

Lessard-Sams Outdoor Heritage Council

MEMO: Agenda Item #7
DATE: August 3, 2018
SUBJECT: ML 2014, subd 5(c) Habitat Protection in Dakota County, Phase 5 - \$1,190,000
Mark Johnson, Executive Director

Background

Dakota County is seeking Council's approval to release an OHF Notice of Funding Restriction (NOFR) on a 7.4 acre conservation easement parcel in Lakeville, MN that was intended to be purchased with ML2014 appropriation funding. A subsequent survey of the adjoining property showed an easement boundary issue due to an inaccurate GIS based MN DNR public waters data layer. Because of this, the County believes the most beneficial course of action for all parties involved is to remove the conservation easement and OHF NOFR and instead utilize fee title ownership of the easement area. The County has not requested reimbursement of OHF funds for the conservation easement acquisition. Therefore, with no OHF funds expended, the County is seeking Council approval to remove the OHF NOFR.

Main Summary Points from Dakota County

Basis for Dakota County's request to vacate an easement and rescind a recorded NOFR:

1. The Mikell Smith natural area conservation easement boundary was positioned and configured based on a GIS-identified, Vermillion River channel location, using a MN DNR public waters data layer. Essentially, a 150-foot wide buffer area is calculated on both sides of the river, using the river centerline, or if possible, the actual edge of the riverbank.
2. The Smith easement was purchased, initially with Dakota County funding, and recorded, as was a Notice of Funding Restriction (NOFR). To date, the County has not requested reimbursement of acquisition expenses from the OHF.
3. A physical survey by a private surveying company for anticipated development of adjacent land revealed that there are two river channels on this portion of the Smith property; and the Vermillion River flows in one, the other, or both. This discovery was brought to the County's attention.
4. Dakota County researched the impacts of this dual-channel discovery. The County determined that if the easement area was shifted to meet the County 150-foot wide buffer requirement, less developable land would be included in the reconfigured easement area, thus reducing the value of the easement. See items 5 and 6 for more detail.
5. No value is assigned, or was paid to the landowner, for easement area within designated wetlands, the floodplain, or the 100-foot wide buffer area required by the watershed organization. This resulted in payment only for a 1.3-acre developable area (\$21,000/acre X 1.3 acres = \$27,300).

6. If the easement area was shifted to address the dual-channel of the river, it would reduce the developable area from 1.3 acres to 0.5 acres, resulting in a reduced cost (\$21,000/acre X 0.5 acres = \$10,500).
7. The County wants to take the opportunity to reposition the protected area, to save money and to protect the appropriate buffer area to meet its 150-foot wide program buffer requirement. In essence, the County believes it overpaid for a less appropriate easement area.
8. Pre-negotiations with the landowner to address this issue resulted in the following offer components from Mr. Smith:
 - a. Mr. Smith will return the \$27,300 paid to him for the conservation easement.
 - b. Mr. Smith will agree to a repositioned buffer area along the river on his property.
 - c. Mr. Smith will donate fee title to the reconfigured buffer area at no cost to the County.
9. To accept Mr. Smith's offer, the County would like to vacate the recorded easement and rescind the recorded NOFR. The County needs LSOHC approval to do these things.

Reasons to vacate the existing easement area and rescind the recorded NOFR:

10. The County's research of the impacts of this discovery present an opportunity to not only correct the position of the protected area to meet the most beneficial buffer width requirements possible for this area, but to achieve permanent land protection at no initial cost to the public.
11. The fact that no grant dollar reimbursement has occurred for this easement acquisition to date, alleviates the need to calculate refund amounts and transfer funding back to the OHF.
12. The main issue involved in approving this request is how the documents must be rescinded to properly follow State and County legal requirements to take these actions.
13. The original placement of the easement was an unfortunate product of the MN DNR data layer the County has used to calculate and position easement areas since its Land Conservation programs began. This is something that can and will be corrected in the future.

Results of Dakota County's request to vacate an easement and rescind a recorded NOFR:

14. The appropriate and required area along the Vermillion River will be permanently protected under County fee title ownership, at no initial cost to the public.
15. Ongoing maintenance and management of the protected area would be at Dakota County's expense.
16. Costs associated with restoration activities for the protected area would be paid for with OHF and County grant-match restoration funds.
17. If approved, vacation of the easement and the resulting donation of fee title by the landowner will be achieved through written agreement between the County and the landowner, approved as to form by the County Attorney's Office.

A detailed memo from Dakota County is attached with maps and a historic summary of events.

Considerations:

MS 97a.056, subd 15 (excerpt printed below) addresses OHF land acquisition restrictions and refers to “an interest in real property, ...that is acquired with money appropriated from the outdoor heritage fund...”

In this case, no money has been sought by the county for reimbursement of expenses toward the purchase, activity of purchase, or purchase related expenses. However, within section 1.7 (State Funding) of the filed easement it identifies, “Funding for this Easement has been provided by the Outdoor heritage Fund.....M.L. 2014, Chap. 256, Article 1, Subd. 5©, under grant number 3-61298, for purposes of acquiring permanent conservation easements and enhance habits...”

LSOHC Staff asked DNR Lands and Minerals staff for their opinion of the request to remove the NOFR. DNR staff indicated that this did not appear to be a simple issue and as such the opinion of professional real estate legal council should be enlisted.

Additional questions to consider:

- Is the state’s “interest” activated due to the purchase activity being within the intent of the appropriation and the fiscal contract? Or,
- Is the state’s “interest” only dependent upon whether OHF monies were expended?
- If a filed NOFR is deemed to have no state “interest,” what is necessary for the state to provide to allow relinquishment of the NOFR?

Staff Recommendation: LSOHC staff recommends that the Council direct LSOHC staff work with legislative legal staff to seek an opinion from a real estate attorney as to:

1. Does the state have an “interest” in the property?
2. If the state is deemed to NOT have an “interest,” what is the appropriate release to be used by Council for notification to the County Recorder.
3. Direct staff to obtain a proper and recordable “Release of Notice of Funding Restriction” document removing OHF interest in the subject property.

Attachments: 1) Dakota County Memo

[Subd. 15.Land acquisition restrictions.](#)

(a) An interest in real property, including, but not limited to, an easement or fee title, that is **acquired with money appropriated from the outdoor heritage fund** must be used in perpetuity or for the specific term of an easement interest for the purpose for which the appropriation was made. The ownership of the interest in real property transfers to the state if: (1) the holder of the interest in real property fails to comply with the terms and conditions of the grant agreement or accomplishment plan; or (2) restrictions are placed on the land that preclude its use for the intended purpose as specified in the appropriation.

(b) A recipient of funding that acquires an interest in real property subject to this subdivision may not alter the intended use of the interest in real property or convey any interest in the real property acquired with the appropriation without the prior review and approval of the Lessard-Sams Outdoor Heritage Council or its successor. The council shall notify the chairs and ranking minority members of the legislative committees and divisions with jurisdiction over the outdoor heritage fund at least 15 business days before approval under this paragraph. The council shall establish procedures to review requests from recipients to alter the use of or convey an interest in real property. These procedures shall allow for the replacement of the interest in real property with another interest in real property meeting the following criteria:

(1) the interest must be at least equal in fair market value, as certified by the commissioner of natural resources, to the interest being replaced; and

(2) the interest must be in a reasonably equivalent location and have a reasonably equivalent useful conservation purpose compared to the interest being replaced, taking into consideration all effects from fragmentation of the whole habitat.

(c) A recipient of funding who acquires an interest in real property under paragraph (a) must separately record a notice of funding restrictions in the appropriate local government office where the conveyance of the interest in real property is filed. The notice of funding agreement must contain:

(1) a legal description of the interest in real property covered by the funding agreement;

(2) a reference to the underlying funding agreement;

(3) a reference to this section; and

(4) the following statement: "This interest in real property shall be administered in accordance with the terms, conditions, and purposes of the grant agreement controlling the acquisition of the property. The interest in real property, or any portion of the interest in real property, shall not be sold, transferred, pledged, or otherwise disposed of or further encumbered without obtaining the prior written approval of the Lessard-Sams Outdoor Heritage Council or its successor. The ownership of the interest in real property transfers to the state if: (1) the holder of the interest in real property fails to comply with the terms and conditions of the grant agreement or accomplishment plan; or (2) restrictions are placed on the land that preclude its use for the intended purpose as specified in the appropriation."