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Dickey County Water Resource District

MEETING MINUTES

October 15, 2025

The Dickey County Water Resource District met at the Dickey County Courthouse in Ellendale ND at 8:00 am on Wednesday, October 15, 2025. Managers Steve Hansen, Keith Hauck, Don Zimbleman, Justin Gemar and John Quandt were all present at the meeting. Sean Fredricks, the board's attorney, and Nathan Trosen, Moore Engineering representative, joined via video conference.

Chairman Hansen called the meeting to order.

Public Comment Period

Al Webster Complaint

Complaint for Water- Related Issues filed by Alan Webster Against Applied Digital Corporation

The Board next considered Alan Webster's COMPLAINT FOR WATER-RELATED ISSUES, dated September 10, 2025, filed against Applied Digital Corporation. In the Complaint, Mr. Webster alleges the Applied Digital facility, under construction in the East Half of Section 4 in Ellendale Township, ultimately qualifies as an illegal obstruction in violation of N.D. Cent. Code § 61-16.1-51 and illegal drainage in violation of N.D. Cent. Code §§ 61-32-03 and 61-32-07. Mr. Webster is concerned that Applied Digital's facility included installation of fill in a wetland and that construction of the facility has ultimately altered drainage on Mr. Webster's adjacent property.

According to Dickey County records, Applied Digital's subsidiaries or other related holding companies own the East Half of Section 4 in Ellendale Township. More specifically, APLD HPC Holdings, LLC, owns the Northeast Quarter of Section 4. The Southeast Quarter of Section 4 was platted into outlots; APLD ELN-01 LLC owns Outlot 4-1; APLD ELN-02 LLC owns Outlot 4-2; APLD HPC Holdings, LLC, owns Outlot 4-3; and APLD ELN-02 LandCo LLC owns Outlot 4-4.

In February of 2025, the City of Ellendale annexed the East Half of Section 4 in Ellendale Township. On July 28, 2025, the City of Ellendale issued building permits to Applied Digital to approve construction of its facility in the East Half of Section 4 in Ellendale Township.

Mr. Webster is seeking relief from the Dickey County Water Resource District under the drainage and obstruction complaint statutes, Sections 61-16.1-51 and 61-32-07. While the Board voiced empathy for Mr. Webster, the Board also recognized Applied Digital constructed its facility within Ellendale city limits and in accordance with a building permit issued by the City of Ellendale. The question before the Board is whether or not the Dickey County Water Resource District's jurisdiction under Sections 61-16.1-51 and 61-32-07 extends into city limits and ultimately if the District's jurisdiction preempts the City of Ellendale's zoning authority over the Applied Digital site and facility.

The North Dakota Legislature has granted municipalities broad police powers "[t]o enact or adopt all such ordinances, resolutions, and regulations, not repugnant to the constitution and laws of this state, as may be proper and necessary to carry into effect the powers granted to such municipality or as the general welfare of the municipality may require." N.D. Cent. Code § 40-05-01. To protect their cities and residents, municipalities have broad powers to adopt zoning ordinances and building codes, to enact and enforce building code permitting requirements, and to enact other construction requirements. N.D. Cent. Code §§ 40-05-01(1) and 40-05-02(6), (7), and (13). Further, the Legislature has granted cities broad police power to exercise zoning authority to regulate construction within their city limits:

For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing body of any city may, subject to the provisions of chapter 54-21.3, regulate and restrict the height, number of stories, and the size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. The regulations may provide that a board of adjustment may determine and vary the application of the regulations in harmony with the regulations' general purpose and intent and in accordance with general or specific rules contained in the regulations. The governing body of a city may establish institutional controls that address environmental concerns with the department of environmental quality as provided in section 23.1-10-16.

N.D. Cent. Code § 40-47-01.

In accordance with the broad police powers granted to municipalities by the North Dakota Legislature to govern zoning and land use within city limits, the City of Ellendale enacted a zoning and land use code that governs and regulates development and construction within city limits. See Revised Ordinances of City of Ellendale, Chapter Five, Zoning - Land Use Planning. The City's zoning and land use code includes building code and permitting requirements, including drainage requirements and provisions. See § 5.0702(7)(a) and See § 5.0801 et seq. The City's enactment of a zoning and building code is an exercise of its constitutional police powers. See *Minch v. Fargo*, 332 N.W.2d 71, 73-74 (N.D. 1983). In enacting and enforcing its zoning and building code, the City of Ellendale is exercising a

quintessential legislative function granted by the constitution and authorized by the North Dakota Legislature. See *id.*

The City of Ellendale has broad legal authority to consider, approve, permit, and govern development and construction activities within its municipal boundaries. In this case, the City annexed the East Half of Section 4 in Ellendale Township, in accordance with Chapter 40-47 of the North Dakota Century Code and in accordance with the City's own zoning and land use code. The City then considered and approved building permits for the Applied Digital facility, in accordance with Section 40-05-01(1); Sections 40-05-02(6), (7), and (13); and Chapter 40-47 of the North Dakota Century Code, and in accordance with the City's own zoning and land use code.

Meanwhile, the North Dakota Legislature has granted the North Dakota Department of Water Resources ("DWR") and individual water resource districts certain authority over drainage activities under Sections 61-32-03, 61-32-07, and 61-32-08, and regarding obstructions to watercourses under Section 61-16.1-51. However, the Legislature has not granted DWR or water resource districts the ability to preempt municipal zoning and land use authorities. DWR has acknowledged the broad police powers of municipalities regarding drainage and land use and has acknowledged those authorities supersede the authority of DWR and water resource districts under Chapter 61-16.1 and 61-32. In 2024, DWR approved a policy manual entitled "Drainage Permitting Considerations" (the "DWR Policies"). Under Section 3.1.2 of the DWR Policies, DWR specifically exempts drainage activities within city limits from DWR's jurisdiction:

The Department does not consider the following to be drains [that require drainage permits under Section 61-32-03]:

- c. Municipal or city stormwater management activities that occur within the jurisdictional limits of a municipality or city and for the purposes of managing sheetwater runoff. These activities include constructing, modifying, and maintaining storm sewer and appurtenant works to alter the sheetwater flow. It is recommended that such activities be regulated under a stormwater management plan recognized by the municipal or city government, as defined in N.D.C.C. ch. 40-01.
- d. Land use changes, such as the construction, modification, or maintenance of buildings, parking lots, streets, lots, or similar activities, that alter sheetwater flow.

The State of North Dakota has acknowledged its lack of jurisdiction over drainage and development activities within municipal boundaries. The same rationale applies to the limitations of the Dickey County Water Resource District's authority over drainage and development activities within the City of Ellendale in this case. The City annexed this property and subsequently issued building permits to Applied Digital, in accordance with the North Dakota Century Code and the City's zoning and land use code. The Dickey County Water Resource District's authority over drainage does not supersede that city authority.

The enforcement provisions in Sections 61-16.1-51 and 61-32-07 further demonstrate the Dickey County Water Resource District's lack of authority over Applied Digital's facility. Mr. Webster's COMPLAINT FOR WATER-RELATED ISSUES includes an obstruction complaint under Section 61-16.1-51, a statute that provides, in relevant part:

61-16.1-51. Removal of obstructions to drain - Notice and hearing - Appeal - Injunction - Definition.

1. ***If a water resource board determines that an obstruction to a drain has been caused*** by the result of a natural occurrence, such as sedimentation or vegetation, ***or by the negligent act or omission of a landowner or tenant, the board shall notify the landowner*** by registered mail at the landowner's post-office address of record. A copy of the notice also must be sent to the tenant, if any. The notice must specify the nature and extent of the obstruction and the opinion of the board as to its cause, ***and must state if the obstruction is not removed within the period the board determines, but not less than fifteen days, the board shall procure removal of the obstruction*** and assess the cost of the removal, or the portion the board determines appropriate, against the property of the landowner responsible. The notice also must state the affected landowner, within fifteen days of the date the notice is mailed, may demand, in writing, a hearing on the matter. Upon receipt of the demand, the board shall set a hearing date within fifteen days from the date the demand is received. In the event of an emergency, the board may apply immediately to the appropriate district court for an injunction prohibiting a landowner or tenant from maintaining an obstruction. Assessments levied under this section must be collected in the same manner as other assessments authorized by this chapter. If, in the opinion of the board, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in accordance with the proportionate responsibility of the landowners. A landowner aggrieved by action of the board under this section may appeal the decision of the board to the district court of the county in which the land is located in accordance with the procedure provided in section 28-34-01. A hearing under this section is not a prerequisite to an appeal. If a complaint is frivolous in the discretion of the board, the board may assess the costs of the frivolous complaint against the complainant. If the obstruction is located in a road ditch, the timing and method of removal must be approved by the appropriate road authority before the notice required by this section is given and appropriate construction site protection standards must be followed.... (Emphasis added.)

Under Section 61-16.1-51, if a water resource district concludes a landowner has, in fact, caused or installed an obstruction to a natural watercourse, the remedy is for the water resource district to order removal of the obstruction. In this case, Mr. Webster alleges construction of the Applied Digital facility is an obstruction to the natural flow of water, to the detriment of Mr. Webster's property. The remedy under Section 61-16.1-51 would be for the Dickey County Water Resource District to order removal of the obstruction, i.e., removal of the Applied Digital facility, a facility for which the City of Ellendale issued building permits.

The Dickey County Water Resource District may have authority to address obstructions to natural watercourses but, in this case, the “obstruction” is a facility permitted and approved by the City of Ellendale in accordance with the North Dakota Century Code and the City’s zoning and land use code. The Dickey County Water Resource District’s authority does not supersede or preempt the City’s police powers regarding land use, development, and construction activities within city limits, and certainly does not grant the WRD the authority to order removal of the facility. See *Minch*, 332 N.W.2d at 73-74 (N.D. 1983) (a zoning ordinance is a constitutionally granted power; it must violate either the state or federal constitution in order for it to be overturned).

The same rationale applies regarding Mr. Webster’s drainage complaint against Applied Digital. The drainage complaint statute, Section 61-32-07, provides:

61-32-07. Closing a noncomplying drain - Notice and hearing - Appeal - Injunction - Frivolous complaints.

1. ...Any person may file a complaint about an unauthorized drain constructed after January 1, 1975. Upon receipt of a complaint of unauthorized drainage, the water resource board shall promptly investigate and make a determination of the facts with respect to the complaint. ***If the board determines that a drain, lateral drain, or ditch has been opened or established by a landowner or tenant contrary to this title or any rules adopted by the board, the board shall notify the landowner*** by certified mail at the landowner's post-office address of record. A copy of the notice must also be sent to the tenant, if known. ***The notice must specify the nature and extent of the noncompliance and must state that if the drain, lateral drain, or ditch is not closed or filled within a reasonable time as the board determines, but not less than fifteen days, the board shall procure the closing or filling of the drain, lateral drain, or ditch*** and assess the cost of the closing or filling, or the portion the board determines, against the property of the landowner responsible. The notice must also state that the affected landowner, within fifteen days of the date the notice is mailed, may demand, in writing, a hearing on the matter. Upon receipt of the demand, the board shall set a hearing date within fifteen days from the date the demand is received. In the event of an emergency, the board may immediately apply to the appropriate district court for an injunction prohibiting the landowner or tenant from constructing or maintaining the drain, lateral drain, or ditch and ordering the closure of the illegal drain. Assessments levied under this section must be collected in the same manner as assessments authorized by chapter 61-16.1. If, in the opinion of the board, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. If a complaint is frivolous in the discretion of the board, the board may assess the costs of the frivolous complaint against the complainant.... (Emphasis added.)

Similar to the remedy under Section 61-16.1-51, under Section 61-32-07, if a water resource district concludes a landowner has, in fact, constructed illegal or unpermitted drainage, the remedy is for the water resource district to order the landowner to “close or fill” the drainage.

In this case, Mr. Webster alleges construction of the Applied Digital facility included illegal installation of fill in a wetland, in violation of Sections 61-32-03 and 61-32-07, to the detriment of Mr. Webster's property. The remedy under Section 61-32-07 would be for the Dickey County Water Resource District to order Applied Digital to remedy the illegal drainage, i.e., removal of the Applied Digital facility, a facility for which the City of Ellendale issued building permits. The Dickey County Water Resource District may have authority to address construction of illegal or unpermitted drainage but, in this case, the drainage activity is installation of fill to accommodate a facility permitted and approved by the City of Ellendale in accordance with the North Dakota Century Code and the City's zoning and land use code. Once again, the Dickey County Water Resource District's authority over drainage does not supersede or preempt the City's police powers regarding land use, development, and construction activities within city limits, and certainly does not grant the WRD the authority to order removal of the facility.

The obstruction and drainage complaint statutes do not and should not authorize the Dickey County Water Resource District to second-guess and ultimately overturn the City of Ellendale's zoning and land use decision-making authorities, authorities granted to the City by the North Dakota Legislature. The City approved an annexation ordinance in February of 2025; no party appealed the City's annexation decision under N.D. Cent. Code § 28-34-01 and the appeal period has now expired. See *Black Gold OilField Services v. City of Williston*, 875 N.W.2d 515 (N.D. 2016) (the proper remedy for challenging a city's zoning decision is an appeal to district court under Section 28-34-01). Similarly, the City of Ellendale approved building permits for the Applied Digital facility on July 28, 2025. No party appealed the City's decision to approve those building permits and the appeal period has now expired. While the Dickey County Water Resource District is sensitive to the issues Mr. Webster is encountering, to the extent Mr. Webster opposed the construction of the facility, including Applied Digital's proposed drainage plan to accommodate the facility, his remedy was to appeal the City of Ellendale's zoning and building permit decisions to Dickey County District Court.

In light of the Board's lack of jurisdiction over the Applied Digital facility or the East Half of Section 4 in the City of Ellendale's city limits, the Board has no choice but to dismiss Mr. Webster's COMPLAINT FOR WATER-RELATED ISSUES.

Manager Quandt moved to dismiss Alan Webster's COMPLAINT FOR WATER-RELATED ISSUES against Applied Digital, dated September 10, 2025, due to lack of jurisdiction. Manager Gemar seconded the motion. Upon roll call vote, the motion carried unanimously.

The Board directed Sean Fredricks to prepare and serve a NOTICE OF DECISION on the parties of record as required by law.

Dickey County Drain 3 Update

Sean Fredricks, the board's attorney, gave a brief update on the status of the joint powers agreement the County and the Commission are negotiating and considering. being worked out between the Dickey County Water Resource District and the county. State's Attorney Kim Rademacher provided some proposed revisions to the draft agreement. The agreement identifies ownership, operation and maintenance, and cost obligations for this drain. At the Board's September meeting, the Board directed Fredricks to include indemnity language to protect the Board from any liability as a result of the drain. State's Attorney Rademacher offered some revisions to the proposed indemnity language, to limit the County's indemnity obligations. The Dickey County Water Resource District remained adamant that the WRD should not be responsible for any liability for this drain, with the exception of any liability caused by the WRD's own gross negligence or intentional misconduct. The Board directed Fredricks to accept the County's proposal to include WRD responsibility for negligence arising out of the WRD's gross negligence, but to reject any additional revisions to the indemnity provisions in the agreement. Chairman Hansen will also reach out to the chairman of the county commissioners, Brandon Carlson, to explain the WRD's position.

Manager Zimbleman farms the land on the north side of the drain and has been doing the mowing maintenance of the ditch. He would like to end maintaining that area because he feels that should be the county's responsibility. He also has concerns regarding safety in light of the drain slopes. Manager Zimbleman also addressed the spoil piles that are eroding the property Manager Zimbleman farms.

Nathan Trosen, Moore Engineering representative, indicated he has been working with the DWR regarding the necessity to apply for and obtain a new permit for this drain. The drain was not constructed as the original permit allowed and a private landowner is currently the permittee; DWR recommended the Board apply for a new permit, to ensure the permit reflects the as-built condition of the drain and to ensure the WRD is the permittee.

Dickey County Road 12 update-John

Manager Quandt gave a brief update on the Dickey County Road 12 project. Mr. Quandt feels like the was has gone down approximately 3 inches before a heavy rain event recently. He mentioned after that rainfall, the slough did rise again but is going back down and working as it was intended.

Other Business

Manager Hansen thanked Sean Fredricks, the board's attorney, and Nathan Trosen, Moore Engineering representative, for their quick and thorough response to a request for information for Chairman Hansen. Chairman Hansen was contacted about a potential complaint from a landowner about drainage he felt was negatively impacting his property. Fredricks and Trosen provided information regarding that permit and project and Chairman Hansen was able to explain to this party that the Board complied with the law when approving the permit. Chairman Hansen also thanked both Mr. Fredricks and Mr. Trosen for the great work they both do representing the Dickey County Water Resource District.

Manager Zimbleman addressed the board on his concerns for a culver/approach on Dickey County Drain #1 that has a potential safety issue. After discussion, Manager Quandt moved to contact Dakota Improvement and have them fix the culvert/approach so that it can be used without any potential safety issues. Manager Zimbleman seconded the motion. Upon roll call, the motion passed unanimously. Manager Gemar also briefly spoke to the area north of the tracks on that same drain and that it should be cleaned out. After discussion, the board decided to have both projects done at the same time to avoid Dakota Improvement from having to come out to the area a second time.

Manager Gemar gave the board an update of Baker Trapping Services and their success of managing the beaver problem on Dickey County Drain #1. He is satisfied with the services of Bakers.

Meeting Minutes

Manager Hauck moved to accept the September 17, 2025 meeting minutes. Manager Gemar seconded the motion. Upon roll call, the motion passed unanimously.

Financial Statement and Bills

The board considered bills from Ohnstad Twichell of \$9611.90, Moore Engineering of \$1883.75, General Irrigation of \$1750, and Baker Trapping Services of \$484.60. Secretary Hansen gave the financial report. Manager Zimbleman moved to approve the financial statement and bills. Manager Gemar seconded the motion. Upon roll call, the motion passed unanimously.

There being no further business to discuss, the meeting was adjourned.

APPROVED:

Steve Hansen, Chairman

Attest:

Judy Hansen, Secretary