

March 10, 2023

2023 ND Senate Energy and Natural Resources Committee – **HB 1462**

Dear Senators:

Reviewing committee discussions on HB #1462, comments are offered. The Committee discussion seems to re-emphasize the bill's purpose as it was introduced.

The Sargent County and or Pembina County are used to spotlight an injustice. The ND Supreme Court has twice written that existing ND Century Code prevented them from offering financial justice to prevailing landowners.

You can read that current Legislative language forced the Court to leave the financial injuries in place. As committee discussion may reveal, this is not acceptable and not a situation that "locals" can solve. It requires legislative action. The original HB 1462 corrects this. As this bill left the House Committee, attorney fees, were stripped without any amendment as to intent. Without a change, governmental entities are "armed" with leverage to avoid legal challenges to their poor decisions. It would seem only four words added to NDCC 11-11-39 are needed; "... board of county commissioners **or their appointed boards, ...**"

Also Rep. Klemin rewrote the "notice" portion of the bill which would appear to address the situation and match existing laws involving street special assessments. That is acceptable.

A concern is HB #1391 only requires timely publication of minutes. Adequacy of notice by minutes may fall short for the Courts to rule if a special assessment drain project can be appealed. Local board's minutes alone may not include all the necessary information in deciding to appeal. Minutes alone can be quite curt in detail. Perhaps both proposed House Bills are necessary.

Included is the exact language from the two ND Supreme Court Decisions that essentially show the harm to property rights. **ND Water Boards should not be isolated from the same requirements other State Governmental entities must adhere to.**

Sincerely yours,

Leon L Mallberg

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“(28-34-01) The legislature may want to consider extending the time for appeal or consider triggering the time for appeal...”

<https://www.ndcourts.gov/supreme-court/opinion/2019ND57>

Robert Banderet, et al. vs. Sargent Count Water Resource District, et al. (2019)

Our decisions in *Zajac* and this case recognize an abbreviated time frame for a party to appeal from a decision by a local governing body is imposed under the plain language of N.D.C.C. § 28-34-01. The legislature may want to consider extending the time for appeal or consider triggering the time for appeal from a decision by a local governing body from service of the notice of the decision on the affected party or from publication of the decision.

[¶19] We again recognize the abbreviated time frame for an appeal that is imposed by the plain language of N.D.C.C. §§ 61-16.1-54 and 28-34-01; however, nothing in N.D.C.C. § 61-16.1-45 required the District to notify the Landowners of its decision to finance the Drain 11 project through the maintenance levy. Regardless of whether or not any notice was given, N.D.C.C. §§ 61-16.1-54 and 28-34-01 require an appeal to be taken within thirty days of a water resource district’s decision. Because the Landowners failed to appeal the District’s resolution of necessity within thirty days, the district court did not err in dismissing the Landowners’ complaint.

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“Although (11-11-39) authorizes an award of attorney fees from a board of county commissioners, it does not ... from a water board.”

<https://www.ndcourts.gov/supreme-court/opinion/2005ND106>

Klindt, et al. v. Pembina Co. Water Resource Bd., et al. (2005)

[¶32] The Board argues the district court had no authority to award the landowners their attorney fees from the Board.

[¶33] Successful litigants are not entitled to attorney fees unless authorized by contract or statute. Eg., Danzl v. Heidinger, 2004 ND 74, ¶ 6, 677 N.W.2d 924. The landowners rely on N.D.C.C. § 11-11-39 as authorizing attorney fees from the Board in this case. Section 11-11-39, N.D.C.C., provides, in relevant part:

An appeal may be taken to the district court from any decision of the board of county commissioners by any aggrieved person. . . . The district court may at its discretion award costs and reasonable attorney's fees to appellants when three or more aggrieved persons have joined in an appeal from a decision of the board of county commissioners and the court rules in favor of the appellants.

[¶34] Although this statute authorizes an award of attorney fees from a board of county commissioners, it does not authorize an award of attorney fees from a water resource board. The landowners have cited no other authority allowing an award of attorney fees against the Board, and we have found none. Therefore, the award of attorney fees to the landowners is reversed insofar as it is assessed against the Board.