

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**THE STATE OF NEBRASKA, ex rel.  
BRIAN MOGENSEN d/b/a PREMIUM  
FARMS,**

Plaintiff,

vs.

**COUNTY OF HOLT BOARD OF  
SUPERVISORS; MELVIN SELTING;  
ROBERT YOUNG; DALE FRENCH;  
DONNA ZIEMS; RON DEXTER; MARVIN  
SCHOLZ; DEAN FUNK; DELOIT  
TOWNSHIP, Holt County, Nebraska;  
DELOIT TOWNSHIP BOARD; DAVID  
ZIEMS; BILL KACZOR; and TOM  
MLNARIK,**

Defendants.

Case No. CI01-99

**DISMISSAL**

**DATE OF HEARING:** September 10, 2001.

**DATE OF RENDITION:** September 28, 2001.

**DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301(3)).

**TYPE OF HEARING:** Open court.

**APPEARANCES:**

For plaintiff: Rodney M. Confer and Richard Reier.

For defendants:

CHBS & individuals: Thomas P. Herzog, Holt County Attorney.

DT, DTB & individuals: David H. Ptak.

**SUBJECT OF ORDER:** Petition for mandamus, and motion for a writ of mandamus with supporting affidavits.

**PROCEEDINGS:** See prior journal entry.

**FINDINGS:** The court finds and concludes that:

1. The plaintiff seeks a writ of mandamus to compel the defendants, as the Deloit Township Board and the Holt County Board of Supervisors, to improve or maintain a particular road to meet the minimum design standards for rural highways classified as “local” roads.

2. The defendants, through their counsel, objected to the court’s jurisdiction. They cited *State ex rel. Chicago & N. W. Ry. Co. v. Harrington*, 78 Neb. 395, 110 N.W. 1016 (1907), for the proposition that an action to procure the issuance of a writ of mandamus is not begun until a motion and affidavit, or a positively verified petition, is filed in the district court. The court agreed that the principle accurately stated Nebraska law. The court agreed that the petition was not positively verified. However, although no affidavits had previously been filed, such affidavits were duly filed with the court clerk in open court at the hearing which is the subject of this order. The action was thus begun.

3. The right to a peremptory writ of mandamus is dependent upon statute. *State ex rel. Van Cleave v. City of No. Platte*, 213 Neb. 426, 329 N.W.2d 358 (1983). As to a case involving the present subject matter, the statute authorizes the court, upon being presented with the motion and affidavit or affidavits which the court determines to be sufficient, to: (1) require a notice to the adverse party, (2) grant an order to show cause why the writ should not be allowed (an alternative writ), or, (3) grant the writ without notice (a peremptory writ). NEB. REV. STAT. § 25-2160 (Reissue 1995).

4. Thus, whatever the relator’s status may have been at the time of noticing the motion for writ of mandamus for hearing, the filing of the affidavits in open court on September 10 properly commenced the action. The appearance of the defendants on that date was not strictly necessary. The matter, which might have been heard ex parte in chambers, was heard in open court with the defendants having the opportunity though not being required to be heard. The court proceeded to hear arguments relating to the available courses under § 25-2160. The court took the matter under advisement. The remaining findings and conclusions set forth the court’s analysis and decision.

5. A principal factual allegation, around which the plaintiff’s analysis revolves, is that the road in question has been classified as a “local” road. See plaintiff’s motion for a writ of mandamus filed August 24, 2001. Unfortunately, that fact appears nowhere in the two affidavits filed in support of the motion (affidavit of Myron Lawler filed September 10, 2001, and affidavit of Paul Ziemba filed September 10,

2001) in substance showing the affiant's personal knowledge, competence to so testify, and admissibility of such evidence.

6. An affidavit must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated. *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999). Statements in affidavits as to opinion, belief, or conclusions of law are of no effect, and mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to meet the requirements of that standard. *Id.*

7. As the Supreme Court observed in *State ex rel. Van Cleave v. City of No. Platte*, *supra*, the reason for the rule requiring an affidavit or its equivalent of a positively verified petition should be apparent. The issuance of a peremptory writ of mandamus is an extraordinary action and should not be done unless the trial court is assured that there is someone who shows to the court that the facts presented are true and who may be subject to perjury if it later proves otherwise. *Id.*

8. The plaintiff requested this court to take judicial notice of certain matters, apparently consisting of a map or maps. The court declined to do so. Judicial notice may be taken at any stage of a proceeding. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999). Neb. Rev. Stat. § 27-201 (Reissue 1995) authorizes a court to take judicial notice of "adjudicative facts," given certain statutory limitations. *Id.* Adjudicative facts within the meaning of § 27-201 are simply the facts developed in a particular case, as distinguished from legislative facts, which are established truths, facts, or pronouncements that do not change from case to case but apply universally. *Id.* The Supreme Court has often found the existence of court records and certain judicial action reflected in a court's record to be facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned, and thus the proper subject of judicial notice. *Id.* However, in this instance, § 25-2160 expressly requires the motion to be made upon affidavit. This court doubts that judicial notice may substitute for the affidavit required by § 25-2160 as to a material fact. Even assuming that judicial notice might properly be utilized in a mandamus action, the court concludes that the requested notice in this case did not meet the requirements of § 27-201.

9. Because the affidavits do not establish that the road in question has been legally classified as a "local" road, the affidavits fail as a matter of law to support the requested relief. It is not necessary

for the court to reach the other issues argued by the defendants, some of which appear to present significant questions of law.

10. Having so concluded, the court considers the appropriate disposition. This court finds the disposition made by the Supreme Court in *State ex rel. Van Cleave v. City of No. Platte, supra*, to be instructive. There, the Supreme Court remanded with direction to dismiss the petition. Thus, under the present circumstances, that precedent shows that dismissal constitutes the proper disposition of the present case.

11. The motion must be denied, and the petition dismissed at relator's cost.

**ORDER:** IT IS THEREFORE ORDERED that:

1. The plaintiff's motion for a writ of mandamus is denied.
2. The plaintiff's petition for mandamus is dismissed at plaintiff's cost.

Signed in chambers at Ainsworth, Nebraska, on September 28, 2001.  
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- 9 Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- Mail postcard/notice required by § 25-1301.01 within 3 days ("Petition for mandamus dismissed at plaintiff's cost").  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- Note the decision on the trial docket as: Signed "Dismissal" entered.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel  
District Judge