

STATE OF SOUTH DAKOTA
COUNTY OF DAVISON

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

Plaintiff:

Kenneth R. Hostler,

vs.

Defendants:

Davison County Drainage Commission,
Millan Acres LLC

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17CIV20-000223

**PLAINTIFF'S NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT**

PLEASE TAKE NOTICE THAT on March 25, 2021, commencing at the hour of 1 :30 o'clock p.m. or as soon thereafter as the matter may be heard in the 2nd floor courtroom of the Davison County Courthouse at 200 East Fourth Avenue, Mitchell South Dakota, before the Honorable Judge Chris Giles, Plaintiff Kenneth R. Hostler (also herein Plaintiff) will and hereby does move the Court for a judgment granting partial summary judgment in his favor as a matter of law against the above-named Defendants on the following matters presented in this Motion:

1. This Motion is made pursuant SDCL § 15-6-56(a) and the court's scheduling order dated February 5, 2021.
2. Plaintiff's Motion is based upon the Exhibits described at the end of this Motion, Plaintiff's Memorandum of Law, Plaintiff's Rule 56 Statement of Material Undisputed Facts, the deposition transcript of Mr. Jeff Bathke, and upon all the pleadings, discovery, attachments, papers, records, affidavits and documents in support of this Motion on file in the above captioned action.
3. Plaintiff moves the Circuit Court for a final judgment certified pursuant to SDCL § 15-6-54(b), declaring, adjudging, and ordering that:

a. Davison County Drainage Commission Administrator, Jeff Bathke, abused his discretion in granting Defendant Millan Acres LLC's (Millan) surface drainage permit because the Administrator failed to make a decision based on the required factors and conditions of Davison County Drainage Ordinance Section 2:05 and state Drainage Law, SDCL § 46A-10A-20 in granting Millan's new project drainage permit.

b. The Administrator failed to follow the law in granting Millan's permit because he did not explain his decision based on the following factors of law required for "evaluating the impact of a proposed drainage project," pursuant to Davison County Revised Drainage Ordinance § 2:05 (2013):

- 1) Flood hazard zones
- 2) Erosion potential
- 3) Water quality and supply
- 4) Agricultural production
- 5) Environmental quality
- 6) Aesthetics
- 7) Fish and Wildlife values
- 8) Considerations of downstream landowners and the potential for adverse effect thereon including consideration of the following criteria:

a. Uncontrolled drainage into receiving watercourses which do not have sufficient capacity to handle the additional flow and quantity of water shall be considered to have an adverse effect.

- b. Whether drainage is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or in the absence of a practical natural drain, a reasonable artificial drain system is adopted.
 - c. The amount of water proposed to be drained.
 - d. The design and other physical aspects of the drain.
 - e. The impact of sustained flows.
- c. The Administrator failed to follow the law in granting Millan's permit because the Administrator failed to explain the decision based on the following factors under SDCL § 46A-10A-20:
- 1) The land receiving the drainage remains rural in character;
 - 2) The land being drained is used in a reasonable manner;
 - 3) The drainage creates no unreasonable hardship or injury to the owner of the land receiving the drainage;
 - 4) The drainage is natural and occurs by means of a natural water course or established water course;
 - 5) The owner of the land being drained does not substantially alter on a permanent basis the course of flow, the amount of flow, or the time of flow from that which would occur; and
 - 6) No other feasible alternative drainage system is available that will produce less harm without substantially greater cost to the owner of the land being drained."

SDCL § 46A-10A-20 (2020).

d. The county's promulgation of the 2013 Davison County Drainage Ordinance administrative approval provisions, §§ 2:15, 2:03, 2:10, 2:11 and 2:12 of the Ordinance, and the Administrator's grant of Millan's drain tile permit under those provisions of the Ordinance, were each ultra-vires and in conflict with South Dakota Drainage Law. Said provisions are, and Mr. Bathke's decision is, ultra-vires, preempted by the South Dakota drainage code, null, void, and invalid.

e. Plaintiff's due process rights were violated under the U.S. Const. amend. XIV, § 1 and S.D. Const. art. VI, § 2.

f. The surface drainage permit issued to Defendant Millan for parcels 03000-10361-303-00 and 03000-10361-304-00, in the S ½ of Section 30, Township 103, Range 61, Davison County, is void ab initio, and the decision granting Millan's described permit should be vacated, void, nullified, and invalidated.

g. Defendant Millan failed to meet its burden of proof because the submitted application and attached maps omitted required information under the county Ordinance and state Drainage Law, including but not limited to the following undisputed omissions:

1) There are no government consents of road and highway authorities in the application.

2) Mr. Bathke did not receive evidence concerning or consider alternatives.

SDCL § 46A-10A-20(6).

3) The Administrator did not receive evidence concerning or consider erosion potential. Ordinance § 2:05.2).

4) The Administrator did not receive evidence concerning or consider the volume of water to be drained. Ordinance § 2:05.8) c. and SDCL § 46A-10A-20(5).

5) The Administrator did not receive evidence concerning or consider agriculture production on Plaintiff's property. Ordinance § 2:05.4).

6) The Administrator did not consider evidence concerning, nor did he determine "the amount of flow, or the time of flow from that which would occur" and whether the proposed project created an "unreasonable hardship or injury to the owner of the land receiving the drainage." SDCL § 46A-10A-20(3), (5).

h. The Administrator erroneously interpreted and applied state Drainage Law and the county drainage Ordinance.

4. Plaintiff respectfully moves the circuit court for a declaratory judgment¹ and certification of final judgment² pursuant to SDCL § 15-6-54(b) ruling that the Defendant Millan's drain tile project permit for the S1/2 of Section 30 (parcels) is null and void, that the Davison County administrative approval provisions of the Ordinance, and any decision made under them, are invalid and void, and for further relief on the grounds stated in the Plaintiff's Memo of Law, and such other relief as the court deems just and equitable.

Dated: March 10, 2021.

¹ "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." SDCL § 21-24-1. "No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for." *Id.* "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." SDCL § 15-6-57.

² To obtain relief on the dispositive issues, the Motion at bar requests a certification of final summary judgment in Plaintiff's favor pursuant to SDCL 15-6-56(a) and SDCL 15-6-54(b).

Respectfully submitted,

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Attorney for Plaintiff

This Motion is also supported by the following Exhibits which are attached and incorporated into this Motion by this reference:

1. Deposition Exhibit D-4 to this Motion is a certified copy of the 14-page Davison County Drainage Commission complete decision record of Defendant Millan's new drainage project application which includes the Administrator's approval decision. Deposition Exhibit D-4 was certified by the Davison County Auditor on September 21, 2020.
2. Deposition Exhibit D-5 is Mr. Bathke's August 24, 2020 email to Mr. Jim Davies.
3. Deposition Exhibit D-6 is Mr. Bathke's July 30 email to John Millan.
4. Deposition Exhibit D-10 is Mr. Bathke's October 22, 2020 email to the County Assessor's office.
5. Deposition Exhibit D-11 is Mr. Bathke's sworn responses to Plaintiff's Interrogatories, Requests for Production of Documents and Requests for Admission to Defendant Commission, sworn to on November 6, 2020.
6. Deposition Exhibit D-17 is Mr. Bathke's resume.
7. Exhibit A to this Motion is the transcript of the deposition testimony of the Administrator Jeff Bathke.
8. Exhibit B to this Motion is the Davison County Drainage Ordinance.