mike said he is going to go over the list (for reconstruction) and give the Board what he thinks the priority would be for the next five or so and then the Board can make a determination as to what drains they want done/prepared next.

HEARING PRIVATE DRAINAGE DISPUTE – CREAGER/GRATE VS COLBURN: Chairman Deetz called the hearing to order for the purpose of receiving evidence for the following drainage matters being the private dispute. Notices were mailed to the landowners and their respective attorney's advising of this hearing.

Drainage Board Attorney Shannon Kruse clarified that according to Indiana Drainage Board Code 36-9-27.4 this is a quasi-judicial function that the Drainage Board sits in on because this is not a county regulated drain but two landowners filed a petition alleging an obstruction in a drain. Per the Code the County Surveyor was charged with doing an investigation to determine if there was in fact an obstruction.

Chairman Deetz noted that a letter was received by Kevin Likes who is the attorney for Mrs. Colburn, Shoemaker Trust stating that he would be out of town and unable to attend this meeting. Chairman Deetz asked Mrs. Colburn if she felt comfortable proceeding without her attorney and she stated that she did so long as she could file an appeal if things didn't go as she thought they should.

Drainage Board Attorney Shannon Kruse stated that Mrs. Colburn would have the option of doing a judicial review with one of the courts here in DeKalb County.

Surveyor Mike Kline presented his report to all present. The Board reviewed the report and Mike explained the invoice given by Jim Dunn as being for the rooting on the Shoemaker property and tile replacement on the Creager property; the time spent on both was broken down in hours and rate per hour.

Drainage Board Attorney Shannon Kruse instructed the Board that the first step under Code Section 14, that if after a hearing is held on this chapter that the Board finds:

- 1) That the obstruction of the drain or natural surface watercourse that is alleged in the petition as exists, and;
- 2) That the removal will promote better drainage of the petitioners land and not cause unreasonable damage to the land of the respondent, the Drainage Board shall find for the petitioner.

The alternative being that if after a hearing that the Board is unable to make a finding described (i.e. that there is an obstruction and that removal will benefit and not unreasonably damage) then the Board shall deny the petition. If they do find that there is an obstruction, the next process is to determine if that was intentionally or unintentionally created, and at that time then determine how the cost shall be split, or if one party should bear all the cost.

Neal Blythe, Attorney representing Ronald Creager and Bradley Grate who filed the petition noted that the property is located on County Road 14 where there is a tile that runs through Mr. Grate's property and down through Mr. Creager's where it crosses under County Road 14 and then connects to a tile; the problem was the water was getting stopped and backing up creating a wet area, this has been a problem for quite some time and his clients tried unsuccessfully to remedy that with the Trustee of the Shoemaker Trust. Mr. Blythe stated that he attempted several letters to the Trust but nothing worked so eventually the petition had to be filed because essentially, his clients couldn't use several acres of their north section of property. It was estimated that some twenty-five years ago trees were planted in rows and it was his client's understanding at that time that it was done for the purpose of obtaining environmentalist, CRP type funds from the government where the Trust essentially benefitted by having planted those trees for wildlife mitigation, tree planting, etcetera. The issue that needs to be decided first, is this a mutual drain, as all would agree this is not regulated by a county or state or federal, so it is a private drain. In Section 36-9-27.2 the definition of a mutual drain it is defined as a drain that is located on two or more tracts of land under different ownership; was established by the mutual consent of the owners; was not established under or made subject to any drainage statute. The court of appeals weighed in on this and decided a case in April of 2015, where the court found that if a drain is found to have been installed as a continuous system, it was reasonable to conclude that the system in place is basically one system to promote the drainage of all three properties. The first finding would have to be that this was a mutual drain. The next phase would be investigation and that has been done as well as the removal of tree roots. They think it clearly can be shown that this was intentional because the drains existed and the trees being put in twenty-five years ago over the top of the drain. Mr. Blythe stated that his clients have forwarded money that was used to clean this up exclusively at this point, there has been no contribution from anybody in the Trust. Essentially Mr. Blythe asked that the Board find today that the obstruction was intentionally placed on a mutual drain, and that the Trust be responsible for the cost to remove that obstruction. The cost is broken down in the report that Mike Kline presented in the amount of \$1,853.00 with a breakdown of the north and the south, which is all irrelevant, as it was all caused by the trees being planted and obstructing and causing blockage. Mr. Blythe asked that the court find in favor of the petitioners and order it removed (which it has already been removed), and order that the costs associated be paid by the Trust. A petition fee was paid to file in the amount of \$500.00 and also attorney fees.

Ronald 'Bud' Creager said the property is draining now but they have had problems with this area for a number of years; the Shoemaker farm has not been farmed for years as it was put in the CRP program. Several years ago he met with Mrs. Colburn to let her know that there was a problem and they walked back and looked at the broken tile south of the wooded area, he also went to the USDA and talked to Mark Henry and told him those trees were planted over drains and he said at that time that it was up to the landowner to inform them of that so they could stay back sixty (60') feet each way, and they were not made aware of that. Brad Grate put a riser in on the south side and they have gotten by with that for 6-8 years according to Mr. Creager.

Donna Colburn stated that no one had told her anything that has been said, looking at Mr. Creager and telling him that he could have told her about it; the trees were not planted intentionally to create a problem, and then she said she put a standing drain in by the road to help when Bud Creager talked to her about this a long time ago. The petitioner trespassed on her property and took a bulldozer and dug, knocking the standing drain down, and that was not very friendly she said. Ms. Colburn said she still doesn't know why we're here; what their intentions are, she is willing to pay that amount that Mike had figured up for her side, she will pay that with no problem. Ms. Colburn said that she had taken pictures but wasn't allowed to bring her cellphone in so she could show them to the Board. Ms. Colburn said there are tree roots on the other side of the road too.

It was questioned where trees roots were found and it was stated on the north side of the road; that this area has been wet for many, many years.

Bill Hartman said with the tree roots on the north side, if that lays wet and they aren't able to farm it, it will naturally grow some trees; the fact that Creager and Grate have lost production on their property needs to be taken into consideration. While he doesn't think the trees were planted with intention of plugging the tile, they were still planted intentionally and research should have been done and that falls on the property owner to take those steps.

Drainage Board Attorney Shannon Kruse stated that she concurs with the law that was recited by Neal Blythe pertaining to the Statute.

Neal Blythe stated that no trees were planted on the north side of the road and he agrees that this matter should not have had to come to this point, he attempted by sending a letter in June 2018, trying to work with the neighbor and hit a brick wall. In agreeing with Mr. Hartman, while it may not have been intentional in planting the trees to block the drain, it was clearly a situation where the trees were planted intentionally over a drain.

Ms. Colburn rebutted stating that she did not know where the tile was and she was not aware that her attorney was being contacted in 2018 to resolve this.

DECISION MAKING PROCESS:

It was asked: Was there an obstruction of a drain that is alleged in the petition exists, and that the removal of that obstruction will promote better drainage of the petitioners land and not cause unreasonable damage to the land of the respondent. If so, the Drainage Board shall find for the petitioner.

According to the Surveyor's report, a blockage was found and has been removed; there were trees along the ditch line on the north side with a small tree that was removed and could have been the source of blockage on that side of the road, which is pretty common Mike reported.

Don Grogg moved to accept the report of the DeKalb County Surveyor as presented, seconded by Mike Krehl, motion carried.

Drainage Board Attorney Shannon Kruse stated that with this being a bit different she wanted to propose, if the Board is so willing as to make a follow-up motion, not only to accept the Surveyor's Report, but also the following Findings:

- 1) That per the Surveyor's Report an obstruction of the drain was found, and
- 2) That during the investigation process the obstruction was removed, and
- 3) That removing said obstruction did promote better drainage to the petitioners land, and
- 4) That it did not cause unreasonable damage to the land of the respondent.

Jacqueline Rowan moved to add the FINDINGS 1 through 4 as stated by Attorney Kruse, seconded by Bill Hartman, motion carried.

OBSTRUCTION INTENTIONAL: Drainage Board Attorney Shannon Kruse recited Section 15 of the Indiana Drainage Board Code as follows:

The Board shall determine upon preponderance of the evidence (51%) whether the obstruction was created intentionally by any of the respondents; if found unintentionally created under Section 19, the Drainage Board can find for the petitioner but does not find that the obstruction was created intentionally by any of the respondents, and the Board shall enter an order authorizing the petitioner to remove it, which is already done, or at least pay for the removal; authorize the respondent to remove it, or pay for it; directing the Surveyor to remove it and assess the cost or directing that it be removed through a joint effort. The cost of removing the obstruction must be borne by owners of all the tracts of land that are benefitted by said drain.

Don Grogg stated that it is his feeling that the trees were planted intentionally but they were not planted intentionally to plug the drain, so he does not feel it is an intentional blockage; Jacqueline Rowan agreed. Bill Hartman agreed as well, adding that planting trees over a drain is the responsibility of that landowner and ignorance of the law is no excuse, it is the responsibility of the landowners to figure out where drains are, so while he agreed with Don and Jacqueline that it was not intentional, the landowner is responsible. Mike Krehl agreed not intentional, while Chairman Deetz said it was unintended, there is a difference between being unintended and unintentional.

Bill Hartman moved that this was an unintentional obstruction, seconded by Jacqueline Rowan, motion carried.

FURTHER DISCUSSION: There is a balance in the Creager/Grate fund of \$147.00 of the money that had been provided by Creager/Grate to pay Jim Dunn for work he had done. It was stated that that money should be refunded to Creager/Grate in the amount of \$147.00.

Ms. Colburn was asked what amount she was referring to that she was 'more than willing to pay' and she clarified that it was the divided portion prepared by Mike Kline in the amount of \$617.37.

Chairman Deetz stated that regarding attorney fees, arguably they are both responsible for their own attorney fees.

Don Grogg said in looking at the costs, the division is two to one with south side paying 1/3, and the north side paying 2/3; most of the work was done on the north side so the petitioners will benefit by having new tile, but their tile was damaged by being plugged on the south side of the road and asked that the petitioners/respondent would split this

50/50 making it \$926.50 each. Both Mike Krehl and Jacqueline Rowan agreed, as did Randy Deetz.

Bill Hartman stated that Shoemaker Trust should pay the total invoice in the amount of \$1,853.00. The planting may not have been intentional however, it was negligence and therefore the Trust should bear the responsibility, but Jacqueline Rowan said she disagreed, the trees were put in for her (Ms. Colburn) and she didn't know the tile was there.

Don Grogg moved to accept the invoice as presented in the amount of \$1,853.00, with the petitioner having physical damage to his tile caused by the mud and silt backup from the blockage on the south side of the road, that the two parties involved split the invoice amount evenly 50/50 in the amount of \$926.50 each, with the \$147.00 being returned to the petitioners from the private dispute fund, seconded by Mike Krehl.

Those voting in favor of the motion: Don Grogg; Jacqueline Rowan; Mike Krehl; Randy Deetz.

Those voting against the motion: Bill Hartman.

Drainage Board Attorney Shannon Kruse advised that the Administrative Assistant prepare the minutes of this meeting in the form of a hearing, and that a cover letter be attached explaining the costs being assessed to those involved as stated.

Mike Krehl moved to approve the \$147.00 be refunded to the petitioners Ronald Creager and Brad Grate from the private drainage dispute fund, seconded by Don Grogg, motion carried.

SAM POMEROY DRAIN NUMBER 350-00-0: Present is Roger Steinman questioning where the tax money has been spent to take care of the county drain, he has paid extra money into that fund at least twice yet he is reading in past minutes that they have run out of money.

Drainage Board Attorney Shannon Kruse stated that the order of projects has nothing to do with money landowners have paid over the years. The money collected is in fact in the drain funds for maintenance.

Mike Kline stated that money that is collected can only be used on the drain that it was collected for. Money is only collected when it is necessary to do work on a drain, or we can collect up to four years collection in order to work on a drain. On this particular drain, maintenance was done from the field west of Roger to where the standpipe sits in the field, and on to the open drain. Mike said he thought they had spent money on Roger's portion of the drain but found out that is not true, it was strictly spent from Goings' property. Mike said according to Mr. Goings they have never done any work in the area where Steinman's or Pomeroy's are located, he didn't know the tile was in bad shape other than it hasn't been draining well. Mike said the tile is cracked, broken and full of mud and that is why Mike keeps telling Roger he can't connect because there's nothing there to connect to.

The claim sheet was displayed for the Sam Pomeroy drain and Roger was told it is all public record as to what work has been done and who was paid to do the work.

Roger stated that he has a file with over \$10,000.00 worth of bills towards this drain and nothing to show for it; he is wanting to sell his property and the realtors have told him that nobody will buy that property because there is no drainage from his house.

Mr. Steinman was instructed to stop in to the Surveyor's office to file a petition for reconstruction and he was informed that would be a cost beyond maintenance and the entire watershed would be assessed to pay for a reconstruction.

SURVEYORS CLAIMS: Nate Frye gave the Board a copy of claims to review.

Chairman Deetz questioned if Nate had researched the double billing on the last claim sheet that was presented to make sure since it wasn't being double billed to a drain, as the same amount on two claims is a red flag of being replicated. Nate said that he had not done that yet.

INFORMATIONAL: Bill Hartman said that Ben Parker from the Highway asked him about the culvert at County Road 39, he has that laying out there and needs direction as to whether or not he is putting that in.

Chairman Deetz said that is Ben's call, they have made him aware that it will have to be changed at some point, but he can put that in with that understanding.

Mike Kline couldn't give a timeline as to when he may get the work done on the drain where this culvert is being put in, it could be 1-5 years or more.

There being no further discussion, meeting adjourned.

Randall J. Deetz, Chairman

Brenda F. Myers, Administrative Assistant