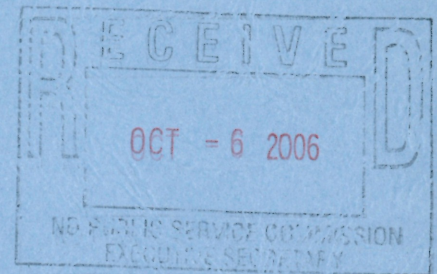


IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Capital Electric Cooperative, Inc.,)
)
Plaintiff and Appellant,) No. 20060199
)
vs.)
)
The City of Bismarck, North Dakota,)
Defendant and Appellee)
)
and)
)
Montana-Dakota Utilities Co., a division of)
MDU Resources Group, Inc.,)
Defendant, Counterclaimant,)
and Appellee)
)
and)
)
The Public Service Commission of North Dakota,)
Defendant and Appellee)



ON APPEAL FROM THE
SOUTH CENTRAL JUDICIAL DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE BRUCE HASKELL

BRIEF ON BEHALF OF
CAPITAL ELECTRIC COOPERATIVE, INC.,
APPELLANT

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ISSUES PRESENTED

1. Whether the District Court erred where it decided that a declaratory judgment is not an available remedy to challenge action by a municipal governing body, and dismissed Capital Electric Cooperative's Amended Complaint for a declaratory judgment.

2. Whether the Board of City Commissioners of the City of Bismarck erred as a matter of law and exceeded its legislative power and authority under the Constitution of the State of North Dakota, North Dakota Century Code Title 40 and Bismarck's Code of Ordinances where it issued "Findings, Conclusions, Decision and Order" that "... Order[ed] that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First Addition to Bismarck."

[The issue is stated with reference to the decision of the Board of City Commissioners of the City of Bismarck, rather than with reference to the decision and judgment of the district court, because the Supreme Court independently determines the propriety of the local governing body's action, without according any special deference to the district court's review. Tibert v City of Minto, 2006 ND 189, 720 N.W.2d 921; Pic v City of Grafton, 1998 ND 202, 586 N.W.2d 159.]

The issues are matters of law. The scope of review by the Supreme Court is not limited.

STATEMENT OF THE CASE

1. Nature of Action.

This case is one of a continuing series of territorial disputes between rural electric cooperatives and electric public utilities. In this case, the rural electric cooperative is Capital Electric Cooperative, Inc. (herein Capital) and the electric public utility is Montana-Dakota Utilities Co. (herein MDU). The disputed territory is part of Boulder Ridge First Addition to the City of Bismarck (Boulder Ridge).

This case originated with MDU's petition to the Board of City Commissioners of the City of Bismarck (herein City Commission or Commission), in which MDU asked the Commission to "Declare Electric Franchise Rights" to determine that MDU is authorized and Capital is not authorized under their respective franchises to provide electric distribution service in Boulder Ridge. (App. 13) The City Commission issued "Findings, Conclusions, Decision and Order" that "... Order[ed] that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First Addition to Bismarck." (App. 61)

Capital commenced declaratory judgment under N.D.C.C. Chapter 32-23 for a judgment declaring its rights under its franchise with the City of Bismarck (herein Bismarck). (App. 67) Bismarck is the principal defendant; MDU and the Public Service Commission are named as defendants under N.D.C.C. § 32-23-11.

On Bismarck's N.D.R.Civ.P. Rule 12 motion to dismiss Capital's complaint for failure to state a claim on which relief can be granted (supported by MDU), the district court, on its own, without motion by any defendant, decided that a declaratory judgment is not an

available remedy to challenge the merits of a determination made by a municipal governing body, that an appeal of the City Commission's decision was an available remedy, and that the court would allow the matter to proceed as if Capital had filed an appeal. (App. 114) The court dismissed Capital's Complaint. Later, the court issued Orders that Capital's appeal was denied and dismissed Capital's Amended Complaint. Judgment was entered "that the Declaratory Judgment Action brought by the plaintiff is dismissed." (App. 187)

Capital seeks reversal of the district court's orders and judgment dismissing Capital's declaratory judgment action. Alternatively, Capital seeks an order from the Supreme Court directing entry of summary judgment declaring that Capital has rights to provide electric distribution services in the City of Bismarck under the franchise granted to Capital by the City Commission, the City Commission's Order to the contrary notwithstanding.

2. Chronology of the Boulder Ridge Dispute and Proceedings Below.

In 1973, Bismarck's City Commission granted a 20 year franchise to Capital. (App. 50) In 1987, the City granted a franchise to MDU, renewing an expiring 20 year franchise. (App. 53) In May of 1993, the City granted a franchise to Capital, renewing the expiring 20 year franchise granted in 1973. (App. 56) In each case the franchise was non-exclusive, in accordance with N.D.C.C. § 40-05-01(57). The franchise documents are identical, except for Article II, Section 1 of Capital's franchise referring to an Area Service Agreement between Capital and MDU. No similar provision is included in MDU's franchise.

In April of 2005, part of Boulder Ridge was annexed to Bismarck. (App. 64)

On August 30, 2005, MDU petitioned the City Commission to "Declare Electric

Franchise Rights” to determine that MDU is authorized and Capital is not authorized under their respective franchises to provide electric distribution service in Boulder Ridge. (App. 13)

On September 28, 2005, Capital complained to the PSC that MDU was extending its facilities to Boulder Ridge in violation of N.D.C.C. § 49-03-01.3. (App. 94)

On November 14, 2005, the City Commission issued “Findings, Conclusions, Decision and Order” that “. . . Order[ed] that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First Addition to Bismarck.” (herein the Order or the Nov. 14 Order). (App. 61)

On November 23, 2005, MDU moved the PSC to dismiss Capital’s Complaint. (App. 111)

On November 30, 2005, Capital commenced an action in district court under N.D.C.C. Chapter 32-23, for a declaration of rights under its franchise granted by the City Commission in 1993. (App. 67)

On December 19, 2005, Bismarck moved to dismiss Capital’s Complaint in the court action for failure to state a claim and moved alternatively for a more definite statement. (App. 73)

On December 19, 2005, the PSC answered Capital’s Complaint in the court action. (App. 71)

On December 20, 2005, MDU answered Capital’s Complaint in the court action. (App. 75)

On December 30, 2005, MDU filed a brief in support of Bismarck's motion to dismiss Capital's Complaint. (Docket 19)

On January 30, 2006, the district court issued a Memorandum Opinion and Order that the City Commission had authority to interpret Capital's franchise, that a declaratory judgment is not an available remedy to challenge the merits of a determination made by a municipal governing body, that an appeal of the City Commission's decision was a remedy available to Capital, and that the court would allow the matter to proceed as if Capital had filed an appeal. (App. 114)

On February 3, 2006, Capital filed an amended complaint and related motions. (App. 123) The amended complaint responded to Bismarck's motion for a more definite statement and added an alternative notice of appeal, responding to the court's January 30, 2006, Order.

On February 9, 2006, the court informed counsel that the practical effect of its January 30 ruling was that the complaint is dismissed and the court would proceed as if the City Commission's decision had been appealed. (App. 134)

On February 22, 2006, Capital moved for reconsideration of the court's January 30, 2006, Order asserting an action for declaratory judgment is an available procedure for judicial review of the Order, and there is no available procedure named appeal. (App. 138)

On March 2, 2006, the district court held a hearing on the appeal. (App. 148)

On March 14, 2006, the district court issued its Order on Appeal. (App. 148) The court stated the issue before it was whether the City Commission abused its discretion in issuing the Order. (App. 148) The court reiterated its January 30 determinations: ". . . the Commission did have the authority to interpret the franchise." and "Having found that the

remedy of a declaratory judgment is not an available remedy to challenge the merits of a determination made by a municipal governing body, the Court then determined that an appeal of the Commission's decision was a remedy available to Capital" [and] "rather than dismiss the action and make Capital start a new proceeding, the Court would allow the matter to proceed as if Capital had filed a proper appeal." (App. 148-160) The Order on Appeal declared ". . . that Capital's appeal is hereby DENIED." (App. 160)

On April 10, 2006, the district court issued its Order denying Capital's motion for reconsideration and granting Capital's motion to amend complaint. (App. 161)

On May 30, 2006, the district court issued its Order granting MDU's motion to dismiss Capital's amended complaint. (App. 186)

On June 7, 2006, the district court issued its Order for Judgment and entered Judgment that "the plaintiff's Appeal from Findings, Conclusions, Decision and Order issued by the Bismarck Board of City Commissioners on November 14, 2005 is denied; [and] that the Declaratory Judgment Action brought by the plaintiff is dismissed." (App. 187)

SUMMARY OF ARGUMENT

The District Court erred where it decided that a declaratory judgment is not an available remedy to challenge a determination made by a municipal governing body, dismissed Capital's Complaint for a declaratory judgment and proceeded as if Capital had filed an appeal. There is no statutory provision for an appeal procedure. Under the North Dakota Rules of Civil Procedure, N.D.C.C. Chapter 32-23 and precedents, a declaratory judgment action is an available remedy to obtain judicial review of action of a municipal

governing body. The district court's error led it to another error, restricting the scope of judicial review of the City Commission's Order.

The Bismarck's City Commission erred as a matter of law and exceeded its legislative power and authority where it issued "Findings, Conclusions, Decision and Order" that ". . . Order[ed] that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First Addition to Bismarck." (App. 61)

"Jurisdiction is the power to hear and determine a proceeding." Capital Elec. Co-op Inc. v Public Service Com'n of State of N.D., 534 N.W.2d 587 at 589 (ND 1995). The City Commission had no power under the Constitution or statutes of North Dakota or Bismarck's ordinances to hear and determine the Boulder Ridge dispute. The Commission had no jurisdiction to make the Order granting MDU's petition. Bismarck's City Commission's action to determine which of MDU or Capital had a superior right to provide electric service in Boulder Ridge was the attempted exercise of judicial power by a legislative body, a violation the constitutional principle of separation of powers.

The City Commission's action determining that MDU had a right under the terms of Capital's franchise to impose geographical limits on Capital's franchise was a violation of the constitutional principle against delegation of legislative authority. The unconstitutional provision of the franchise should be severed from Capital's franchise.

Entry of summary judgment should be ordered under N.D.R.Civ.P. Rule 56 and N.D.C.C. Chapter 32-23, declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck under its franchise granted by Bismarck on May 25, 1993, with the provisions of paragraph 1 of Article II stricken from the franchise.

ARGUMENT

I. Background.

This case is one of a continuing series of territorial disputes between rural electric cooperatives and electric public utilities. ". . . [T]he typical conflict . . . arises when a potential customer, on or near the edge of a city served by a public utility under a franchise but within a rural area served by a rural electric cooperative, seeks service which each of the suppliers would like to furnish. It was to settle such controversies with a minimum of wasteful duplication and conflict that the Territorial Integrity Act was passed." Cass County Elec. Co-op v Wold Properties, Inc., 249 N.W.2d 514 at 520 (ND 1976) (herein Cass v Wold).

Most litigated territorial disputes begin as a proceeding before the North Dakota Public Service Commission (herein PSC), where an electric public utility seeks to serve a customer in a rural area outside the corporate limits of a municipality. See, e.g., Capital v PSC and Application of Otter Tail Power Co., 169 N.W.2d 415 (ND 1969). The Boulder Ridge dispute is atypical. First, this dispute is not about electric service in a rural area outside a municipality; this dispute is about electric service in a rural area that has been annexed to a municipality.

Second, this appeal did not originate in a proceeding before the PSC. This case originated with MDU's petition to Bismarck's City Commission, in which MDU asked the Commission to "Declare Electric Franchise Rights" to determine that MDU is authorized and Capital is not authorized under their respective franchises to provide electric distribution service in Boulder Ridge. (App. 13) The Commission issued "Findings, Conclusions,

Decision and Order” that “. . . Order[ed] that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First Addition to Bismarck.” (App. 61) Capital commenced a declaratory judgment action for judgment declaring its rights under its electric franchise with Bismarck. (App. 67)

Though atypical, the Boulder Ridge dispute is not unprecedented. It has an antecedent in Cass County Elec. Co-op, Inc. v Northern States Power Co., 419 N.W.2d 181 (ND 1988) and Northern States Power Co. v North Dakota Public Service Com’n, 452 N.W.2d 340 (ND 1990). (The two cases are referred to herein as Cass v NSP and NSP v PSC, respectively, and collectively as the “South Pointe cases.”) The South Pointe cases resolved a dispute in the Fargo area substantially the same as the dispute over Boulder Ridge in Bismarck.

Nor is the procedure unprecedented. Other territorial disputes have come to the Supreme Court via routes other than appeals from PSC proceedings. See, e.g., Cass v Wold (electric cooperative’s action for declaratory judgment); Montana-Dakota Utilities Company v Divide County School District, 193 N.W.2d 723 (ND 1972) (electric utility’s action for injunction); Application of Otter Tail Power Co., 451 N.W.2d 95 (ND 1990) (herein Otter Tail 1990) (electric utility’s action for writ of prohibition against PSC’s jurisdiction).

After MDU filed its petition with Bismarck’s City Commission, Capital commenced a proceeding before the PSC, complaining of MDU’s extending its facilities to Boulder Ridge in violation of the provisions of the Territorial Integrity Act that prohibit MDU’s interference with Capital’s existing service and system in the Boulder Ridge area. (App. 94)

Capital's complaint to the PSC against MDU is like Cass's complaint to the PSC against NSP in the South Pointe cases.

The two separate proceedings, MDU's petition to Bismarck's City Commission and Capital's Complaint to the PSC, clashed when MDU moved the PSC to dismiss Capital's complaint. (App. 111) MDU's motion to dismiss was premised "on the grounds that CEC [Capital] is not authorized to provide service within Boulder Ridge and, therefore, Montana-Dakota cannot, as a matter of law, interfere with the services of CEC". (App. 112-113)

According to MDU's theory presented to the PSC, the Boulder Ridge dispute is not within the jurisdiction of the PSC under N.D.C.C. Chapter 49-03, but is within the exclusive jurisdiction of Bismarck's City Commission, under Article VII, § 11 the State Constitution. (App. 111-113)

Capital's response to MDU's motion to dismiss was the PSC should deny the motion to dismiss as a matter of routine because the PSC should not consider, has not jurisdiction to decide, the issue of constitutional law presented by MDU's motion. ". . . [A]dministrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate." Johnson v Elkin, 263 N.W.2d 123 at 126 (ND 1978). When a party to a PSC proceeding (such as MDU) raises a constitutional objection to the PSC's jurisdiction, the PSC should not attempt to resolve the constitutional issue. "We reserve the issue of constitutionality to the first court to which the agency decision is appealed." Johnson v Elkin, 263 N.W.2d at 127 (that is, appealed from a PSC decision under N.D.C.C. § 28-32-42). That is the right way to deal with MDU's constitutional claims. That was Capital's position, but it was not certain the PSC would follow Johnson v Elkin.

MDU's defensive claim in the PSC case explains why Capital commenced the declaratory judgment action for judicial review of the City Commission's Order. The PSC had scheduled a hearing on Capital's complaint, listing as one of the issues whether the PSC has jurisdiction, and the PSC scheduled separate consideration of MDU's motion to dismiss. The PSC was poised to consider and perhaps grant MDU's motion to dismiss on the grounds the City Commission's Order deprived the PSC of jurisdiction.

The City of Bismarck (herein Bismarck) is the principal defendant in Capital's declaratory judgment action. MDU and the PSC are named as defendants, but not as wrongful actors; they are parties because N.D.C.C. § 32-23-11 requires persons who might be affected by declaratory relief to be made parties. Capital's action against Bismarck challenges its City Commission's Order to grant MDU's Petition, so it is clear from N.D.C.C. § 32-23-11 that MDU must be a party to the action. The PSC might be "affected" also, because MDU alleged the City Commission's Order as the basis for its motion to dismiss Capital's complaint to the PSC.

Capital's declaratory judgment action may be regarded as a "helpful" collateral proceeding. See Application of Otter Tail Power Co., 354 N.W.2d 701 (ND 1984) (herein Otter Tail 1984). (A collateral action may be helpful to resolve questions of jurisdiction.). See also Otter Tail 1990 (Collateral proceedings by utility challenging PSC's jurisdiction; PSC's jurisdiction sustained.). The entire record of this case marks it as collateral in relation to the PSC proceeding. MDU's petition to the City Commission was a pre-emptive collateral attack on the PSC's jurisdiction. Capital's action for a declaratory judgment collaterally supports the PSC's jurisdiction by seeking a judicial declaration that the City Commission

has not the power it claims, a power that MDU claims has been exercised to its benefit to deprive the PSC of its jurisdiction under the Territorial Integrity Act.

If the City Commission's action was ineffective, there is no conflict between its action and the PSC's jurisdiction to act on Capital's complaint. But if the court were to sustain the City Commission's action, that would not resolve the constitutional conflict set up by MDU. If the City Commission's action were sustained, whether that action is constitutionally inferior to or superior to the PSC's authority, is not an issue in this case.

The court action does not challenge the PSC's jurisdiction. No party to the court action, not Capital, not MDU, not the city of Bismarck, and not the PSC, has asked the court to make a collateral determination of the PSC's jurisdiction or its status as inferior or superior to the City Commission's. The only challenge to the PSC's jurisdiction is MDU's motion to the PSC to dismiss Capital's Complaint. (App. 111) That motion was denied by the PSC; the PSC's order has been appealed by MDU, under Johnson v Elkin. On September 25, 2006, the PSC's Order was affirmed. (District Court Case No. 06-C-1177).

Capital's action should not be regarded as the commencement of a collateral proceeding; it continues a collateral proceeding commenced by MDU. MDU's petition, asking for the City Commission's help in MDU's territorial dispute with Capital, was a pre-emptive collateral attack on the PSC's jurisdiction, pre-meditated as MDU prepared to extend its facilities into Boulder Ridge, anticipating Capital would complain to the PSC, like Cass complained about NSP in the South Pointe cases. Capital's action for judicial review is the second stage of MDU's collateral attack on the PSC's jurisdiction.

II. **The District Court erred where it decided an action for declaratory judgment is not an available remedy to challenge Bismarck's City Commission's order granting MDU's petition to the Commission to declare franchise rights, dismissed Capital's complaint for a declaratory judgment, and proceeded as if Capital had filed an appeal.**

Capital commenced this action for declaratory judgment under N.D.C.C. Chapter 32-23 for judicial determination of its franchise rights and review of action taken by Bismarck's City Commission. (App. 67)

Bismarck's alternative motions for dismissal for failure to state a claim on which relief can be granted or for a more definite statement were premised on its evaluation of the complaint as "overbroad," "failing to allege specific facts" or "specific relief sought." (App. 73)

The district court's January 30, 2006, memorandum opinion and order determined that the motion to dismiss should be granted, but not on grounds asserted by Bismarck. The Court opined on its own, without any party asserting that the remedy of a declaratory judgment is not an available remedy to challenge a determination made by a municipal governing body, and the court determined that Capital has a remedy under N.D.C.C. § 27-05-04(4) to appeal the City Commission's decision to the district court. The court concluded the complaint should be dismissed but would be considered to be an appeal of the City Commission's Order. (App. 114)

The district court's opinion "... that the remedy of a declaratory judgment is not an available remedy to challenge a determination made by a municipal governing body. . . ." is erroneous. (App. 148, 153)

The plain words of N.D.C.C. Chapter 32-23 provide that a declaration of Capital's

rights, status, or other legal relations under its franchise as affected by the Nov. 14 Order, is an appropriate procedure for judicial review of the Order.

District courts have “jurisdiction of appeal from . . . the determinations of inferior officers, boards, or tribunals, in such cases as pursuant to such regulations as may be prescribed by law.” N.D.C.C. § 27-05-06(4). Similarly, N.D.C.C. § 28-34-01 enacts procedures to govern “. . . any appeal provided by statute from the decision of a local governing body. . . .” There is no “appeal provided by statute” or “prescribed by law” for Capital to obtain judicial review of the City Commission’s Order by a procedure named “appeal.”

No statute provides for appeal from the Nov. 14 Order. North Dakota statutes include rights to judicial review of some actions of local governing bodies under procedures named “appeal” (See, e.g. N.D.C.C. § 40-39-10 (appeal of decision as to vacation of public grounds, streets or alleys) and N.D.C.C. § 40-47-11 (appeal of zoning decision)), but no statute provides for appeal from the Nov. 14 Order. N.D.C.C. Chapters 40-05 and 40-05.1, arguable bases of the City Commissions’ claimed powers exercised in the Order, do not include any provisions for an appeal from a municipal governing body’s action under either Chapter. Bismarck has no ordinance that provides for appeal from the Order.

There is no “appeal provided by statute” or “prescribed by law” for Capital to obtain judicial review of the Order by a procedure called “appeal.” (The absence of appeal procedures parallels the absence of statutes or ordinances to sustain the Commission’s action making the Order.)

Even if an appeal were available, the existence of another adequate remedy does not

preclude declaratory relief. N.D.C.C. § 32-23-01; N.D.R.Civ.P. Rule 57. Declaratory relief is not precluded where there is no “appeal” process provided by statute or otherwise prescribed by law.

In the absence of an “appeal provided by statute” or an appeal “prescribed by law,” or as an alternative to any procedure called “appeal,” an action for declaratory judgment is an available remedy to obtain judicial review of a city governing body’s action. It is not only commonly used, e.g. Go Committee ex rel. Hale v City of Minot, 2005 ND 136, 701 N.W.2d 865 and City of Fargo v Harwood Township, 256 N.W.2d 694 (ND 1977), the opinion in one case that came to the Supreme Court via a certiorari procedure ended with the court’s remark that an action for declaratory judgment is a proper method to challenge the city commission’s action. Cowan v Stroup, 284 N.W.2d 447 (ND 1979).

The district court’s decision that “. . . declaratory judgment is not an available remedy to challenge the merits of a determination made by a municipal governing body. . .” (App. 148, 153) and dismissal of Capital’s complaint were erroneous. Precedents, the Rules of Civil Procedure and the plain words of N.D.C.C. Chapter 32-23 provide that a declaratory judgment action is an appropriate procedure for judicial review of the City Commission’s Order.

Capital is aggrieved by the district court’s erroneous procedural decision and action, its self-initiated conversion of Capital’s Complaint to an appeal where there is no “appeal provided by statute,” and no appeal “prescribed by law.” Compare State v Hansen, 2006 ND 139, 717 N.W.2d 541, where the Supreme Court was critical of a district court’s raising an

issue on its own initiative, pre-determining the outcome, and failing to follow established procedures and orderly process.

As stated in Capital's motion to the district court for reconsideration, the court's actions were equal to summary judgment procedures, except its rush to judgment deprived Capital of a reasonable opportunity to make a complete presentation under N.D.R.Civ.P. Rule 12 and N.D.R.Civ.P. Rule 56. If the record was sufficient to decide the legal issues without more evidence, the district court should have entered summary judgment against the moving party, under N.D.R.Civ.P. Rule 56.

III. The Bismarck City Commission's Order was not the exercise of a power under the North Dakota Constitution, North Dakota statutes, or Bismarck's ordinances.

A. The Order was not the exercise of a power granted by the Constitution.

Bismarck's City Commission purported to exercise a power conferred by the Constitution. The Order's "conclusion of law" "That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City" is wrong, an erroneous conclusion of law. (App. 64)

"Heavy artillery" is required to support claims of rights and powers under the Constitution. Conclusory arguments without supportive reasoning may be summarily dismissed. Southern Valley Grain Dealers Ass'n v Board of City Com'rs of Richland County, 257 N.W.2d 425, 434 (ND 1977). Effertz v North Dakota Workers Compensation Bureau, 481 N.W.2d 218, 223 (ND 1992) and Froysland v North Dakota Workers

Compensation Bureau, 432 N.W.2d 883, note 7 at 892 (ND 1988). Bismarck's (and MDU's) arguments should be dismissed, not merely because they are conclusory, but because reasoning shows they are wrong.

Article VII, § 11 of the State Constitution provides:

“The power of the governing board of a city to franchise the construction and operation of any public utility or similar service within the city shall not be abridged by the legislative assembly.”

Article VII of the Constitution was adopted at a general election in 1982 as one part of constitutional revision proposed by the legislature in 1981. 1981 ND Laws, Chapter 665. (The draft constitution proposed and rejected in 1972 included Article VII, § 11.) Article VII, § 2 encompasses former Section 130, which empowered the legislative assembly to provide by general law for the organization of municipalities. There is a paucity of legislative history as to new Article VII as proposed in 1981 and an absolute dearth as to Section 11. Article VII, § 11 has no history of judicial interpretation.

Section 139 of the State's original 1889 Constitution addressed the same subject and to the same general effect as new Article VII, § 11, adopted in 1982. The provisions of original Section 139 remain in the Constitution after the 1982 election, renumbered as Article XII, § 10:

“No law shall be passed by the legislative assembly granting the right to construct and operate a street railroad, telegraph, telephone or electric light plant within any city, town or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied for such purposes.”

In City of Grafton v Otter Tail Power Co., 86 N.W.2d 197 (ND 1957) (herein Grafton v Otter Tail), the city asserted Section 139 was a grant of power to the city, a power

superior to the State's power. The Supreme Court's response was:

“Section 139 of the Constitution is not a grant of power to municipalities but a restriction upon the legislature designed to prevent it from authorizing indiscriminate use of the streets of a municipality by certain enumerated public utilities without control by the local authorities. To that extent it is a limitation upon the sovereign power of the state.” 86 N.W.2d at 205.

This long standing interpretation of Article XII, § 10 leads to the consistent interpretation that Article VII, § 11 is “not a grant of power to municipalities.” Statutes relating to the same subject matter are construed together so as to harmonize them. Cass v NSP, 419 N.W.2d at 185. The principles of construction applicable to statutes are generally applicable to construction of the Constitution. Johnson v Wells County Water Resource Bd., 410 N.W.2d 525 (ND 1987).

To construe Article VII, § 11 as not a grant of power to municipalities is consistent with the interpretation of former Section 130 of the Constitution, now Article VII, § 2.

“Section 130, as amended and approved in 1966, basically removed limitations previously placed upon the legislature relating to cities, directed the legislature to enact laws authorizing home rule, and permitted the legislature to devolve certain powers upon home rule cities. This constitutional provision in itself does not grant any powers to home rule cities. Whatever powers home rule cities may have are based upon statutory provisions.” Litten v City of Fargo, 294 N.W.2d 628 at 631 (ND 1980) (herein Litten v Fargo).

The Nov 14. Order's conclusion of law “That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City” is erroneous. (App. 64)

Article VII, § 11 is not a grant of power to municipalities. Article VII, § 11 “. . . in itself does not grant any powers to home rule cities.” Litten v Fargo, 294 N.W.2d at 631;

Grafton v Otter Tail, 86 N.W.2d at 205. See also Johnson v Wells County Water Resource Board, 410 N.W.2d at 528 (Constitutional provisions relating to eminent domain powers of local governing bodies are inoperative until appropriate legislation is enacted.)

Not only is Article VII, § 11 not self-executing as to powers to grant franchises, nothing in Article VII, § 11 supports the Order's statement "That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City." (Underscoring added.) (App. 64) The power referred to in (not granted by) Article VII, § 11 is the power "to franchise." N.D.C.C. § 40-05-01(57) empowers cities "to grant franchises" and "to regulate the use of the same" and refers to "the regulatory powers of the governing body" (i.e. powers under subsections 1 and 13). N.D.C.C. § 40-05.1-06 empowers cities "to grant and regulate" franchises. "The power to regulate" claimed by the City Commission is not granted by, and is not referred to in the Constitution.

B. The Order was not the exercise of a power granted by any statute.

Bismarck's City Commission's Order claims "the power to regulate" under Article VII of the Constitution. (App. 64) It has no such constitutional power.

"This constitutional provision in itself does not grant any powers to home rule cities. Whatever powers home rule cities may have are based upon statutory provisions." Litten v Fargo, 294 N.W.2d at 631.

"Cities are agencies of the state and have only the powers expressly conferred upon them by the legislative branch of the government or such powers as may be necessarily implied from the powers thus conferred." Fradet v City of Southwest Fargo, 59 N.W.2d 871 (ND 1953) (Court syllabus No. 5).

These judicial expressions reflect the provisions of Article VII of the Constitution:

“The legislative assembly shall provide by law for the establishment and the government of all political subdivisions. Each political subdivision shall have and exercise such powers as provided by law.” Constitution, Article VII, § 2.

“The legislative assembly shall provide by law for the establishment and exercise of home rule in counties and cities.” Constitution, Article VII, § 6.

After Capital commenced its declaratory judgment action to challenge the City Commission’s Order that asserted non-existent constitutional powers, Bismarck modified its theory about jurisdiction. Now it is claimed the Order was the exercise of a statutory power to regulate under N.D.C.C. § 40-05-01(57) (Bismarck’s January 13, 2006, brief, pages 2-4; Docket #24), a claim not made in the Order. (App. 61-66)

N.D.C.C. § 40-05-01(57) provides:

“**Powers of all municipalities.** The governing body of a municipality shall have the power. . . .

“57. Franchises. To grant franchises or privileges to persons, associations, or corporations, any such franchise, except where given to a railroad company, to extend for a period of not to exceed twenty years, and to regulate the use of the same, franchises granted pursuant to the provisions of this title not to be exclusive or irrevocable but subject to the regulatory powers of the governing body.” (Underscoring added)

There is no disputing the power of Bismarck’s City Commission to grant franchises, the power exercised when it granted non-exclusive franchises to MDU in 1987 and to Capital in 1973 and 1993. Capital does not challenge the City Commission’s power to grant franchises. (The wrongful delegation of that power is challenged. See Section III A, below.) Capital disputes Bismarck’s and MDU’s assertion the Order was the exercise of the City Commission’s power to grant franchises and “to regulate the use of the same” or the exercise

of “the regulatory powers of the governing body.” The quoted words are taken from N.D.C.C. § 40-05-01(57). N.D.C.C. § 40-05-01 also provides:

“Powers of all municipalities. The governing body of a municipality shall have the power. . . .

“1. Ordinances. To enact or adopt all such ordinances, resolutions, and regulations, not repugnant to the constitution and laws of this state, or as the general welfare of the municipality may require, and to alter repeal, alter, or amend the same.

. . . .
“13. Gas and water mains - Sewers - Electric light and gas plants. To regulate the laying of gas or water mains and pipes, and the building, laying, or repairing of sewers, tunnels, and drains, and the erecting of gas and electric light plants. Any company or association of persons organized for the purpose of manufacturing illuminating gas or electricity to supply municipalities and the inhabitants thereof shall have authority, subject to existing rights, with the consent of the governing body of the municipality, to erect gas or electric light works and lay down pipes and string wires or poles in streets or alleys subject to such regulations as the municipality may prescribe by ordinance.” (Underscoring added)

These provisions of N.D.C.C. § 40-05-01 that apply to all cities are substantially the same as statutes that also govern home rule cities. Under N.D.C.C. § 40-05.1-06(10), the power “to grant and regulate franchises” is conditioned: “if implemented through ordinances.”

The object of N.D.C.C. § 40-05-01(1) is to prevent the local governing body from exercising large grants of authority without specific regulations having been first made by some enactment which has the force of law. Engstad v Dinnie, 76 N.W. 292 (ND 1898). See also (Mini Mart, Inc. v City of Minot, 347 N.W.2d 131 (ND 1984) (herein Mini Mart v Minot).

Nothing in N.D.C.C. Title 40 is a self-executing grant of power to any municipality “to regulate.” What is granted by statute, under N.D.C.C. § 40-05-01, is power “to grant

franchises,” that are “subject to the regulatory powers of the governing body,” i.e. “such regulations as the municipality may prescribe by ordinance.” What is granted by statute are separate powers “to grant and regulate franchises” “if implemented through ordinances” (See N.D.C.C. § 40-05.1-06(10)).

C. **The Order was not the exercise of a power implemented by any ordinance.**

Whatever power any city has “to regulate” is not a constitutional power, it is a statutory power under N.D.C.C. Chapter 40-05, or 40-05.1, a power Bismarck’s City Commission does not have in the absence of implementing ordinances.

“It is not sufficient merely to examine the subsections of 40-05.1-06, N.D.C.C., to determine what powers the city of Fargo, a home rule city, may have. To make this determination, it is also necessary to review the charter to determine if those powers are included in the charter, and if they are it then becomes necessary to determine if they were implemented by ordinance. It therefore follows that if the powers are not stated in the charter, or if they are stated in the charter but are not implemented by ordinance, the home rule city may not avail itself of the powers enumerated in 40-05.1-06, N.D.C.C., but would be governed by the statutes applicable generally to all cities.” Litten v Fargo, 294 N.W.2d at 632.

“ . . . in order to make the grant of such power [to grant or deny liquor licenses] effectual, the municipality must enact ordinances reserving the legislative grant of discretion and prescribing reasonable rules and standards to govern the exercise of that discretion.

“ . . . a municipality must reserve its legislative grant of discretion through the use of written criteria which both adequately inform applicants of the standards and policies to be contemplated by the municipality, and adequately guide the licensing authority in arriving at its decision. Aside from any constitutional considerations, fundamental fairness would seem to require nothing less.” Mini Mart v Minot, 347 N.W.2d at 139 and 141, citing N.D.C.C. § 40-05-01(1).

No ordinances have been enacted by Bismarck's City Commission to implement regulatory powers available under N.D.C.C. § 40-05-01 or § 40-05.1-06. Article 3, Section 10 of Bismarck's home rule charter does not fill the void; it is merely a restatement of a City's powers under N.D.C.C. § 40-05.1-06 to grant and regulate franchises. Those powers are conditioned: "if implemented through ordinances." N.D.C.C. § 40-05.1-06. Litten v Fargo.

Bismarck's ordinances do include the power to grant franchises (Chapter 10-11), the power exercised when it granted franchises to MDU and to Capital. There are no provisions in Bismarck's ordinances that sustain the power "to regulate" claimed by the City Commission in its Order. There are no provisions in Bismarck's ordinances that sustain the claimed power to hear and decide local territorial disputes between holders of non-exclusive franchises granted by the Commission, as if the City Commission were also Bismarck's little public service commission. "Bismarck has enacted ordinances regarding the granting of franchises, but has not enacted ordinances regarding regulation of franchises." (Bismarck's February 28, 2006, brief, page 7; Docket #51.)

D. Bismarck's City Commission's Order was not a legal exercise of power.

Bismarck's City Commission's Order is not the exercise of any power created by legislation at any level. Not by the Constitution; not by any statute; not by any ordinance.

In the proceedings below, the district court, Bismarck and MDU relied on the principle that judicial review of local governing bodies' legislative decisions is limited by the doctrine of separation of powers. See, e.g., GO Committee ex rel. Hale v City of Minot,

2005 ND 136, 701 N.W.2d 865 (herein Committee v Minot) and Pic v City of Grafton, 1998 ND 202, 586 N.W.2d 159. They argued the City Commission's decision was not arbitrary or unreasonable, not an abuse of discretion. They made the same mistake the Commission did in its Order, erroneously concluding the Commission acted within the scope of its legislative power.

There is a difference between questions about whether a power exists and questions about the exercise of a power that exists. As explained in Committee v Minot, the rule of strict construction applies. See also Braunagel v City of Devils Lake, 2001 ND 118, 629 N.W.2d 567 and Frey v City of Jamestown, 548 N.W.2d 784 (ND 1996), distinguishing between an illegal exercise of power and discretionary exercise of a legal power. The arbitrary/unreasonable standard applies to a power that exists, one that is authorized by statute and implemented by local ordinance, a power that exists under the rule of strict construction.

Courts have the ultimate responsibility to decide whether a claimed discretionary legislative power exists. If no power exists under ordinances implementing a power available under statutes, an ad hoc assertion of power cannot be sustained on claims the local governing body made a reasonable decision. Mini Mart v Minot, 347 N.W.2d at 138, note 4. In the absence of any law to confer, implement, ordain, or otherwise create the "power to regulate" claimed by the City Commission to sustain its Order, the Order is ineffective. It is ineffective not because the Order is unreasonable. It is ineffective because Bismarck's City Commission lacks the legal power to make the Order. Mini Mart v Minot, 347 N.W.2d at 137-39.

The City Commission's Order was not the exercise of a legal power. It is not sustainable under the Constitution, any statute, or any ordinance to implement any statutory power. The Order exceeded the City Commission's scope of legislative authority.

"The failure of a governing body to correctly interpret and apply controlling law can constitute arbitrary, capricious or unreasonable conduct." (MDU's January 13, 2006, brief, page 4, citing City of Fargo v Ness, 529 N.W.2d 572, 577 (ND 1995); Docket #26). See also Committee v Minot, 701 N.W.2d at ¶ 11. ("We conclude that the construction of the ordinance advocated by Minot is unreasonable.")

The City Commission's Order included two particularly extreme failures to correctly interpret and apply controlling law, failures that constitute arbitrary, capricious or unreasonable action, mistakes in use of the power of office where no legal power really exists. The Order violated fundamental constitutional principles.

IV. Bismarck's City Commission's Order violated fundamental constitutional principles.

In the course of claiming constitutional powers, Bismarck violated constitutional principles. The Commission delegated its legislative powers to MDU to govern Capital's franchise. The City Commission imagined itself having judicial powers; it breached the constitutional wall of separation between legislative and judicial functions when it assumed the power to resolve the territorial dispute between Capital and MDU.

A. **The franchise granted to Capital by Bismarck's City Commission included an unconstitutional delegation of legislative authority to MDU.**

Bismarck's City Commission "performs the legislative functions of the city." N.D.C.C. § 40-05.1-00.1(3). The Commission performed a legislative function when it granted franchises to MDU in 1987 and to Capital in 1973 and 1993. Capital's franchise refers to an Area Service Agreement between Capital and MDU. The Agreement is referred to in the Order.

The Agreement has its own legal history. Electric providers sometimes tried to arrange by private agreement for orderly development of service without unreasonable duplication of capital-intensive facilities. The agreements were unreliable because they were unenforceable, easily abandoned unilaterally when one of the parties deemed the agreement no longer advantageous. See Williams Elec. Co-op, Inc. v Montana-Dakota Utilities Co., 79 N.W.2d 508 (ND 1956); Montana-Dakota Utilities Co. v Williams Elec. Co-op Inc., 263 F.2d 431 (8th Cir. 1959). That is part of the history of territorial disputes, before and after the Territorial Integrity Act was enacted in 1965. See Cass v NSP, and NSP v PSC. That is also the background of the Boulder Ridge dispute. Order, Findings 3, 4 and 5 and Conclusions 2, 3, 4, and 5. (App. 61-66)

The main ingredient of the Order is the City Commission's interpretation of the Area Service Agreement and how that Agreement (as interpreted by the Commission) affected Capital's franchise and the Commission's decision on MDU's petition. Principal references to the Agreement are: The Agreement "removed MDU's objections" to the City's granting a franchise to Capital (Finding 3). (App. 62) "The franchises of both MDU and CEC

[Capital] are similar except that the CEC Franchise incorporates the provisions of the Area Service Agreement” (Finding 3c and Conclusion 4, referring to paragraph 1 of Article II of Capital’s franchise.). (App. 62, 63, 65) The Agreement “is incorporated into the CEC Franchise” (Conclusion 2). (App. 64) “CEC’s Franchise is limited by the language of Article II of that Franchise, which incorporates the Area Service Agreement between MDU and CEC.” The Agreement and Capital’s franchise installed MDU as the “main provider of electric service within the City” excepting Capital’s “existing customers” or “customers or service areas conceded to CEC by MDU.” Capital’s franchise did not extend to areas later (after 1993) annexed to Bismarck except “by an Amendment to the Area Service Agreement” or “specifically consented to by MDU.” When MDU unilaterally canceled the Agreement, MDU foreclosed Capital’s franchise extending to annexed areas (Conclusions 3 & 5). (App. 64, 65)

The City Commission’s action was initiated by MDU’s petition to declare its rights. (App. 13) But MDU’s franchise was not the object of the Order. The object of MDU’s petition and the Commission’s Order was Capital’s franchise and MDU’s rights under Capital’s franchise, MDU’s rights to impose limits on Capital’s franchise. “Pursuant to the terms of the CEC franchise, the cancellation of the Area Service Agreement [by MDU] froze the boundaries of the CEC franchise to those areas within the City of Bismarck as described by the Area Service Agreement as of the effective date of cancellation.” (MDU’s petition, page 2) (App. 14).

Whether or not Capital’s franchise was ambiguous (Capital does not agree it was ambiguous) the Order was not. In 2005, the City Commission declared Capital’s franchise

is geographically limited, limited by powers held by MDU, powers granted to MDU by the Commission when it granted Capital's franchise. Bismarck unambiguously declared that it delegated to MDU the legislative power to determine the geographical limits of Capital's franchise.

Delegation of legislative power is unconstitutional. Legislative bodies routinely delegate authority to inferior governmental agencies to administer laws enacted by the legislature, but legislative authority may not be delegated. See, e.g. Stutsman County v State Historical Soc. of North Dakota, 371 N.W.2d 321 (ND 1985). Legislative authority may not be delegated to private parties. Montana-Dakota Utilities Co. v Johanneson, 153 N.W.2d 414 (ND 1967) (herein MDU v Johanneson). The principle that legislative authority cannot be delegated applies to local governing bodies. Cowan v Stroup, 284 N.W.2d 447 (ND 1979).

Here we have a small mirror image of the delegation issue in MDU v Johanneson. Small, because the delegation issue in this case involves Bismarck's City Commission and the city's municipal limits, not the State Legislature and the entire State's area. Bismarck (and MDU) interpret the grant of Capital's franchise as including a grant of power to MDU by the Commission, the power to decide whether a rural electric cooperative may provide electric service in rural area that has been annexed to the municipality. The reflection is the ironic resemblance to the original Territorial Integrity Act, where rural electric cooperatives were empowered to determine "whether a certificate of public convenience and necessity shall be granted to a public utility in the area outside the limits of the municipality," a power

found to be an unconstitutional delegation of legislative authority. MDU v Johanneson, 153 N.W.2d at 421.

The City Commission interpreted Capital's 1993 franchise as including, by incorporation of the Agreement (as interpreted by the Commission), MDU's unilateral power to geographically limit Capital's franchise, a power exercised by MDU and wrongly sanctioned by the Nov. 14 Order.

In MDU's words, "The issuance of a municipal franchise is a legislative function of the City founded upon the police power inherent in the State and granted to the municipality." (MDU brief, December 30, 2005, page 2; Docket #19.) Bismarck's delegation of that power to MDU is unconstitutional, under principles championed by MDU, in MDU v Johanneson.

B. Bismarck's assumption of power to decide the dispute between Capital and MDU violated the principle of separation of powers.

Bismarck's City Commission "performs the legislative functions of the city." N.D.C.C. § 40-05.1-00.1(3). MDU's petition to the Commission did not invite the exercise of a legislative function, nor does the Nov. 14 Order record the exercise of a legislative function. The City Commission's Order violated the constitutional principle of separation of governmental powers.

Bismarck's Nov. 14 Order is the subject of judicial review, not MDU's franchise and not Capital's franchise. There is a difference between two kinds of actions. Bismarck granted franchises to MDU in 1987 and to Capital in 1993, exercising a legislative power

under enabling statutes, charter powers, and local ordinances. The Order issued on November 14, 2005, is different.

The Order purports to grant a petition to resolve a territorial dispute between holders of non-exclusive franchises granted by the city. No constitutional provision, no enabling statute, no charter power or local ordinance sustains that process or that decision. The Order is ineffective not only because it was not authorized under any state statutes or local ordinances, it is also ineffective because legislative bodies are constitutionally excluded from exercising judicial powers.

Under the North Dakota Constitution and its structure of separate legislative, executive and judicial branches of government, there is an implied exclusion of each branch from the exercise of the functions of the others. City of Carrington v Foster County, 166 N.W.2d 377 (ND 1969). Courts do not invade local legislative provinces, as demonstrated by City of Carrington v Foster County, and more recently by Committee v Minot. And courts attend to the other side of the boundary, to restrict local governing bodies to the exercise of legislative functions. See, e.g., Cowan v Stroup and Fradet v City of Southwest Fargo.

The Nov. 14 Order itself demonstrates it was an attempted judicial act. Bismarck's City Commission entertained MDU's "Petition to Declare Franchise Rights" to determine that MDU is authorized and Capital is not authorized to provide electric distribution service in Boulder Ridge. The title of the Commission's response to MDU's petition, "Findings, Conclusions, Decision and Order" and the words used in that document indicate the Commission made its findings, reached its conclusions and issued its decision and order as

if it were a panel of judges. (App. 61)

Its decisive words were judgmental: “Accordingly, the Board of City Commissioners orders that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First Addition to the City of Bismarck.” (Order, p. 6; App. 66) The Order adopted the form and expressions of a judicial forum, perceiving the conflict as affected by ambiguities in a contractual agreement, resolving the perceived ambiguities, citing and interpreting the State Constitution, all leading to a decision and order as to the litigants’ rights as affected by the Constitution, statutes, municipal ordinances, a contract and Capital’s franchise.

The City Commission not only asserted power to adjudicate conflicting claims under Capital’s franchise. The Commission conferred on itself jurisdiction to adjudicate the Area Service Agreement between Capital and MDU, to declare that Agreement to be ambiguous and to interpret the Agreement as if the Commissioners were judges exercising powers of contract interpretation under N.D.C.C. Chapter 09-07. The City Commission used its interpretation of the Agreement to make its interpretation of Capital’s franchise. (“The Area Service Agreement is ambiguous and the Commission may consider extrinsic evidence to interpret the provisions of the Area Service Agreement and related provisions of the CEC Franchise.” (Order Conclusion 2; App. 64)

A real court would have distinguished between interpretation of a franchise granted under an ordinance and interpretation of a private agreement, recognizing that private parties’ intent uncertainly expressed in the agreement cannot be superimposed on the franchise. “When construing a statute, a court must begin by examining the text, not by

psychoanalyzing those who enacted it.” State ex rel. Stenehjem v FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828.

If ambiguity was an issue with the Agreement, a real court would not have tried to reconstruct original intent uncertainly expressed in 1993 or 1973 without looking to the parties’ conduct through 2005. See National Bank of Harvey v International Harvester Co., 421 N.W.2d 799 (ND 1988) (“The parties’ conduct in the course of performance after the contract’s formation can help determine the meaning of ambiguous language.”). The Order did not consider the City’s, MDU’s or Capital’s conduct with respect to electric service in areas annexed to Bismarck after the 1993 franchise and agreement and before MDU’s 2005 petition. (See App. 61-66, Transcript of City Commission Meeting, pp. 9-11, 14 and 22.) Although that meeting consisted of much argument and little evidence, it did include MDU’s admissions of facts about how the parties’ conduct differs from MDU’s arguments about how Capital’s franchise should be interpreted. Id. Compare NSP v PSC, 452 N.W.2d at 343, note 1.

Bismarck’s City Commission’s interpretation of the Area Service Agreement between MDU and Capital was a principal feature of the Order. Contract interpretation is a judicial function under N.D.C.C. Title 09, not a local governing body’s legislative function. Where contract interpretation involves resolving ambiguity, that is a question of law to be resolved by courts. National Bank of Harvey v International Harvester. See also Williams Electric Cooperative v Montana-Dakota Utilities Co., 79 N.W.2d 508 (ND 1956) and Northwestern Bell Telephone Company v Hagen, 234 N.W.2d 841 at 845 (ND 1975). (“Its [the PSC’s] jurisdiction does not extend into the enforcement of contracts between public utility

companies, a judicial function that is rooted in tradition, constitution and statute.”)

A real court might have been troubled by MDU’s arguments about resolving claimed ambiguities and enforcing in 2005 an agreement that MDU purported to cancel in 2003. A real court would have recognized MDU’s claim that its cancellation of the Agreement had the legal effect to limit Capital’s franchise is integral to the delegation problem. Even if MDU has the legal privilege or power to cancel the Agreement, to exercise that power cannot affect Capital’s franchise because the grant of a franchise is a legislative act and that legislative power cannot be delegated. MDU’s actions cannot deprive Capital of its franchise with the city.

MDU and Bismarck have cited cases where cities’ governing bodies’ actions have been upheld under the test whether the legislative body acted arbitrarily, capriciously or unreasonably, a principle applied most recently in Tibert v City of Minto, 2006 ND 189, 720 N.W.2d 921. That principle does not sustain the Nov. 14 Order or shield it from judicial review. The rationale of those cases is the principle of separation of powers. See, e.g., Pic v City of Grafton, 460 N.W.2d 706, at 710 (ND 1990). (“Judicial review of non-judicial decision making is, under the separation of powers, limited to whether the decision is arbitrary, capricious, or unreasonable.”) The arbitrary/unreasonable standard is applied to restrict courts from invading the legislative province, not to expand local governing bodies’ legislative powers into judicial decision making. It is arbitrary, capricious, unreasonable for any local legislative body to breach the wall of separation of powers, to invade the judicial sphere in an ad hoc hearing with no procedural or substantive foundation under any existing

law, to interpret contracts, to adjudicate a territorial dispute between holders of non-exclusive franchises.

In the context of the current litigation, it is fair comment to say the Order to declare franchise rights resembles action of a district court with jurisdiction to render a declaratory judgment. Bismarck's City Commission has no such jurisdiction, and its decision is erroneous.

The Nov. 14 Order is not legislation, it is usurped adjudication. It should be rejected under the constitutional principle of separation of powers.

V. **The City Commission's interpretation of Capital's franchise is unreasonable.**

Capital is confident that the City Commission's Nov. 14 Order cannot be sustained because it violates two fundamental principles of constitutional law, the prohibition of delegation of legislative powers and the separation of powers. Capital is also mindful that courts avoid constitutional issues if a case can be decided on any other basis. There is another basis on which the court can reject the City Commission's interpretation of Capital's franchise. The Commission's interpretation is unreasonable.

Ultimately, the interpretation of Capital's franchise is a judicial function. Bismarck asserts and Capital agrees: A franchise is like an ordinance and "Ordinances are interpreted like statutes." and "Statutory interpretation is a question of law subject to full review upon appeal." (Bismarck's February 28, 2006, brief, page 3, citing City of Fargo v Ness). A city governing body's interpretation of its ordinance that is unreasonable may be rejected by the court. Committee v Minot. An interpretation may be rejected as unreasonable, without

being adjudged as unconstitutional.

The Commission's interpretation of Capital's franchise was unreasonable, because Article II of Capital's franchise was not ambiguous. The text is clear; Capital's franchise applies to a certain geographical area. It was unreasonable for Bismarck to declare Capital's franchise to be ambiguous. It was unreasonable to look outside the text of the franchise to a private agreement to determine a previous governing body's intent underlying the franchise. It was unreasonable for the Commission to interpret the franchise in such a way that the cancellation of the Area Service Agreement had the effect that MDU re-defined the geographical area affected by Capital's franchise. Capital's franchise states unambiguously that if the Agreement is canceled by either party "all privileges, rights, obligations and restriction as therein stated shall continue to apply." (App. 57) Bismarck's interpretation of Capital's franchise should be rejected as unreasonable, so whether the interpretation was also unconstitutional need not be decided.

RELIEF REQUESTED

The district court's judgment of dismissal should be reversed, and the case remanded for further proceedings, or with directions for the entry of summary judgment that Capital has franchise rights to provide electric distribution services in the City of Bismarck.

There are alternate ways to remedy the district court's errors. It could reverse the erroneous dismissal of Capital's complaint and remand with appropriate directions for Capital's action to be reinstated. If remanded, the action would go back to the district court to be tried or addressed on summary judgment proceedings, possibly appealed again and

finally decided later. If remanded, the action would not go back to the City Commission. Remand to the district court would only delay remedying Bismarck's errors.

Even though the record in this case is not as fully developed as it might have been, even though on remand Capital would have the opportunity to present more evidence at a trial or in summary judgment processes (particularly evidence of conduct affecting the ambiguity issue), it is within the Supreme Court's power to provide complete relief now, not merely correcting the district court's procedural errors but providing complete relief to remedy the City Commission's errors. Instead of remand to the district court, the Supreme Court should exercise its plenary powers under N.D.R.App.P. Rule 35 to remedy the errors of Bismarck's City Commission and its Order, as the district court should have done.

By operation of N.D.R.Civ.P. Rule 12, Bismarck's motion to dismiss must be treated as a motion for summary judgment under N.D.R.Civ.P. Rule 56, because the motion was decided by consideration of matters outside the pleadings. The Supreme Court may look at the entire record and acknowledge there is no disputed issue of material fact. Continued litigation might produce additional evidence, but no more evidence is necessary to remedy the errors of Bismarck's City Commission's Order.

Under N.D.R.Civ.P. Rule 56, summary judgment may be entered against the moving party, and that may happen on appeal. See Montana-Dakota Utilities Company v Divide County School District, 193 N.W.2d 723 (ND 1972) (Summary judgment against electric utility reversed and district court ordered to enter judgment against electric cooperative) and Fredericks v Eide-Kirschmann Ford, Mercury, Lincoln, Inc., 462 N.W.2d 164 (ND 1990). See also State ex rel. Stenehjem v FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828

(whether summary judgment is appropriate is a question of law subject to de novo review by the Supreme Court.)

On the basis of the present record, a remand and further proceedings are unnecessary for the Supreme Court to conclude under N.D.R.Civ.P. Rule 56: As a matter of law, Bismarck's City Commission had no power under the Constitution, State statutes, or any of Bismarck's ordinances to make the Nov 14 Order. This conclusion as a matter of law cannot be materially affected by additional evidence that might be produced on further proceedings following a remand.

An equivalent result would be achieved if Capital's complaint were regarded as an appeal, and the City Commission's Order is reversed under the arbitrary/capricious/unreasonable standard of review because that test is failed. The test is failed because no constitutional provision, no state statute, no charter provision and no local ordinance sustains the Order as an exercise of the City Commission's legislative power.

Having said so much about Bismarck's City Commission's lack of power and about principles of separation of powers, Capital does not suggest that the Supreme Court should cross the line to usurp legislative powers. The Court should assert and exercise judicial power to restrict Bismarck's City Commission to acting within its scope of legislative power, to declare ineffective the Nov. 14 Order that was not produced by the exercise of legislative power. Ultimately, the interpretation of Capital's franchise is a judicial function.

All of the Order's findings and conclusions regarding interpretation of Capital's franchise were focused on paragraph 1 of Article II, the provision of Capital's franchise that ". . . incorporates the provisions of the Area Service Agreement " (Order Finding 3c; App.

62-63), the provision that constitutes an unconstitutional delegation of legislative authority. In these circumstances, interpretation of paragraph 1 of Article II is less than moot, because that provision must be severed from Capital's franchise when the franchise is interpreted like statutes. Just as the delegation section of the original Territorial Integrity Act was severed from the Act as unconstitutional, so also paragraph 1 of Article II of Capital's franchise should be severed from Capital's franchise. The provisions of paragraph 1 of Article II of Capital's franchise can be stricken from the franchise without in any manner affecting the validity of the balance of the franchise. MDU v Johanneson, 153 N.W.2d at 424-25; N.D.C.C. § 01-02-20. "The franchises of both MDU and CEC are similar except the CEC Franchise incorporates the provisions of the Area Service Agreement" (Order Finding 3c; App. 62-63). The franchises are virtually identical when Capital's franchise is emancipated from the unenforceable Agreement and the unconstitutional provision delegating to MDU the power to impose geographical limits on Capital's franchise.

Alternatively, the Court may decline to address the City Commission's interpretation of Capital's franchise on constitutional principles, instead rejecting the Nov. 14 Order as an unreasonable interpretation of Capital's franchise.

Entry of summary judgment should be ordered under N.D.R.Civ.P. Rule 56 and N.D.C.C. Chapter 32-23, declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck under its franchise granted by Bismarck on May 25, 1993, with the provisions of paragraph 1 of Article II stricken from the franchise.

CONCLUSION

For all these reasons, Capital requests relief from the errors of the district court and of Bismarck's City Commission. Capital requests reversal of the district court's order dismissing Capital's complaint and an order for entry of summary judgment under N.D.R.Civ.P. Rule 56 and N.D.C.C. Chapter 32-23, declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck under its franchise granted by Bismarck on May 25, 1993, Bismarck's City Commission's Order to the contrary notwithstanding, and with paragraph 1 of Article II stricken from the franchise. Alternatively, Capital requests reversal of the district court's order dismissing Capital's complaint and an order remanding the case for further proceedings as an action for declaratory judgment under N.D.C.C. Chapter 32-23. Alternatively, if Capital's action is regarded as an appeal, Capital requests reversal of Bismarck's City Commission's Order of November 14, 2005.

Dated: October 5, 2006.

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CERTIFICATE OF SERVICE

A copy of the Corrected Brief of Appellant, Capital Electric Cooperative, Inc., was served by via first class mail to the following on October 5, 2006:

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