

more definite statement. The order was also in response to a motion to dismiss filed by defendant MDU, which Capital does not address in its motion. The Order involved issues raised in both the City's and MDU's motion and Capital responded to arguments presented by both MDU and the City. The motions by MDU and the City, were for the most part, similar. However, Capital does not mention the issues discussed in the Court's order that deal directly with MDU's motion. Regardless, there is no reason to reconsider the Court's order as a hearing on this appeal is scheduled for March 2, 2006.

Capital first seems to be claiming that Bismarck's initial motion and its reply brief in support of that motion were based on separate grounds. This is entirely inaccurate. Bismarck initially moved for dismissal of Capital's complaint for failure to state a claim under Rule 12(b)(vi), N.D.R.Civ.P., or in the alternative, for a more definite statement. This was necessary because it was impossible to determine from Capital's complaint what relief it was requesting. In response, Capital attempted to provide a more definite statement which demonstrated the complaint needed to be dismissed for failure to state a claim as a matter of law. The City responded accordingly, and Capital filed another reply brief. Capital seems to be arguing that the reply motion constituted a separate motion because it contained the words "as a matter of law" rather than failure to state a claim. The City fails to see a distinction in the terminology. The motion was simply for failure to state a claim as a matter of law as it was clear (and remains clear) that Capital failed to state a claim for declaratory relief. Regardless, the order was dismissing Capital's complaint without prejudice and allowing Capital to proceed as if this were an appeal.

Capital also questions the Court's jurisdiction for the appeal. As the Court indicated, jurisdiction for appeal comes from N.D.C.C. § 27-05-06(4). This statute provides the basis for

an appeal and N.D.C.C. ch. 28-34 provides the regulations pursuant to which the appeal is taken. Capital appears to be arguing that because no city ordinance provides for appeal, none exists. This is absurd as an appeal and jurisdiction of the court is provided for by statute, and not regulated by the City. The existence or nonexistence of such an ordinance is irrelevant. Regardless, even if an appeal is not provided for, a declaratory judgment action is still not the appropriate remedy in this case, as indicated in the briefs filed regarding this issue previously.

Next, Capital argues that the City's motion to dismiss relied on attached exhibits, and therefore, was a summary judgment motion. This argument is ludicrous. The exhibits attached to the City's brief were Capital's complaint and underlying documents in the PSC action. In regards to attaching the Complaint, the Complaint is not a "matter outside the pleadings" as provided in Rule 12(b)(vi). It is completely illogical and nonsensical to argue that attaching the complaint to a motion to dismiss for failing to state a claim in the complaint somehow turns the motion into one for summary judgment. Pleadings are not evidence and no extrinsic evidence was submitted in support of the City's motion. The other attachments to the City's motion were underlying submissions in regards to a PSC proceeding initiated by Capital. Part of the City's motion was for failure to exhaust administrative remedies. The sole purpose of the attachments was for the purpose of showing that an underlying PSC proceeding was ongoing. Regardless, the Court's decision was not based on the arguments in regards to Capital's failure to exhaust administrative remedies. The Court ruled in Capital's favor on that issue and Capital has not sought reconsideration on those grounds.

Capital also argues the Court's Order was incorrect in stating that "CEC failed to plead that the City had no authority to hear the Petition and issue its Order." The City interprets the Court's order as stating that Capital did not make such an assertion in its complaint in the present

matter, which is entirely accurate. Capital seems to be treating the Court's statement as a finding that, in the proceedings below, Capital never objected to the jurisdiction of the Board of Commissioners. Capital asserts that it did object below. The City disputes this, but it is simply not relevant because the Court did not make such a determination. All the Court stated was that Capital made no such allegation in its complaint in the present case, a statement which is easily verified by a review of Capital's complaint. Regardless, a declaratory judgment action is not the appropriate remedy for such an assertion.

Capital next argues that the motion should be reconsidered because the City argued in the alternative that it was seeking a more definite statement and Capital provided one in its amended complaint. The amended complaint presents issues similar to those addressed in Capital's reply briefs in regards to the underlying motion, which were considered by the Court in issuing its order. These issues were addressed in the City's reply brief in support of its motion to dismiss. It is clear that Capital is seeking broad relief through the inappropriate avenue of a declaratory judgment. The only issue is that which has been decided upon by the City, which is in regards to which company would provide electric services to Part of Boulder Ridge Subdivision. Capital's overbroad request failed to state a claim for declaratory relief as a matter of law.

Capital's motion for reconsideration should also be denied because it seeks only to challenge those issues raised by the City of Bismarck in its motion. Defendant MDU also joined in the motions and made arguments on its behalf. Capital responded to these arguments and the Court's decision dismissed the case in response to the City's motion and MDU's motion. Yet, Capital appears to only challenge the Court's order as it relates to the City's arguments for dismissal. The City's and MDU's briefs were, for the most part, similar. However, there were differences in the arguments presented. Put simply, the Court's order was accurate based on the

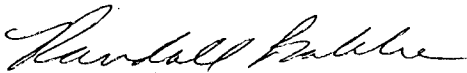
arguments made both by the City and MDU. Capital has not challenged the Court's order to the extent it relied upon arguments by MDU. Capital's motion for reconsideration is simply inaccurate, wasteful, and unnecessary. The matter should have been treated as an appeal from the beginning by Capital, and there is no need for reconsideration of the Court's January 30, 2006, order.

III. CONCLUSION

For the foregoing reasons and those discussed in the City's and MDU's briefs requesting dismissal, the City requests Capital's motion for reconsideration be denied.

Dated this 31st day of March, 2006.

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