

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 29463

JON LITTLE AND SHIRLEY LITTLE AND CLARICE LITTLE
Appellants,
vs.

HANSON COUNTY DRAINAGE BOARD, HANSON COUNTY,
SOUTH DAKOTA, AND JAMES F. PAULSON
Appellees.

APPEAL FROM THE CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

HANSON COUNTY, SOUTH DAKOTA

THE HONORABLE CHRIS S. GILES
Circuit Court Judge

BRIEF OF THE APPELLANTS

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NOTICE OF APPEAL FILED NOVEMBER 4, 2020.

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Jurisdictional Statement

The Hanson County Drainage Board granted a drainage application for James Paulson. Appellants appealed to the Circuit Court, and a court trial was held on September 21, 2020. The Honorable Chris Giles ruled that Drainage Board had not abused its discretion in granting the drainage permit, and upheld the drainage permit by order dated October 6, 2020. Notice of Entry of the Order of the Trial Court was made on October 8, 2020. Appellants' Notice of Appeal was filed on November 4, 2020.

Preliminary Statement

The Appellants will be referred to as "Littles". The applicant for the drainage application will be referred to as "Paulson". Hanson County Drainage Board shall be referred to "Board or Drainage Board". Spring Lake Township shall be referred to "Township". The previous trial not involved in this appeal shall be referred to as "Little 1". The trial involved in this

matter may be referred to as "Little 2." Transcripts will be referred to as TR. (Trial, and page or pages).

Statement of the Issues

1. Did the Drainage Board violate its own ordinance in granting the Paulson application? The trial court held that the granting of the application by the Board was proper. The most relevant case is Hernando County v. Franklin, 666 So.2d 602 (Fla. App. 1996). The most relevant statutes are SDCL 1-25-1.1, SDCL 8-5-1, and SDCL 8-5-2.

2. Did the failure of the Board to follow state law or its own ordinances violate the Littles' right to due process? The trial court held that the granting of the Paulson drainage application was proper. The most relevant cases are Boddie v. Connecticut, 401 US 371, Northwest South Dakota Production Credit Ass'n v. Dale, 361 NW2d 275 (SD 1984) and Blanchard v. City of Ralston, 559 NW2d 735 (Neb. 1997).

3. Did the Hanson County Drainage Board abuse its discretion in granting the Paulson application for drainage? The trial court ruled that the Board did not abuse its discretion in granting the application. The most relevant cases are James Carmody v. Lake County Board of Commissioners and Steve Carmody and Dallas Schwiesow, 2020 SD 3, Credit Collection Servs., Inc. v. Pesicka, 2006 SD 81, and Wilcox v. Vermeulen, 2010 SD 29.

4. Did the trial court err when it refused to allow Littles to inquire as to the procedure used by the Township to issue its consent to the drainage application? The trial court allowed Littles to present testimony as an offer of proof as to the deficient procedure used by the Township Board, but did not allow the testimony into evidence. The most relevant case is

Perman v. South Dakota Dept. of Labor, Unemployment
Ins. Div., 411 NW 2d 133 (SD 1987). The most relevant
statutes are SDCL 19-19-401 and SDCL 19-19-402.

5. Did the trial court err when it refused the request
of Appellants for the court to take judicial notice of
Little 1? The trial court denied the request of Littles

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for the court to consider in these proceedings the
previous proceedings involving the same parties in
Little 1. The most relevant statutes are SDCL 19-19-401
and SDCL 19-19-402.

Statement of the Case

James Paulson filed an application for a drainage
permit with the Hanson County Drainage Board, which
drainage permit application was dated July 7, 2020. The
Hanson County Drainage Board heard the application on
June 16, 2020, and a motion was made to table the
application. At that time no new hearing date was set
for the drainage application. On July 6, 2020, the

Hanson County Auditor notified counsel for Appellants by email that the Drainage Board would consider the application again the next day, on July 7, 2020. No notice was provided directly to Appellants. At the July 7, 2020, counsel for the Appellants appeared, but the Appellants did not and they did not know of the hearing. The Drainage Board approved the drainage permit. Appellants appealed to the Circuit Court, and

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a court trial was held on September 21, 2020. The Honorable Chris Giles ruled that Drainage Board had not abused its discretion in granting the drainage permit, and upheld the drainage permit. This appeal ensued.

Statement of the Facts

James F. Paulson (Paulson) applied for a drainage permit to drain the Southwest Quarter of Section 21, Township 104, Range 57 W., Hanson County, South Dakota, such drainage application dated July 2, 2020. The area to be drained was identified as 90 acres. The outlet of the drain is located in the Southeast Corner of

Section 21. John and Shirley Little and Clarice Little are landowners into which the water to be drained would flow through their land once it exits the South Corner of Section 21. The application described the project as removing approximately 2.4 feet of debris from an existing ditch, which is approximately 630 feet long, 20 feet wide, and has a depth of 4-5 feet. The ditch runs all of its way through a Springlake Township road right-of way. This application was the second application of Paulson for a drainage application for

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this same land and route. Little vs. Hanson County Drainage Board and Paulson, 30CIV19000023 (Little 1). In Little 1, the circuit court held that the Hanson County Drainage Board abused its discretion or did not follow its own ordinance and overruled the granting of the drainage application. (Plaintiffs Exhibit 1) At that hearing, it was testified to that the Springlake Township Board did not even have a meeting to consider its portion of the drainage application and did not post or publish any notice of a meeting in order to consent to the application of Paulson. (Plaintiffs

Exhibit 1) Further, it was shown that, prior to the application of Paulson for drainage of the ditch, Paulson had earlier removed a culvert and a driveway along the same route which had the effect of altering drainage along the same land and ditch. (Plaintiffs Exhibit 1) A hearing date on the petition for drainage now on appeal was set for June 16, 2020. Notice of the hearing was given by publication on May 28, 2020 and June 4, 2020. No notice of the hearing set for June 16, 2020 was given by Paulson posting notice. At the time of the June 16, 2020, Drainage Board proceedings, Littles and their attorney appeared and objected to the

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application, and the Hanson County Drainage Board tabled the drainage application. TR. Trial, pages 22-27, Exhibit 2. No new hearing date was set for consideration of the application. The application was further considered on July 7, 2020. The Hanson County Auditor emailed Littles' counsel on July 6, 2020, and the Auditor posted an agenda for the July 7 meeting more than 24 hours in advance of the July 7th hearing. No notice was provided directly to the Littles. The

Littles were in the Black Hills and did not have cell phone reception and counsel was unable to contact them. TR. Trial, page 30 No notice of publication of the hearing set for July 7, 2020, was made. The Littles' counsel appeared at the July 7, 2020 hearing, but the Littles, unaware of the hearing, did not attend. The Hanson County Drainage Board approved Paulson's application. With regard to the drainage application of July 7, 2020, on appeal, the Township Board did have a meeting to consider its acquiescence to the Paulson application for drainage. The Springlake Township Board did not post or publish any notice of the meeting in which they approved the Township to sign their approval to the Paulson application. TR. Trial, pages 20-22

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Prior to proceeding with the drainage application of July 7, 2020, Paulson had not filed another drainage application or taken any action to remedy the removal of the driveway and culvert which also affected the drainage of his land. TR. Trial, pages 34-35, 41-42

Argument

ISSUE ONE

1. Did the Drainage Board violate its own ordinance in granting the Paulson application? The trial court held that the granting of the application by the Board was proper.

It is axiomatic that the provisions of the County's own ordinances must be followed before the Court gets to the question of whether the County abused its discretion in granting the permit. The public is entitled to rely on the ordinance passed by the County, and the County must comply with its own ordinances. See Hernando County v. Franklin, 666 So.2d 602 (Fla. App. 1996). See e.g., SDCL 1-26-36, with regard to administrative appeals to circuit court. ".... The

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court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;

Littles maintain that the Board violated its own ordinance in granting the Paulson application. First, the Hanson County Drainage Ordinance requires that, if township property is affected, the application has to be consented to by the affected township. See Ordinance Sec. 2.03. In this case, although two of the Township supervisors did sign the application, it was undisputed that the actions of the Township Board did not comply with law, and the consent was ineffective. See Issue 4 below. The Township did not provide any notice, either by actual notice, posting notice or publishing notice, of the meeting to authorize the signature of the Paulson application. South Dakota Open Meetings Law,

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SDCL 1-25-1.1 provides that "Each political subdivision shall provide public notice, with proposed agenda, that is visible, readable, and accessible for at least an entire, continuous twenty-four hours immediately

preceding any official meeting, by posting a copy of the notice, visible to the public, at the principal office of the political subdivision holding the meeting. The proposed agenda shall include the date, time, and location of the meeting. The notice shall also be posted on the political subdivision's website upon dissemination of the notice, if a website exists. For any special or rescheduled meeting, the information in the notice shall be delivered in person, by mail, by email, or by telephone, to members of the local news media who have requested notice. For any special or rescheduled meeting, each political subdivision shall also comply with the public notice provisions of this section for a regular meeting to the extent that circumstances permit."

Further, SDCL 8-5-1 provides that "The township board of supervisors shall hold regular meetings on the last Tuesday of February, the last Tuesday of March, and the last Tuesday of October, of each year. The

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meetings shall be held at the office of the township clerk or the location established in § 8-3-1 at a time

determined by the board. If any two supervisors submit a written statement signed by them not less than twelve days before the meeting requesting that the next regular meeting be held at a different time, the township clerk shall give notice of the time and place of the meeting as provided by § 8-3-1. In case of inclement weather, any required township meeting may be rescheduled for the following Tuesday at the same place and location without additional publication in the newspaper and meeting requirements provided in § 1-25-1.1." SDCL 8-5-2 further provides that "At each regular meeting, the board shall perform the duties required of it by law and transact any other business that may legally come before it. The board may adjourn from time to time. The township clerk or the chairman of the board of township supervisors may call special sessions if the interests of the township demand it upon giving three days' notice of such session by mailing a copy of such notice to each of the supervisors at their several post office addresses or by giving such notice to each supervisor by telephone.

It shall be the duty of all persons having business to transact with the board to appear before such board at any regular meeting, or file such business with the clerk to be laid before the board by him at its next meeting."

The Township provided no notice to anyone and did not comply with the South Dakota Open Meetings Law. How can the Court uphold governmental action based on such a violation? Because the signatures of the Township were legally invalid, the application for drainage was ineffective. Approving the drainage permit was a violation of the Board's own ordinance.

Secondly, the Ordinance states that "For all hearings required pursuant to this article, the County will, at the applicant's expense publish notice in the County legal newspaper once a week for two consecutive weeks. Ordinance Sec. 2.07. This requires that notice of all hearings, not just an initial hearing, be published twice. The Board did not publish any notice of the second hearing, and merely emailed a one day notice to Appellants' counsel, and because of the short

notice, Appellants could not participate in the hearing.

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Third, the Ordinance also states that "At the county's direction, the applicant shall prominently post the property in a manner most visible to the nearing public right-of-way, giving notice for the permit hearing." Ordinance Sec. 2.07. In this case, Paulson neither posted notice of the first hearing or the second, and the Board failed to direct Paulson to do so. Appellants argue that the provision for posting of notice is mandatory. "Direction" means guidance or supervision of action or conduct. Merriam Webster Online Dictionary. The Board directs the manner or location for posting, but the ordinance clearly states that the "applicant shall" prominently post the notice of hearing.

It is clear that the Board violated its own ordinance by its failure to publish notice of the second hearing, by failure to direct the applicant to post notice of either the first hearing or the second, and that the Board violated its own ordinance by

accepting the unauthorized consent of the Township Board to the application.

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ISSUE TWO

2. Did the failure of the Board to follow state law or its own ordinances violate the Littles' right to due process? The trial court held that the granting of the Paulson drainage application was proper.

Not only was the failure of the Board to publish notice of the second hearing, the failure of the Board to direct Paulson to post notice of any hearing, and the underlying failure of the Township Board to post or publish any kind of notice prior to meeting to consent to the Paulson application a violation of state statutes and the Drainage Board's own ordinances, all of those factors constituted a violation of the Littles' right to due process. The due process clause requires, at a minimum, that deprivation of life, liberty, or property

by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Northwest South Dakota Production Credit Ass'n v. Dale, 361 N.W.2d 275 (S.D. 1984).

Failure to comply with notice requirements violate due process standards. Blanchard v. City of Ralston, 251 Neb. 706, 559 N.W.2d 735 (Neb. 1997). As this Court is

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completely aware, drainage cases are some of the most contentious cases before it, precisely because it affects valuable property rights. Any person affected by drainage decision should be given a full opportunity to participate and rely on the notice provisions of the local government and state statutes. The Board complied with the publication requirement for the first hearing which allowed the Littles to be present and participate (although not complying with the posting requirement), but neither the Drainage Board or the Township lived up to the notice requirements set for them, and that failure constituted a denial of due process.

ISSUE III

3. Did the Hanson County Drainage Board abuse its discretion in granting the Paulson application for drainage? The trial court ruled that the Board did not abuse its discretion in granting the application.

Littles likewise argue that the Drainage Board "acted unreasonably, arbitrarily or otherwise abused its discretion," James Carmody v Lake County Board of Commissioners and Steve Carmody and Dallas Schwiesow,

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2020 SD 3. In that context, Littles argue that the Board proceeding to make a determination in light of the various notice deficiencies is not only a violation of law and its own ordinances, but would also constitute a determination that the Drainage Board acted unreasonably, arbitrarily or otherwise abused its discretion in going forward. "(A) decision based on an error of law is, by definition, an abuse of discretion. Credit Collection Servs., Inc. v. Pesicka, 2006 SD 81,

¶ 5, 721 N.W.2d 474, 476 (citation omitted)." Wilcox v. Vermeulen, 781 N.W.2d 464, 2010 SD 29 (S.D. 2010)

Littles also argue that at the hearing on July 7, 2020, the Drainage Board should have inquired as to the validity of the consent of the Township. That is because in Little 1, in which the same parties participated, the issue of the procedure, or lack of it, that the Township followed, was brought to the attention of the Drainage Board. See TR., Little 1, pg. 103. The trial court in Little 1 stated "The township board members need to sign off and have official action to authorize their decision." TR., Little 1, pg. 103. Therefore, it was unreasonable, arbitrary, or an abuse of discretion for the Drainage Board to act without

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inquiring as to the procedure that the Township Board used in consenting to this application.

Likewise, in Little 1, the Drainage Board was made aware that Paulson had altered a driveway and removed a culvert affecting the same drainage ditch that he now

seeks to alter again. He had not filed a previous application to either alter the driveway or remove the culvert prior to Little 1, and the trial court in that case stated "The (new) permit should probably ask permission to reinstall a culvert and a driveway, which it does not, and that appears what Mr. Mr. Paulson wants to do. In doing so, it probably needs to be spelled out what diameter of culvert is going to be used, what was there previously, what is going to be replaced... ". TR., Little 1, pg. 104. However, the Drainage Board required none of this in considering the application now on appeal even though the Drainage Board was aware of Paulson's actions. Therefore, the Board knew that Paulson's actions had not been remedied, and that no application had been made to the Drainage Board to do this. This action of approving this application without first requiring Paulson to restore his previous actions constituted an abuse of

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discretion, and an action that was arbitrary and unreasonable.

ISSUE IV.

Did the trial court err when it refused to allow Appellants to inquire as to the procedure used by the Township to issue its consent to the drainage application?

The trial court allowed Littles to present testimony as an offer of proof as to the deficient procedure used by the Township Board, but did not allow the testimony into evidence.

The evidence presented in Littles' offer of proof by way of testimony was uncontroverted evidence that the consent of Township to the Paulson application was invalid as a matter of law. How could the legally invalid consent of the Township, which was required by the Board's own ordinance, not be relevant? SDCL 19-19-401 provides that "Evidence is relevant if: (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and (b) The fact

is of consequence in determining the action. SDCL 9-19-402 provides that "All relevant evidence is admissible, except as otherwise provided by constitution or statute or by this chapter or other rules promulgated by the Supreme Court of this state. Littles were not offering this evidence to retry the facts underlying the application (impact on other landowners, etc.), but for compliance with the law and the legality of the Board's decision, which the trial court can review. "'Questions of law, unlike questions of fact, are freely reviewable by the courts; the courts are under no obligation to defer to [the agency's] legal conclusions.'..." Permann v. South Dakota Dept. of Labor, Unemployment Ins. Div., 411 N.W.2d 113, 41 Ed. Law Rep. 322 (S.D. 1987). Because the testimony impacted a question of law (did the application conform to the requirements of the ordinance), and it was certainly relevant and impactful, the evidence should have been admitted.

Again, because the Littles had no notice whatsoever of the Township board meeting that resulted,

in part, of the granting of the Paulson application, it was a violation of due process. That violation is,

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once again, a matter of law for the court to determine, and the proffered evidence as to the Township procedure is relevant to that determination of the law, and, once again, should have been admitted.

ISSUE V

5. Did the trial court err when it refused the request of Appellants for the court to take judicial notice of Little 1? The trial court denied the request of Littles for the court to consider in these proceedings the previous proceedings involving the same parties in Little 1.

Littles asked the trial court to take judicial evidence of Little 1, which was the appeal of a previous drainage application by Paulson for the same drainage ditch. The transcript of Little 1 was relevant as evidence to these proceedings for two reasons. First, in Little 1, the signatures of the Township Board were also invalid because of the

improper procedure used by the Township Board. The Drainage Board was aware of this because of Little 1, and because of that, should have inquired as to the procedure used by the Township Board in Little 2 when

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this application was discussed. As this brief argues, the procedure again used by the Township Board was wholly insufficient to validly approve the application as is required by the ordinance of the Drainage Board. Secondly, the transcript details the actions of Paulson in removing a driveway and culvert in the proposed drainage area. The trial court in that case put the Drainage Board on notice of the alteration of the driveway and culvert by Paulson that should have been remedied prior to approving this new application. Nonetheless, the Drainage Board in this action did not require Paulson to remedy his previous actions in restoring the driveway and the culvert prior to approving his drainage permit. The transcript and proceedings in Little 1 were evidence of the prior knowledge of the Drainage Board in considering the present application of Paulson and were not new

evidence. The Drainage Board is charged with actual notice of the proceedings in which it participated. Those proceedings should have been considered by the Board and the trial court and were relevant to determine whether or not the Drainage Board abused its

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discretion or acted arbitrarily or capriciously. SDCL 19-19-401 and SDCL 19-19-402.

CONCLUSION

Wherefore, Appellants respectfully request this Court to overturn the order of the trial court and remand this matter to the trial court, either for a new trial or with directions to the trial court to enter an order denying the drainage application of Paulson and the decision of the Hanson County Drainage Board.

Respectfully submitted this 23rd day of February, 2021.

Chris A. Nipe
Attorney for Appellants JON LITTLE AND SHIRLEY
LITTLE AND CLARICE LITTLE

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REQUEST FOR ORAL ARGUMENT

Appellants, JON LITTLE AND SHIRLEY LITTLE AND
CLARICE LITTLE, by and through their attorney of record

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Chris A. Nipe respectfully requests oral argument
before this Court in this matter.

Chris A. Nipe
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CERTIFICATE OF COMPLIANCE

Comes now the attorney for appellants and
certifies that this brief complies with the type-volume
limitation as set forth in SDCL 15-26A-61(2) and that

the number of words in the brief are 4,822 and the
number of characters are 29,102.

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IN THE SUPREME COURT OF
THE STATE OF SOUTH DAKOTA

APPEAL NO. 29463

JON LITTLE AND SHIRLEY LITTLE AND CLARICE LITTLE
Appellants,
vs.
HANSON COUNTY DRAINAGE BOARD, HANSON COUNTY,
SOUTH DAKOTA, AND JAMES F. PAULSON
Appellees.

AFFIDAVIT OF MAILING
AND
PROOF OF SERVICE

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF DAVISON)

Chris A. Nipe, Attorney for the Appellants above-named, being first duly sworn upon oath, hereby deposes and says a copy of Appellants Brief in the above entitled matter was served by electronic service upon the attorney listed below, addressed to his last known Odyssey electronic address as stated:

Mike C. Fink
Special Deputy States Attorney
PO Box 444
Bridgewater, SD 57319, Attorney for Appellees, and that he mailed one original and two (2) copies of Appellants Brief to the Clerk of the Supreme Court of South Dakota, 500 East

Capitol, Pierre, SD 57501-5070, by depositing the same in

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the United States Mail, postage prepaid for first class
mail, on the 23rd day of February, 2021.

Chris A. Nipe
Attorney for Appellants
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Subscribed and sworn to before me this 23rd day of
February, 2021.

(SEAL)

Notary Public - South Dakota
My Commission Expires: August 6, 2022.

APPENDIX

1. ORDER dated May 7, 2020 . . . App
1
2. FINDINGS OF FACT AND CONCLUSIONS OF LAW . App 2
3. ORDER dated October 6, 2020 . . . App 10

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HANSON)

FILED

CIRCUIT COURT

OCT 01 2020

FIRST JUDICIAL CIRCUIT

Pam Kaupol
Hanson County Clerk of Courts
First Judicial Circuit Court of SD

JOHN LITTLE, SHIRLEY LITTLE,
AND CLARICE LITTLE
Plaintiff,

30 CIV. 20-26

vs.

HANSON COUNTY DRAINAGE BOARD
AND HANSON COUNTY, SOUTH
DAKOTA

Defendant.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter came before the Court on September 21, 2020, upon Plaintiffs' appeal of the decision of the Hanson County Drainage Board for Hanson County, South Dakota to grant a drainage permit to James F. Paulson; Plaintiffs appeared in person, along with their attorney Chris Nipe and the Hanson County Drainage Board, Hanson County, South Dakota, appeared by and through the Hanson County Deputy States Attorney, Mike C. Fink.

By stipulation of the parties made in advance of the September 21st hearing, Defendant James F. Paulson was dismissed as a Defendant herein; neither Mr. Paulson nor his attorney attended the September 21, 2020 proceedings. The Court first considered procedural issues raised by Plaintiffs. The Court then considered limited testimony, as to whether the Drainage Board abused its discretion in granting a drainage permit to James F. Paulson. In advance of the hearing, the Court had issued a preliminary decision, ruling that the proper standard on appeal of an administrative decision is the "abuse of discretion" standard. After hearing the testimony, the Court then ruled from the bench and directed Defendant Hanson County Drainage Board to

prepare Findings of Fact and Conclusions of Law consistent with the Court's bench decision.

Now therefore, the Court makes the following Findings of Fact:

FINDINGS OF FACT

1. A copy of the James F. Paulson drainage permit application is attached to the Affidavit of Lesa Trabing, the Hanson County Auditor, all of which is on file herein. The Drainage Permit Application is dated July 7, 2020.
2. Pursuant to the Application, Paulson requested permission to drain the Southwest Quarter of Section 21, Township 104, Range 57 W., Hanson County, South Dakota. The area to be drained was identified as 90 acres. The outlet of the drain is located in the Southeast corner of said Section 21.
3. The Application contains two township signatures, as is required by the Hanson County Drainage Ordinance.
4. The name of the downstream landowner between the outlet of the drain and the nearest named watercourse is Richard Kunkel; Mr. Kunkel signed his consent on Page 3 of the Application.
5. The Application describes the project as removing approximately 2.5 feet of debris from an existing ditch, which is approximately 630 feet long, 20 feet wide, and has a depth of 4-5 feet.
6. The Application contains a proposed completion date, as well as a start date time frame.
7. The Application contains the name of the contractor, and the form is signed by the

applicant, James Paulson.

8. The Application indicates the appropriate \$25.00 fee was paid, and the Minutes of the Special Meeting of Springlake Township (hereinafter "Township") at which time consent was discussed and is attached to the Application form.
9. The Application also contains a site map and an NRCS Drain Map, as well as documents indicating the waterway is a vested drainage right.
10. A Google map reflecting the area of the drain was also attached to the Application.
11. After the Drainage Application was submitted, public notice was given by publication.
12. The Affidavit of Publication is attached to the Responsive Brief of the Hanson County Drainage Board, on file herein. This Affidavit indicates notice was given by publication on May 28 and June 4, 2020, in a manner and at times consistent with the Ordinance requirements.
13. The published Notice indicated that a public hearing would be held on June 16, 2020, beginning at 9:30 a.m.
14. Section 2.07 of the Ordinance provides:

At the County's direction, the applicant shall prominently post the property in a manner most visible to the nearest public right of way, giving notice for the Permit Hearing.

The facts of this case indicate that the County did not direct Paulson to "post" the property on site.

15. At the time of the June 16, 2020, Drainage Board proceedings, the Littles and their attorney Chris Nipe appeared and objected to the application; they gave input regarding the Paulson project.
16. Upon Motion by the Board, the June 16, 2020, hearing was "tabled".
17. More than 24 hours prior to July 7, 2020, Hanson County Auditor Lesa Trabing notified the Littles' attorney, Chris Nipe, that the continued Hearing would take place on July 7th. The Plaintiffs were not directly notified. In addition, an Agenda was posted in compliance with state statute more than 24 hours in advance of the July 7th meeting. The agenda included an entry related to the continued Paulson Drainage Hearing.
18. When the Hanson County Drainage Board convened on July 7, 2020, Chris Nipe appeared at the continued hearing, on behalf of the Littles, and submitted further information.
19. Attorney Nipe did not, however, request a further postponement so that his clients could attend.
20. The Minutes of the June 16 and July 7 proceedings were received as Exhibits in this matter. According to the July 7, 2020, minutes, Paulson himself was present to explain the nature and extent of the project and to answer questions by the Board.
21. The Minutes also reflect that Attorney Nipe was given an opportunity to present his objections to the Application; that Attorney Mike Fink, Deputy Hanson County States Attorney, was present to answer certain legal questions submitted by the Board.
22. The Board then read, out loud, the Drainage Ordinance Section 2.09 factors, which are to

be considered. After reading those factors, the Board made the following findings:

1. The project is not a flood hazard or affect flood plain values;
2. No potential of erosion;
3. Will not affect water quality and supply;
4. Will improve agriculture production;
5. Will not affect environmental quality;
6. Aesthetics will be maintained;
7. Fish and wildlife values will not be affected;
8. Downstream landowner signatures have been obtained;
 - A. This project does not involve any new drainage, the goal is to simply restore the natural flow of water; this drain is a natural watercourse, and no evidence was submitted by any party to suggest the natural flow would be altered once the applicant removes silt and debris which now impedes the flow. As such, there will be no additional flow or additional quantity of water passing into the nearest named waterway.
 - B. The project will improve the natural drainage.
 - C. Approximately 80 acres will drain naturally.
 - D. The drain will be cleared of silt and debris to return ditch to its natural state.
 - E. No evidence was presented by any party to suggest this maintenance

project would have any adverse impact upon downstream landowners. As such the project appears to merely return the waterway to historical levels of natural flow.

23. After considering the above factors, the Drainage Board passed a Motion, by which Paulson was granted a permit to clean subject waterway to its original depth. All members voted aye.
24. At the Appeal Hearing held on September 21, 2020, the Court heard limited evidence as to the matters submitted to the Township Board. The Court finds that the Drainage Board followed the procedure set forth in the Hanson County Drainage Ordinance and required by state statute.
25. The evidence reflects the Paulson property is the dominant property and Littles' property is servient— Paulson has a vested drainage right related to the subject waterway.
26. Although there was testimony indicating the Township may not have followed proper procedure at its meeting to discuss consent, the Township did in fact grant Paulson permission to perform the project; this permission was reduced to writing.
27. And since the County did not require posting upon the property, and the Ordinance does not require the same unless such posting is directed by the County, the Court finds no defect in the manner public notice was given.
28. Littles did have ample notice of the proceedings, and their attorney appeared at both the initial hearing phase, and the continued hearing phase.

29. All persons entitled to notice of the hearing actually received notice of the same. Littles were heard on June 16, and their attorney was again heard on July 7th.
30. Publication was made in accordance with Hanson County ordinances in advance of the June 16th meeting, and although the Court would have preferred that a new date be identified when the initial hearing proceedings were "tabled", the Board was not required to republish the matter a second time and no request was made by Mr. Nipe to table the matter so that his clients could be heard further.
31. Chris Nipe was given personal notice approximately 24 hours before the July proceedings, and the matter was properly identified on a timely agenda.

Based upon the foregoing Findings of Fact, the Court enters its Conclusions of Law as follows:

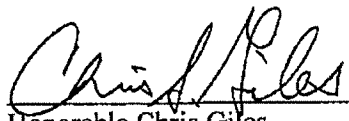
CONCLUSIONS OF LAW

1. The court has subject matter jurisdiction and personal jurisdiction over the parties.
2. The appeal of the Plaintiffs from the decision of the Hanson County Drainage Board in granting the drainage permit of James F. Paulson was proper and timely filed.
3. This is an appeal by Plaintiffs of a Hanson County Drainage Board decision made July 7, 2020. The Hanson County 2010 Drainage Ordinance and Amendments, effective at the time the Paulson matter were considered, are contained in the file herein. This ordinance was promulgated under the authority of SDCL 46A-10A and SDCL 46A-11.
4. The contents of Paulson's application satisfied the requirements of the Hanson County Drainage Ordinance Article 2.

5. During the Board hearing process, the Drainage Board considered the factors found in Section 2.09 of the Ordinance and made findings as to each such factor. In doing so, the Board adequately supported its decision to grant Paulson a permit.
6. On appeal to this Court, the standard of review is "abuse of discretion". As such, the question before this Court was not whether the Court should substitute its judgment for that of the Hanson County Drainage Board, but to determine whether the Drainage Board's decision was arbitrary and an abuse of discretion.
7. The burden of proof in such an appeal is upon the party challenging the decision made by the Drainage Board. In this case, the burden of proof was upon the Plaintiffs. This Court concludes that, based upon the facts set forth above, the Hanson County Drainage Board did not abuse its discretion when it granted Paulson's request for a Drainage Permit.
8. Likewise, the Court concludes the Board did not act arbitrarily or capriciously. The Court therefore affirms the decision by the Hanson County Drainage Board. An Order shall be entered accordingly.

Dated this 15th day of October 2020.

BY THE COURT:


Honorable Chris Giles
Circuit Court Judge

Attest:
Koupal, Pam
Clerk/Deputy



STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	:SS	
COUNTY OF HANSON)	FIRST JUDICIAL CIRCUIT

JON LITTLE AND SHIRLEY)	
LITTLE,)	
)	30CIV. 19-23
Plaintiffs,)	
vs.)	
)	ORDER
HANSON COUNTY DRAINAGE)	
BOARD, HANSON COUNTY,)	
SOUTH DAKOTA,)	
AND JAMES F. PAULSON)	
Defendants.)	

This matter having come before the court for trial upon an appeal filed by the plaintiffs of the decision of Hanson County, acting through the Hanson County Drainage Board, to grant a drainage permit (Permit 19-38) to Defendant James Paulson to drain the SW 1/4 of 21-104-47 in Hanson County South Dakota, such permit dated September 24, 2019, and the Plaintiffs appearing in person and by and through their attorney of record, Chris A. Nipe, and Hanson County and the Hanson County Drainage Board appearing through Hanson County States Attorney James Davies, and Defendant James Paulson appearing in person and by and through his attorney of Record Jacob Tiede, and the Court having considered the evidence, the file herein, the exhibits presented, and the arguments of counsel, and being fully advised in the premises;

IT IS THEREFORE ORDERED that the decision of Hanson County, acting through the Hanson County Drainage Board, to grant the drainage application of James Paulson to drain SW 1/4 of 21-104-47 in Hanson County South Dakota as reflected in Drainage Permit 19-38 dated September 24, 2019, is hereby REVERSED, and the drainage permit is denied, for the following reasons: the ordinances of Hanson County relating to drainage were not followed, including but not limited to publication of notice of the hearing on the application for drainage, an inadequate description of the drainage project, the attachment of a color map of the proposed drainage area to the application, the description of the 40 acres nearest to the outlet drain, the attachment of James Paulsen's vested drainage permit, and the signature of the adjoining landowner on page 3 of the application;

IT IS FURTHER ORDERED that, in the alternative, the decision of Hanson

Filed on: 05/07/2020 HANSON County, South Dakota 30CIV19-000023

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County, acting through the Hanson County Drainage Board, to grant the drainage application of James Paulson to drain SW 1/4 of 21-104-47 in Hanson County South Dakota as reflected in the Drainage Permit 19-38 dated September 24, 2019, is hereby REVERSED, and the drainage permit is denied, because Hanson County, acting by and through the Hanson County Drainage Board, abused its discretion in granting such permit, in that it is did not have sufficient information according to its own ordinances, to grant such permit;

IT IS FURTHER ORDERED that, in the alternative, the decision of Hanson County, acting through the Hanson County Drainage Board, to grant the drainage application of James Paulson to drain SW 1/4 of 21-104-47 in Hanson County South Dakota as reflected in the Drainage Permit 19-38 dated September 24, 2019, is hereby REVERSED, and the drainage permit is denied, because Hanson County, acting by and through the Hanson County Drainage Board, did not have jurisdiction to hear such permit, in that Spring Lake Township was required to consent to the application of James Paulson, and Spring Lake Township did not conduct a meeting or a vote to approve the Township's consent to such application.

BY THE COURT

Attest:

Koupal, Pam
Clerk/Deputy



Signed: 5/7/2020 3:19:28 PM

Chris L. Miles

CIRCUIT COURT JUDGE

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App 11

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29463

* * * *

JON LITTLE, SHIRLEY LITTLE AND CLARICE LITTLE,
APPELLANTS,

VS.

HANSON COUNTY DRAINAGE BOARD, HANSON COUNTY,
SOUTH DAKOTA, AND JAMES F. PAULSON
APPELLEES,

* * * *

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
HANSON COUNTY, SOUTH DAKOTA

* * * *

HONORABLE CHRIS S. GILES
Circuit Court Judge

* * * *

BRIEF OF APPELLEES

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* * * *

Notice of Appeal filed on November 4, 2020.

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PRELIMINARY STATEMENT

The Appellants will be referred to collectively as "Littles." James F. Paulson (the Applicant before the Hanson County Drainage Board) will be referred to as "Paulson." The Hanson County Drainage Board will be referred to as "the Board" and Spring Valley Township will be referred to as the "Township."

References to the settled record will be with the letters "SR", followed by the appropriate page number.

REQUEST FOR ORAL ARGUMENT

Appellee (the Board) respectfully requests the privilege of appearing before the Court for oral argument.

STATEMENT OF THE ISSUES

I. DID THE CIRCUIT COURT ERR WHEN IT AFFIRMED THE BOARD'S DECISION TO ISSUE A DRAINAGE PERMIT TO PAULSON?

The Circuit Court determined the Board did not abuse its discretion when it granted Paulson a drainage permit, and affirmed the Board's decision. The most relevant cases, related to this issue, are as follows:

a. Carmody v. Lake County Board of Commissioners, 2020 SD 3

b. State of South Dakota, Department of Game, Fish and Parks v. Troy Township, 900 N.W.2d 840 (SD 2017)

c. In re Jarmen, 860 N.W.2d 1 (SD 2015)

STATEMENT OF THE CASE

This appeal stems from a Drainage Board decision, whereby it granted a drainage permit to Paulson. Littles objected to Paulson's Application, and later appealed the Board's decision to the Circuit Court. The Circuit Court reviewed and upheld the Board's decision. This appeal followed.

STATEMENT OF FACTS

With his Drainage Application, Paulson sought the Board's permission, allowing him to remove debris from an existing waterway. SR 11. Specifically, Paulson's clean-out project involved the removal of approximately 2.5 feet of debris from an existing waterway located in the Southwest Quarter of Section 21, T104, R57, Hanson County, South Dakota. SR 10.

1. The Pertinent Hanson County Drainage Regulations.

The Hanson County Drainage Ordinances, first adopted in 2010, were promulgated under the authority of SDCL 46A-10A and SDCL 46A-11. SR 33, 34, 37. The specific purpose of the Ordinances is set forth in Section 1.01:

" These regulations govern the drainage of water within the unincorporated area of Hanson County, and are designed to enhance and promote the physical, economic environmental management of the County; protect the tax base; prevent inordinate adverse impacts on servient properties; encourage land utilization to facilitate economical and adequate

productivity of all types of land; lessen government expenditures; conserve and develop natural resources; and preserve the important benefits provided by wetlands."

SR 37.

According to the Ordinance, a "*drainage project*" is "any man-made improvements constructed or installed to drain water."

SR. 52. Pursuant to section 2.01 of the ordinance, a Drainage Permit is required prior to commencing the excavation for, or the construction or installation of, a drainage project including, but not limited to, the following:

- "1. Any draining or filling, in whole or in part;
2. Construction of any drain; or
3. Modification of any permitted drainage with the extending or re-routing any drainage." SR 38.

Ordinance Section 2.02 identifies the process to be utilized by the Board, when considering a drainage application.

SR 38. Pursuant to Section 2.02, a person who files the drainage application must do so on an approved form, and pay the appropriate filing fee with the "administrative official."

SR 39.

Along with the filing fee, the Applicant must also file a detailed site plan, identifying the location of the proposed construction. SR. 39. The site plan must include a description of the type and size of the drain, and the location

of the proposed outlet. SR. 39. If the subject waterway empties into an existing drain system, the application must also include a copy of the vested drainage record on file at the Register of Deeds office. SR 39. Likewise, if the project involves work in a road right of way, the Applicant is required to obtain written approval of such government agency, which maintains the right of way. SR 39.

And, the Application must contain written notification or approval of affected landowners or their representatives, down to the first named watercourse. SR 39. Section 2.07 provides that the County (the Board) must publish notice of the hearing in the County newspaper once a week for two consecutive weeks. SR 41. The final published notice must be published not more than 15 days, or less than 5 days, before the date set for the hearing. SR 41. Notably, Section 2.07 provides:

"At the county's direction, the Applicant shall prominently post the property in a manner most visible to the nearest public right-of-way, giving notice for the permit hearing." SR 41.

When evaluating the permit Application, the drainage Board is required to consider, at a minimum, the factors found in Section 2.09 of the ordinance. These factors are:

"1. Flood hazards, flood plain values;

2. Erosion potential;
3. Water quality and supply;
4. Agricultural production;
5. Environmental quality;
6. Aesthetics;
7. Fish and wildlife values;
8. Consideration of downstream landowners and the potential adverse effect thereon, including the following criteria:
 - A. Uncontrolled drainage into receiving watercourses which do not have sufficient capacity to handle the additional flow and quantity of water will be considered an adverse effect.
 - B. 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 physical aspects of the drain.
 - E. The impact of sustained flows." SR. 43.

2. Paulson's Application.

With respect to Paulson's Application, it is not disputed that the only affected landowner (between the waterway and the nearest named downstream watercourse) is Richard Kunkel. SR 12. Mr. Kunkel's signature/consent is included upon face of Paulson's Application. SR 12.

And, as is reflected in the Township notes, which were attached to the Application, Spring Lake Township held a special

meeting on May 6, 2020, at which time Paulson described the clean-out project to the township, and requested approval for the permit (along with approval to remove a driveway "approach" and culvert). SR 13. The Township notes reflect that, upon motion made and seconded, the Chairman and township clerk executed minutes regarding approval of Paulson's drainage project. SR 13.

Having received Paulson's Application, with all of the information set forth above, the Hanson County Auditor published Notice of a public hearing before the Board; the timing of publication is reflected in the Affidavit of Publication found at SR 110 and 111. The Notice indicated the Paulson matter would come before the Board on June 16, 2020. SR 111.

3. The Drainage Board Proceedings.

Hanson County Auditor Lesa Trabing kept the minutes for the June 16, 2020 Drainage Board proceedings. SR 112. Those minutes reflect that Paulson, as well as John and Shirley Little (and their attorney Chris Nipe), were all present for the Board discussion; the notes indicate information was presented by the parties. SR 112.

However, before the Board made any decision, the matter was "tabled" at the request of the Hanson County States' Attorney (James R. Davies). SR 112. At that time, no date was given for a continuation of the proceedings. SR 341.

The matter came back before the Board, for further discussion, on July 7, 2020. SR 113. Importantly, the day before, Trabing had notified the Littles' Attorney (Chris Nipe) of the date and time of the hearing by sending him an e-mail. SR 342. In addition, the Board agenda was duly posted more than 24 hours in advance of the meeting. SR 342. Auditor Trabing (upon State's Attorney Davies' advice) did not publish any additional notices. SR 342.

Paulson appeared at the continued July 7th proceedings, and further explained the nature and extent of the project, and answered questions by the board. SR 113. Attorney Chris Nipe also appeared on behalf of the Littles and was given an opportunity to present his objections. SR 113. Hanson County Deputy States' Attorney Mike Fink was also present - to answer legal questions submitted by the Board. SR 113. At the close of the presentations, Attorney Nipe did not request any further delays or further tabling. SR 343.

At the close of the July 7, 2020 proceedings, the Board first determined Paulson's Application was submitted by the proper party, and that the Application included the appropriate Township and landowner consent. SR 113. The Board minutes go on to reflect that, after considering the input of those in attendance, the Board read, out loud, the Ordinance Section 2.09 factors to be considered (by the Board) when determining

whether to grant Paulson a permit. SR 113.

The board then made several findings, including:

"1. The project is not a flood hazard or affect flood plain values.

2. No potential of erosion.

3. Will not affect water quality and supply.

4. Will improve agriculture production.

5. Will not affect environmental quality.

6. Aesthetics will be maintained.

7. Fish and wildlife values will not be affected.

8. Downstream landowners signatures have been obtained.

a. This project does not involve any new drainage, the goal is to simply restore the natural flow of water; this drain is a natural watercourse and no evidence was submitted by any party to suggest the natural flow would be altered once the applicant removes silt and debris which now impedes the flow. As such, there will be no additional flow or additional quantity of water passing into the nearest named waterway.

b. This project will improve the natural drainage.

c. Approximately 80 acres will drain naturally.

d. The drain will be cleared of silt and debris to return ditch to its natural state.

e. No evidence was presented by any party to suggest this maintenance project would have any adverse impact upon downstream landowners. As such, the project appears to merely return the waterway to historical levels of natural flow."

SR 113.

Based upon these findings, the Board then granted Paulson

a permit, allowing him to clean out the waterway to its original depth. SR 113. Littles then appealed the matter to the Circuit Court.

4. Appeal to Circuit Court.

On September 21, 2020, the matter came before the Honorable Chris Giles, for proceedings upon the Littles' Appeal. The Court first considered procedural issues raised by the Littles, and then considered limited testimony, as to whether the Drainage Board abused its discretion in granting a drainage permit to Paulson. SR 295. Thereafter, the Court issued Findings of Fact and Conclusions of Law, and entered an Order Affirming the Decision of the Hanson County Drainage Board. See SR 282 - 290. A copy of the Court's Findings of Fact and Conclusions of Law are attached to Appellants' Brief in Appendix 2. This appeal followed.

LEGAL ANALYSIS

A. STANDARD OF REVIEW:

This Court's review is limited to whether the Board acted unreasonably, arbitrarily, or manifestly abused its discretion. State of South Dakota, Department of Game, Fish and Parks v. Troy Township, 900 N.W.2d 840, 848 (SD 2017). The "arbitrariness" standard is narrow, and under that standard, a court is not to substitute its judgment for that of an agency. Id. at 852-853. In Troy Township, this Court held:

"[a]rbitrariness review generally applies to the results of an informal process." Id. § 8334 (emphasis added). This standard was "[d]eveloped and codified as a review for fact finding and policy choices (reasoning processes) made in an informal setting." Id. Citing, Steven A. Childress & Martha S. Davis, Federal Standards of Review § 15.07 (2d. ed. 1992)."

This Court only reverses the Circuit Court's findings of fact when they are clearly erroneous in consideration of the entire record. In re Jarmen, 860 N.W.2d 1, 5 (S.D. 2015).

B. WHETHER THE CIRCUIT COURT ERRED WHEN IT AFFIRMED THE BOARD'S DECISION TO ISSUE A DRAINAGE PERMIT TO PAULSON

As set forth in the Circuit Court's Findings of Fact, Paulsons drainage Application met the requirements of the Hanson County Drainage Ordinance. . . in that it contained the required information:

- It identified the area to be drained and the location of the outlet; (Finding of Fact #2) SR 296;

- It contained two township signatures; FF #3; SR 296;

- The only downstream landowner which needed to consent did sign his consent; FF 4; SR 296;

- The nature of the project (remove built up debris) was included; FF #5; SR 296;

- The proper fees were paid and a site map (and NRCS Drain Map and vested drainage documentation) were included; FF #8; SR 297;

The Circuit Court also found that the Board complied with the Notice requirements set forth in the Ordinances:

#11. After the Drainage Application was submitted,

public notice was given by publication. SR 297;

#12. The Affidavit of Publication is attached to the Responsive Brief of the Hanson County Drainage Board, on file herein. This Affidavit indicates notice was given by publication on May 28 and June 4, 2020, in a manner and at times consistent with the Ordinance Requirements. SR 297;

#13. The published Notice indicate that a public hearing would be held on June 16, 2020, beginning at 9:30 a.m. SR 297;

#14. Section 2.07 of the Ordinance provides:
At the County's direction, the applicant shall prominently post the property in a manner most visible to the nearest public right of way, giving notice for the Permit Hearing.

The facts of this case indicate that the County did not direct Paulson to "post" the property on site.
SR 297;

#15. At the time of the June 16, 2020, Drainage Board proceedings, the Littles and their attorney Chris Nipe appeared and objected to the application; they gave input regarding the Paulson project. SR 298.

#16. Upon Motion by the Board, the June 16, 2020, hearing was "tabled." SR 298.

#17. More than 24 hours prior to July 7, 2020, Hanson County Auditor Lesa Trabing notified the Littles' attorney, Chris Nipe, that the continued Hearing would take place on July 7th. The Plaintiffs were not directly notified. In addition, an Agenda was posted in compliance with state statute more than 24 hours in advance of the July 7th meeting. The agenda included an entry related to the continued Paulson Drainage Hearing. SR 298.

#18. When the Hanson County Drainage Board convened on July 7, 2020, Chris Nipe appeared at the continued hearing, on behalf of the Littles, and submitted further information. SR 298.

#19. Attorney Nipe did not, however, request further postponement so that his clients could attend. SR

298.

#20. The Minutes of the June 16 and July 7 proceedings were received as Exhibits in this matter. According to the July, 2020, minutes, Paulson himself was present to explain the nature and extent of the project and to answer questions by the Board. SR 298.

#21. The Minutes also reflect that Attorney Nipe was given an opportunity to present his objections to the Application, that Attorney Mike Fink, Deputy Hanson County States Attorney, was present to answer certain legal questions submitted by the Board. SR 298.

These Findings of Fact are supported by the records, and are, for the most part, not disputed by the Littles. Likewise, Littles do not argue they were prevented from providing the drainage board with additional information or argument which would have potentially changed the minds of the Drainage Board members.

Littles instead claim Paulson's Application should not have been granted because of claimed procedural defects. First, Littles claim defects in the proceedings before the Springlake Township are fatal to Paulson's Application. Such argument is without merit.

The Hanson County Drainage Ordinance does not require the consent of a Township Board to follow any particular procedure, and Littles can point to no authority suggesting a procedural defect in a Township meeting somehow makes the consent (which appears on the face of Paulson's application) ineffective.

The Board was presented with documentation of the Township's approval, and the Board did not abuse its discretion when it accepted notes reflecting such approval at face value.

Ordinance 2.02 simply provides that an "Applicant must obtain written approval of the governing agency for any drainage into a road right-of-way." Again, the Ordinance does not require any specific form of such approval, and the Ordinance does not indicate such approval must even come as a result of a meeting of any kind.

Even so, with their argument, Littles would have this Court find that the Drainage Board erred by relying upon the consent and note from the Township - and that the Board should instead have researched and investigated the procedure utilized by the Township, before accepting such consent. Such is an unreasonable reading of the Ordinance as a whole.

No doubt, the ultimate purpose behind the Township consent requirement is to ensure the Township is placed on notice of the proceedings and has an opportunity to provide input when a proposed drainage project includes work being done in a Township road ditch. Those goals were met in this case. The Board did not abuse its discretion when it accepted the Township's consent.

Littles next argue the Board abused its discretion when it did not publish any notice of the continued proceeding held

on July 7, 2020. This is a rich argument, considering the fact that Littles' attorney was given a specific personal notice of the continued proceedings, in advance (by E-Mail)- and even appeared at those continued proceedings to present argument.

At no time did Mr. Nipe request a delay, so that his clients could be present, or submit additional information.

To "table" is to suspend consideration. (See Blacks Law Dictionary.) As such, the application hearing was not actually terminated (and no decision was made). Therefor, when the continued proceedings were held on July 7th, no further publication was required. Contrary to the assertions made in the Littles' Brief, there is nothing in the Drainage Ordinance which suggests publication is required all over again when a proceeding is "tabled". This makes sense, as all interested parties were placed on notice of the matter in general; once the interested parties have been placed on notice of the Application, the purpose of publication has been met.

Considering all of the circumstances, the Board did not abuse its discretion when it moved forward on July 7, 2020 (after Mr. Nipe was personally notified) and concluded the proceedings.

Again, if the Littles wanted further opportunity to appear and/or submit further information, Mr. Nipe could have made such a request on July 7th.

Next, Littles argue the Ordinance required a notice (an

actual sign) to be physically placed at the site of the project.

This argument is countered by the plain language of the Ordinance. Ordinance 2.07 provides: "At the county's direction, the applicant shall prominently post the property in a manner most visible to the nearest public right-of-way, giving notice for the permit hearing." SR 41.

If it was the County's intention to require posting of signs in all cases, then the County would have skipped the language "At the county's direction" at the beginning of Ordinance 2.07, and instead started that paragraph off with the words "The applicant shall . . .". But by including the language as written, it is clear the posting of a sign is not required unless such is directed by the County.

It is undisputed the Board/County did not direct Paulson to post a notice at the site of the work. See Finding of Fact #14; SR 297. As such, no such posting was required of Paulson; The Board did not abuse its discretion by not requiring Paulson to post a sign on site.

Littles next argue their due process rights were violated by procedural deficiencies they claim tainted the proceedings.

This argument is not supported by the record, as the Littles and/or their attorney were notified of the Application and were given opportunity to appear and present their concerns/objections on two occasions. Littles (or their

attorney) had actual notice of the June proceedings, and attended the same. And, when the July meeting took place, Mr. Nipe appeared on Paulsons' behalf and submitted further argument; he did not request any delay (or further tabling) so that his clients could provide additional input and appear in person.

Again, it is not clear what other information or objection the Littles would have submitted, even if they *had* appeared in person or requested a delay. In truth, the Littles were given ample opportunity to submit their case to the Board and can point to no actual substantive facts which might have changed the outcome of the Board hearing.

Paulson's project did not involve the creation of a new waterway. . . it merely involved cleaning out an existing drainage ditch. The Board's findings related to the project itself are clearly supported by the evidence. The Littles' Due Process rights were not violated.

Likewise, the Littles' reliance on matters raised in a prior proceeding ("Little 1") are misplaced. It is true that, in "Little 1", the same Circuit Court Judge determined Paulson's (earlier) application was deficient. See App 10 (Appellant's Brief). But that earlier application, and the related proceedings, have no relevance to the matter before this Court. After "Little 1" was concluded, Paulson submitted a new

application, and it is that second Application (and the proceedings related thereto) which are the subject of these proceedings.

As is reflected in the Circuit Court's Conclusion #4: "The contents of Paulson's application satisfied the requirements of the Hanson County Drainage Ordinance Article 2." SR 299.

Any earlier deficiencies (as found by the Court the earlier proceedings) should be disregarded.

Finally, the Littles argue the Circuit Court should have allowed additional evidence (not brought before the Board during the hearing process). Specifically, Littles argue the Circuit Court abused its discretion when it refused to allow evidence regarding the methodology utilized by the Township, when it met and voted to give Paulson consent. With this argument, the Littles essentially submit the Circuit Court should have held a de novo review, as opposed to limiting its review to those facts presented to the Board below.

This Court has clearly held such proceedings before the Circuit Court are not entitled to a de novo review. (See, generally, Carmody v. Lake County Board of Commissioners, 2020 S.D. 3.) As such, it would have been inappropriate for the Circuit Court to consider evidence which the Board itself did not have a chance to review.

CONCLUSION

It is not disputed Littles had notice of Paulson's Drainage Permit Application. They appeared either in person or through their attorney at all stages of the proceedings. At no time did they or their attorney request any delay or further tabling of the matter, so that the Littles could attend in person or submit additional information/objection.

Paulson's Application (and the Notice given to the public) substantially complied with the Ordinance. After allowing the Littles and/or their attorney to present their arguments and objections, the Board granted a permit and, in doing so, made specific findings which satisfied the requirements of the Ordinance.

Littles' Due Process rights were not violated and the Board did not abuse its discretion when it granted Paulson's Application. The Circuit Court's Findings of Fact, Conclusions of Law (and Order Affirming the Decision of the Board) are not clearly erroneous and should be affirmed.

Dated this 2nd day of April, 2021.

HANSON COUNTY DEPUTY STATES'
ATTORNEY

/s/ Mike C. Fink
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief and all appendices were served via

email upon the following:

CHRIS A. NIPE
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Dated this 2nd day of April, 2021.

/s/ Mike C. Fink

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Corel Word Perfect, and contains 3670 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Mike C. Fink

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 29463

JON LITTLE AND SHIRLEY LITTLE AND CLARICE LITTLE
Appellants,
vs.

HANSON COUNTY DRAINAGE BOARD, HANSON COUNTY,
SOUTH DAKOTA, AND JAMES F. PAULSON
Appellees.

APPEAL FROM THE CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

HANSON COUNTY, SOUTH DAKOTA

THE HONORABLE CHRIS S. GILES
Circuit Court Judge

REPLY BRIEF OF THE APPELLANTS

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NOTICE OF APPEAL FILED NOVEMBER 4, 2020.

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Jurisdictional Statement

Appellants rely on the jurisdictional statement contained in Appellant's original Brief.

Preliminary Statement

The Appellants will be referred to as "Littles". The applicant for the drainage application will be referred to as "Paulson". Hanson County Drainage Board shall be referred to "Board or Drainage Board". Spring Lake Township shall be referred to "Township". The previous trial not involved in this appeal shall be referred to as "Little 1". The trial involved in this matter may be referred to as "Little 2." Transcripts will be referred to as TR. (Trial, and page or pages).

Statement of the Issues

Appellants rely on their Statement of Issues as set forth in their original brief.

Statement of the Case

Appellants rely on their Statement of the Case as set forth in their original brief.

Statement of the Facts

Appellants rely on their Statement of the Facts as set forth in their original brief.

Argument

The Board argues that this application was just for the cleaning of an existing ditch, and so apparently is not an important issue. That argument ignores the previous issue raised in Little 1 wherein Paulson admitted that he removed an approach and culvert in the same area without a drainage application, which the Board was aware of (and which had not been cured prior to this application). It was an abuse of discretion to allow further drainage without first addressing the unlawful diversion of drainage that occurred before involving all of these same parties.

The Board does not even argue that effective Township action was taken in order to consent to the drainage application in question or that statutory

notice was provided of the Township "meeting" at which approval was given. Instead, it argues that the Board can rely on what is put in front of it. However, the County Ordinance itself requires, as a condition

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precedent, the consent of the Township Board. See e.g., Searle v. City of Lead, 10 SD 312 (Ascertainment and payment of damages is a condition of precedent to the right of the municipality to proceed); Ehlers v. Jones, et.al., 81 SD 351 (passage of resolution required by statute and service was a condition precedent to condemnation and rendered proceedings void). Can the Board seriously argue to this Court that a legally invalid consent can be relied upon to the detriment of affected landowners?

The Board argues that Littles can point to no authority suggesting a procedural defect in a Township meeting somehow makes the consent ineffective. However, as previously set out in Littles' original brief, state statutes set out the requirements for any action by a branch of local government. SDCL 1-25-1.1; SDCL 8-5-1. Amazingly, the Board argues that it does not even

indicate that such approval must even come as a result of a meeting of any kind. Although true of the actions of an individual, that is certainly not true of a branch of local government.

The Littles were not only deprived of an opportunity to present argument or information to the

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County, but also to the Township.

What is the remedy available to the Littles for the failure of the Township to meet according to our statutes and to provide notice of that meeting, if it does not invalidate the Township's consent to this drainage application?

The Board argues that it did need to publish notice of the second hearing on the application even though its own ordinance requires that for "all" hearings. The Board also argues that posting was not required even though the ordinance provides for notice by posting (at the County's direction, which Littles argue refers to the manner of posting, not the requirement). "The interpretation of an ordinance

presents a question of law which we review de novo."

Peters v. Spearfish ETJ Planning Com'n, 1997 SD 105.

"When interpreting an ordinance, we must assume that the legislative body meant what the ordinance says and give its words and phrases plain meaning and effect.

Peters v. Spearfish, id. In this case, "all" means "all."

Additionally, the ordinance states that the Board "will" cause notice to be published. Littles argue

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that "will" is not discretionary. It is the equivalent of "shall". See State v. Troy Township, et.al., 900 NW2d (SD 2017), where notice of a hearing on a petition to vacate highway segments was published twice; the Township tabled the petition, and then later published notice of the second hearing.

Under the Board's argument that the original hearing was "tabled" and therefore could be raised again at any time, if this Court accepts that reasoning, then six months after the original hearing, upon a one day's notice, the matter could be brought up

again. This Court is aware that these drainage cases are among the most contentious (and important) cases that are litigated. Would that constitute sufficient notice of the continued hearing?

The ordinance calls for publication of "all" hearings. The clear terms of the ordinance should not be defeated by parliamentary definitions of what constitutes "tabling" a hearing. Tabling the motion did not provide notice of any continued hearing.

Board argues that Littles had notice of the second hearing because notice was emailed to counsel that had appeared previously one day before the hearing, and it

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is undisputed that Littles were not able to be contacted by counsel. The hearing before the County Board is not a court proceeding. The Board does not cite any authority that service upon counsel is legally sufficient as opposed to actual notice to the affected parties. See Gillespi, Matter of, 397 NW2d 476 (1986) (mailing papers to States Attorney is not sufficient service on Beadle County and the Beadle County

Treasurer). Is the constitutional right to be heard and the ordinance satisfied when no notice is provided directly to the affected parties, but given to their attorney one day before the County decides the matter?

This is especially important if the County then argues that the scope of review before this Court is narrow, and, as long as the County recites in its minutes the factors called for by the ordinance, that it cannot be challenged.

County argues that it is discretionary as to whether the County posts notice. Appellants argue that the language gives the County discretion as to the manner, or location, of posting, rather than whether or not to post notice. Again, the non-posting of notice of either the first hearing or the second, would have

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provided valuable notice to the Appellants of their right to be heard. That, in addition to the failure to publish or the lack of personal notice, led to the Appellants not being at the second hearing at which the petition was approved.

On the one hand, the Board argues that Littles do not argue that they were prevented from providing the drainage board with additional information or argument which would have potentially changed the minds of the board. On the other, it argues that Littles should not have been allowed to present any further evidence to the trial court. It is significant that when the Littles appeared at the original hearing, the Board did not approve the application, and, when they did not, the Board granted the petition. That is the importance of the affected landowners appearing at the hearing.

CONCLUSION

Wherefore, Appellants respectfully request this Court to overturn the order of the trial court and remand this matter to the trial court, either for a new trial or with directions to the trial court to enter an

order denying the drainage application of Paulson and the decision of the Hanson County Drainage Board.

Respectfully submitted this 5th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

Comes now the attorney for appellants and certifies that this brief complies with the type-volume limitation as set forth in SDCL 15-26A-61(2) and that the number of words in the brief are 1,913 and the number of characters are 9,702.

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AFFIDAVIT OF MAILING
AND
PROOF OF SERVICE

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF DAVISON)

Chris A. Nipe, Attorney for the Appellants above-named, being first duly sworn upon oath, hereby deposes and says a copy of Appellants Reply Brief in the above entitled matter was served by electronic service upon the attorney listed below, addressed to his last known Odyssey electronic address as stated:

Mike C. Fink
Special Deputy States Attorney
PO Box 444
Bridgewater, SD 57319, Attorney for Appellees, and that he mailed one original and two (2) copies of Appellants Reply Brief to the Clerk of the Supreme Court of South Dakota,

East Capitol, Pierre, SD 57501-5070, by depositing the same

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in the United States Mail, postage prepaid for first class
mail, on the 5th day of May, 2021.

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Subscribed and sworn to before me this 5th day of May,
2021.

(SEAL)

Notary Public - South Dakota
My Commission Expires: August 6, 2022

