



LOWER MINNESOTA RIVER WATERSHED DISTRICT

Executive Summary for Action

Lower Minnesota River Watershed District Board of Managers Meeting

Wednesday, July 17, 2024

Agenda Item

Item 8. C. – 535 Lakota Lane – recovery of legal fees

Prepared By

Linda Loomis, Administrator

Summary

At the June 2024 LMRWD Board of Manager meeting, the Board approved an after the fact permit for the property located at 535 Lakota Lane contingent upon the receipt of payment of expenses incurred by the LMRWD for investigation and inspection of the property. President Barisonzi inquired as to whether legal fees were included in the fee request. Attorney John Kolb explained that legal expenses were not included in the payment request.

President Barisonzi asked for an explanation as to why legal fees were not requested. A request by President Barisonzi for an explanation is attached. A response from legal counsel is attached. Attorney Kolb is not able to attend the July Board of Managers meeting.

Attachments

Request from President Barisonzi dated June 27, 2024

Office Memorandum Re: Attorney Fees in Permitting vs. Enforcement Actions dated July 9, 2024

Recommended Action

No action recommended

Joseph Barisonzi
President, Board of Managers
Lower Minnesota River Watershed District
112 E Fifth St., Suite 102
Chaska, MN 55318
info@lowermnriverwd.org
(952) 856-5880

June 27, 2024

John Kolb
Rinke Noonan Law Firm
1015 W St Germain St #300,
St Cloud, MN 56301

Dear John,

Subject: Request for Official Opinion Regarding Legal Authority in Settlement for After-the-Fact Permit

I hope this letter finds you well. During our last board meeting of the Lower Minnesota River Watershed District (LMRWD), we discussed the settlement of an "after-the-fact" permit and the authority to recover legal expenses incurred. Your responses raised concerns we need to clarify and document officially.

Specifically, we request an opinion on the following points:

1. **Recovery of Legal Bills:** Confirmation on whether the LMRWD can request recovery of legal expenses during a settlement.
2. **Cost Recovery Restrictions:** Clarification on whether the LMRWD is limited to recovering only the costs incurred during the permit evaluation and assessment.
3. **Statutory Limitations:** Confirmation that unless explicitly stated otherwise, the LMRWD is restricted by statute in what it can request or demand to resolve an "after-the-fact" permit issue.
4. **Legal Compliance Costs:** Your opinion on whether there is a legal mechanism for the LMRWD to recover its legal costs associated with bringing a homeowner into compliance with its permitting rules.
5. **Authority in the Absence of Specific Rules:** Clarification on whether the absence of specific rules governing the process limits our authority to ask for anything during a settlement proceeding.
6. **Judgment vs. Settlement:** Explanation on whether the statute allows for the recovery of legal costs only from a court judgment, and not from a settlement agreement, and if so, the rationale behind this interpretation.

Please provide the specific legal basis, including relevant statutes, regulations, or precedents, supporting your opinion on these matters.

This opinion letter will be presented to the Board of Managers and will become a matter of public record. We aim to have this matter resolved by our July board meeting. Therefore, we kindly request your response by [specific date before the July meeting].

Thank you for your prompt attention and continued support.

Sincerely,

Joseph Barisonzi
President, Board of Managers
Lower Minnesota River Watershed District



RINKE NOONAN
attorneys at law

1015 W. St. Germain St., Ste. 300, P.O. Box 1497
St. Cloud, Minnesota 56302-1497
Telephone 320-251-6700, Fax 320-656-3500

Office Memorandum

To: Board of Managers, Lower Minnesota River Watershed District
From: John C. Kolb (320) 656-3503
Re: Attorney Fees in Permitting vs. Enforcement Actions
Date: July 9, 2024

At President Barisonzi's request, Ms. Loomis asked that I address the collection of fees in permitting actions vs. court enforcement of Board orders.

Watershed District permitting is authorized by statutes chapter 103D, Watershed District Law. Section 103D.341 requires the managers to adopt rules to accomplish the purposes of this chapter (103D) and to implement the powers of the managers.¹ In most cases, Watershed District rules create permitting programs to manage and implement performance standards for activities identified in the Watershed Management Plan. In the seven-county metropolitan area, the authority of Watershed Districts to regulate activities is further authorized and constrained by provisions of section 103B.211 (part of the metropolitan surface water management act).

Section 103B.235 requires, upon adoption of the Watershed Management Plan, each local government unit with land use planning and regulatory responsibility for territory within the watershed to prepare a local water management plan, capital improvement program, and official controls as necessary to bring local water management into conformance with the watershed plan within the time period prescribed in the implementation program of the watershed plan and, as necessary, shall prepare, or cause to be prepared, amendments to the local comprehensive plan. In the absence of conforming local controls, a Watershed District may implement its own permitting program. Lower Minnesota River Watershed District has chosen to authorize a municipal permit to those local government units with conforming local controls. Where local controls are not enforced, the municipal permit allows the Watershed District to enforce performance standards consistent with its rules.

¹ 2024 statutory amendments reword this section to say, "to accomplish the purposes of this chapter and to implement the regulatory powers of the managers. (2024 Laws Chapter 90, Article 3, Section 38, effective August 1, 2024).

Section 103D.345 provides standards for Watershed District permitting programs. The statute constrains the collection of application and other fees related to permitting. A person applying for a permit required by the managers under a rule controlling the use and development of land must accompany the application with a permit application fee to defray the cost of recording and processing the application. The managers may set the fee not to exceed \$10. (103D.345, subd. 1). The managers may charge, in addition, a field inspection fee of at least \$35. The inspection fee must be used to cover actual costs related to a field inspection. Inspection costs include investigation of the area affected by the proposed activity, analysis of the proposed activity, services of a consultant, and any required subsequent monitoring of the proposed activity. Costs of monitoring an activity authorized by permit may be charged and collected as necessary after issuance of the permit. (103D.345, subd. 2). By its plain language, the statute does not authorize collection of attorney fees as part of the permitting program.

The limitations on permitting fees stand in contrast to costs and fees that may be awarded by the district court in enforcement actions. The district courts may enforce the provisions of chapter 103D, and a rule adopted or order issued by the managers by injunction or other appropriate order. (103D.551). A court action may be initiated to enforce a permit or order of the board. Enforcement may be pursued either as criminal prosecution or as a civil action seeking injunction, action to compel performance, restoration, abatement, and other appropriate action. (103D.545, subd. 2). In any civil action arising from or related to a rule, order, or stipulation agreement made or a permit issued or denied by the managers under this chapter, the court may award the prevailing party reasonable attorney fees and costs.

An award of attorney fees in a civil action lies solely within the discretion of the District Court and requires the action to be pursued to a verdict. An award of attorney fees is not mandated or guaranteed by statute.

In the Lakota Lane matter, the District, from the beginning, sought to work with the landowner to resolve non-compliant conditions through the issuance of a permit. When the owner failed to respond to repeated requests, the Board adopted and recorded an order finding the property to be non-compliant with the District's rules and performance standards. Following recording of the order, the Board authorized initiation of a civil action to obtain compliance.

The civil action worked as intended – gained the attention of the landowner and coerced development of a plan to correct non-conformities. The landowner ultimately applied for and has been granted an after-the-fact permit. The basis of the civil action is now moot – assuming the landowner complies with the requirements of the permit. The District has obtained compliance and, likely, the full extent of relief the District Court could have issued in the action. Since the matter will not be pursued to a verdict, the Court has no authority to award fees.

It is possible that attorney fees could have been negotiated as part of a settlement of the civil action. However, the after-the-fact permit was pursued and actioned outside of the civil action and prosecution of the civil action and incurring of costs were intentionally delayed to allow the permitting process to proceed. As part of the permitting process, however, there is no statutory authority to include attorney fees as a cost to the applicant.