

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. CI01-143

**ORDER FOR ISSUANCE
OF ALTERNATIVE WRIT**

DATE OF HEARING: January 28, 2002.

DATE OF RENDITION: January 31, 2002.

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

APPEARANCES:

For plaintiff: Rodney M. Confer.

For defendants:

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

DT, DTB & individuals: James G. Kube.

SUBJECT OF ORDER: Motion for a writ of mandamus with supporting affidavits.

PROCEEDINGS: See journal entry entered January 29, 2002.

FINDINGS: The court finds and concludes that:

1. The plaintiff seeks a writ of mandamus to compel the defendants, as the Deloit Township and its board and board members and the Holt County Board of Supervisors and its board members, to

improve or maintain a particular road to meet the minimum design standards for rural highways classified as “local” roads. Although the proper corporate name of the township is the Town of Deloit, the parties refer to Deloit Township. NEB. REV. STAT. § 23-219 (Reissue 1997).

2. 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).

3. As the brief submitted by plaintiff at the motion hearing correctly cites, in *State ex rel. Krieger v. Board of Suprvs. of Clay Cty.*, 171 Neb. 117, 120-121, 105 N.W.2d 721, 724-25 (1960) (citations omitted), the Nebraska Supreme Court summarized the proper procedure in a mandamus action as follows:

The regular procedure in mandamus, after a petition therefor has been filed, is to make an application for a writ by motion supported by affidavit, whereupon the court may grant the writ without notice, may require notice to be given, or may grant an order to show cause why the writ should not be allowed. . . . When the right to the writ is clear, and it is apparent that no valid excuse can be given for failure to perform the duty, a peremptory writ should be issued. In all other cases, when a writ is issued, it should be in the alternative and contain an order to show cause. . . . The alternative writ and the answer thereto constitute the pleadings in any case wherein an alternative writ has been issued and no other pleadings are permitted. . . . If no answer is filed to an alternative writ then a peremptory writ must be allowed. . . . Generally, when a hearing on an application is ordered and notice thereof given or an order to show cause has been issued and served and a return in either situation presents an issue or issues of fact, the court should not try such issue or issues at that stage of the proceedings but, in such case, issue a writ. However, such writ should be an alternative writ and issues should be made up thereon by the filing of an answer thereto and then tried on the issue or issues raised thereby.

4. In this case the plaintiff filed a petition and subsequently filed an amended petition. A motion for writ of mandamus and supporting affidavits were filed. The appearance of the defendants at the motion hearing 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 on the motion. The court took the matter under advisement. The remaining findings and conclusions set forth the court's analysis and decision.

5. Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. Amisub v. Buckley*, 260 Neb. 596, 618 N.W.2d 684 (2000). To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. *Id.* Mandamus is not available to control judicial discretion and will be issued only if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Id.* In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *Id.*

6. In the present case, it is possible that a valid excuse can be given for not performing the road construction or maintenance. Accordingly, if any writ is appropriate, an alternative writ must be first issued. NEB. REV. STAT. § 25-2159 (Reissue 1995).

7. Section 39-1520 grants only the limited power of general supervision of township road and culvert work to the township board. NEB. REV. STAT. § 39-1520 (Reissue 1998); *Art-Kraft Signs, Inc. v. County of Hall*, 203 Neb. 523, 279 N.W.2d 159 (1979). The county board is vested with general supervision and control of the public roads located in its county. NEB. REV. STAT. § 39-1402 (Reissue 1998); *Art-Kraft Signs, Inc. v. County of Hall, supra*. The statutory definition of public roads makes no distinction between county roads and township roads for the general purposes prescribed in § 39-1402. NEB. REV. STAT. § 39-1401(2) (Reissue 1998); *Art-Kraft Signs, Inc. v. County of Hall, supra*.

8. Mandamus applies to compel public officers to perform their duty to take care of and keep in repair public highways and bridges and the like. *State ex rel. Draper v. Freese*, 147 Neb. 147, 22 N.W. 556 (1946).

9. However, the plaintiff here relies strictly upon the functional classifications of roads and development of minimum design, construction, and maintenance standards provided in NEB. REV. STAT. § 39-2101 *et seq.* (Reissue 1998). Those statutes provide no role for township boards. NEB. REV. STAT. § 39-2105 (Reissue 1998). The statute assigns responsibility for design, construction, reconstruction, maintenance, and operation of roads classified under the rural highway category to the various counties. NEB. REV. STAT. § 39-2105(2) (Reissue 1998). The law imposes no legal duty upon the Town of Deloit regarding compliance with those minimum standards. The court concludes that the motion should be denied as to the Town of Deloit and the township board and its members. In accordance with *State ex rel. Van Cleave v. City of No. Platte, supra*, the amended petition should be dismissed as to those parties.

10. However, the statutory responsibility does run to the County of Holt and its officers. The court concludes that the affidavits set forth sufficient facts to make it appear that the County of Holt Board of Supervisors and its individual members have failed to perform the duties imposed regarding design, construction, and maintenance of the road described in the amended petition, and that an alternative writ should issue to the said board and constituent members. Certain facts which may have a significant bearing on the ultimate determination do not appear, such as the date the road was established, the original construction method or design, and what, if any, changes have occurred in the condition of the road after establishment. But these are issues of fact which may be properly determined upon trial.

11. The court observes that the county board of supervisors and its individual members have filed an answer directly to the amended petition. Under the procedure outlined by the Supreme Court, the answer is probably premature where filed prior to issuance of the alternative writ. However, it does indicate to the court that the defendants would likely file an answer to the alternative writ without necessity of personal service of the writ upon the individual officers. Accordingly, the court will direct the clerk to file the alternative writ, but to withhold issuance of certified copies thereof to the sheriff for service upon the board of supervisors and the individual members for 10 days from the date of entry of this order to allow time for filing of an answer on their behalf without necessity of personal service.

12. The date fixed in the order section would not be the date for trial, but would be the date for issuance of a peremptory writ if no answer is filed after the issuance of the alternative writ.

13. The dismissal of the amended petition as to the Town of Deloit and the town board and its members is interlocutory in character and remains subject to modification without further notice or hearing until the entry of final judgment as to all parties. NEB. REV. STAT. § 25-1315 (Cum. Supp. 2000).

ORDER:

IT IS THEREFORE ORDERED that:

1. The plaintiff's motion for a writ of mandamus to the Town of Deloit and the town board and its members, David Ziems, Bill Kaczor, and Tom Mlnarik, is denied, and upon entry of final judgment the plaintiff's amended petition shall be dismissed at plaintiff's cost as to said defendants.

2. The plaintiff's motion for a writ of mandamus to the County of Holt Board of Supervisors and its board members, Melvin Selting, Robert Young, Dale French, Donna Ziems, Ron Dexter, Marvin Scholz, and Dean Funk, is granted to the extent of the relief and orders set forth herein and is otherwise denied.

3. An alternative writ of mandamus shall issue to the said County of Holt Board of Supervisors and its board members, Melvin Selting, Robert Young, Dale French, Donna Ziems, Ron Dexter, Marvin Scholz, and Dean Funk, in the form set forth on Attachment "A" to this order.

4. The original alternative writ accompanies this order, with this court's allowance of the writ endorsed thereon. The clerk is directed to sign the alternative writ and affix the court seal thereto, and to file the same forthwith.

5. In the event that no answer to the alternative writ has been filed by any one or more of the said defendants to whom such alternative writ runs within 10 days after the date of entry of this order, the clerk shall cause true and certified duplicate originals thereof to be issued to the sheriff for service upon the said defendants. The clerk shall use the eight additional copies, stamped "signed copy of original," which shall be conformed by the clerk with the clerk's signature and court seal, and further certified by the clerk as true and correct copies of the original, as such copies to be issued to the sheriff for service and return.

6. In the event that no answer has been filed by the date and time of hearing set forth in the alternative writ, a peremptory writ shall issue without further notice or hearing as provided by § 25-2163.

7. In the event that an answer has been filed by all defendants to whom the writ runs by such date and time set forth in the alternative writ, the court will assign the matter for trial to the court without

a jury at the next trial session of the court in this county after such date. Such trial shall be advanced for trial with priority over other civil cases scheduled for trial at such session.

8. This order is interlocutory in character and remains subject to modification without further notice or hearing until the entry of final judgment as to all parties.

Signed in chambers at **Ainsworth**, Nebraska, on **January 31, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- Note the decision on the trial docket as: [date of filing] **Signed "Order for Issuance of Alternative Writ" entered**
Done on _____, 20____ by _____.
- Comply with paragraphs 4 and 5 of "Order" section.
Done on _____, 20____ by _____.

William B. Cassel
District Judge

Mailed to:

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 SUPER-
VISORS; MELVIN SELTING; ROBERT
YOUNG; DALE FRENCH; DONNA
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DELOIT TOWNSHIP BOARD; DAVID
ZIEMS; BILL KACZOR; and TOM
MLNARIK,**

Defendants.

Case No. CI01-143

**ALTERNATIVE WRIT
OF MANDAMUS**

TO: DEFENDANTS, COUNTY OF HOLT BOARD OF SUPERVISORS; MELVIN SELTING; ROBERT YOUNG; DALE FRENCH; DONNA ZIEMS; RON DEXTER; MARVIN SCHOLZ; and DEAN FUNK:

IT HAVING BEEN MADE TO APPEAR TO THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA, AS FOLLOWS:

1. Relator is the owner of real property in the Town of Deloit (referred to by the parties as Deloit Township), Holt County, Nebraska, (the "Property"), the only access to which is provided by a public road located on the Section line between Sections 5 and 8, Township 25 North, Range 9 West of the 6th P.M., Holt County, Nebraska (the "Road"); the Road is located within the Town of Deloit, Holt

County, Nebraska, and is a “rural highway” classified as a “local” road according to the State Functional Classification System.

2. The State of Nebraska, through the Board of Public Roads Classification and Standards, has established minimum design, construction and maintenance standards for rural highways classified as local roads and has imposed jurisdictional responsibility for the reconstruction, maintenance and operation thereof upon the counties.

3. General supervision and control of public roads within Holt County is vested in the Defendant Holt County Board of Supervisors, which consists of Defendants Melvin Selting, Robert Young, Dale French, Donna Ziems, Ron Dexter, Marvin Scholz and Dean Funk.

4. The Road does not currently meet applicable state design standards, is rapidly deteriorating and is in an unsafe condition.

6. Relator has requested the Holt County Board of Supervisors to improve the Road to meet state standards and to maintain the Road in accordance with the minimum maintenance standards, but Defendants have failed and refused to comply with their responsibilities under state law by maintaining the road in accordance with the required standards, and have prevented Relator’s own efforts to improve or maintain the Road.

7. Other than the relief sought herein, Relator has no adequate remedy available to him in the ordinary course of law.

WHEREFORE, THE COURT COMMANDS YOU AS FOLLOWS:

1. You shall immediately improve the Road to meet the minimum design standards for rural highways classified as local roads promulgated by the Department of Roads of the State of Nebraska;

2. You shall immediately and hereafter maintain the Road as required by the minimum standards for the maintenance of local roads promulgated by the Department of Roads of the State of Nebraska;

3. You shall then and there return this writ with your certificate of having done as commanded hereby;

4. If you fail to perform such duties as commanded herein immediately upon receipt of this writ you are required to show cause why you have not done so before this Court at **10:00 a.m.**, or as soon thereafter as the same may be heard, on **Monday, March 4, 2002**, in the District Courtroom of the Holt County Courthouse in O'Neill, Nebraska.

Signed on February ____, 2002.

(court seal)

Clerk of the District Court of Holt County

Issuance authorized:

Signed in chambers at Ainsworth, Nebraska, on January 31, 2002.

William B. Cassel, District Judge

CERTIFICATE

I, _____ hereby certify that I have complied with the provisions of this writ of mandamus by performing the duties commanded of me herein.
