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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
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Robert & Laurie Banderet, Carol Beck, Gerald Bosse, Matthew Bosse, Duane & Valera Hayen, Beverley Kelley, Leon Mallberg, Paul Mathews, Nancy Mathews, Katheryn Nelson, R & I Memorial Trust, Kathaleen R. Rehborg as Trustee, Gerald & Judith Ringdahl, and John & Beth Wentworth, Plaintiffs and Appellants, and William E. Kurschet, and Jan Vold & Melanie Jones as Trustees of the Evergreen Trust, Plaintiffs, v. Sargent County Water Resource District and Ransom County Water Resource District, Appellees.	Supreme Court No. 20180253 Sargent County District Court Case No.: 41-2017-CV-00014

Appeal from Judgments Entered on April 17, 2017 & April 26, 2017
Case No. 41-2017-CV-00014
County of Sargent, Southeast Judicial District
The Honorable Bradley A. Cruff, Presiding

REPLY BRIEF OF APPELLANTS

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I. REPLY TO SCWRD

[¶1] The Landowners in this case seek nothing more than a simple declaration from the Court about whether or not the Landowners have certain rights regarding Sargent County Water Resource District's ("SCWRD") Drain 11 Improvement Project ("Project'), including whether or not they have the right to vote on it. The Plaintiffs had a good faith basis for their suit (the complaint described in detail why the project is not maintenance). SCWRD had even issued a Resolution of Necessity describing the project as a new "Project." Moreover, the Declaratory Judgment Act is a tool that is supposed to be "construed and administered liberally" to "settle and afford relief from uncertainty and insecurity with respect to rights…" N.D.C.C. § 32-23-12.

[¶2] But instead of allowing the district court to enter a declaratory judgment as to whether or not the Landowners are entitled to notice, a hearing, and a vote on the Project, SCWRD filed a motion to dismiss premised on the theory that SCWRD has the power to take these statutorily defined rights away from the Landowners. Further, SCWRD's position is that by burying a statement that the Landowners are not entitled to any further legal process in the back of a Resolution of Necessity and voting on that Resolution at a meeting where the issue was not even placed on the agenda, that SCWRD has effectively forever shielded itself from any potential judicial review – *even if its actions are indeed not legal*. SCWRD's position is not tenable.

[¶3] In ¶ 35 of its Brief, SCWRD argues that an appeal is an "adequate remedy at law" in this circumstance. SCWRD, in other words, suggests that it could place a statement so important that it allegedly had to be appealed into the back of a Resolution; not put that Resolution on the public agenda; vote on the Resolution when no members of the public who had voiced concerns about the potential Project were present; and mislead

the Landowners by incorrectly stating that their appeal deadline had passed. According to SCWRD, so long as it successfully makes it past the thirty-day appeal deadline, then SCWRD is forever safe from both the public's right to vote on the Project and from judicial review because the appeal is an "adequate remedy at law" and an appeal was not taken.

[¶4] SCWRD tries to shroud its remarkable position in this Court's case law by saying that two of this Court's decisions "control." SCWRD Brief, ¶ 35 (citing to *Cossette v. Cass Cty. Joint Water Res. Dist.*, 2017 ND 120, 894 N.W.2d 858; *Anderson v. Richland Cty. Water Res. Bd.*, 506 N.W.2d 362, 365 (N.D. 1993)). But SCWRD merely cites to these cases for their language that an appeal is generally an adequate remedy at law. Neither of these cases contain a factual situation that remotely parallels the complete lack of notice and misleading of the public that has taken place here. As explained in Landowners' opening brief, this alone is sufficient to render an appeal an inadequate remedy at law.

[¶5] Also in ¶ 35, SCWRD tries to cast Landowners' discussion of the relevant case law on writs of prohibition and mandamus as new arguments. SCWRD is incorrect. The cases on writs of prohibition and mandamus provide relevant case law on the standard for a declaratory judgment and injunction action brought to compel a mandatory duty unlawfully withheld by a public body. Indeed, the standard for these writs "parallel" that for declaratory and injunctive relief. *Medical Arts Clinic, P.C. v. Franciscan Initiatives, Inc.*, 531 N.W.2d 289, 295 (N.D. 1995).

[¶6] In ¶ 37 of its brief, SCWRD cites to *Olson v. Cass Cty.*, 253 N.W.2d 179 (N.D. 1977). This case contains a second rationale for why SCWRD cannot waive notice, hearing, and voting procedures for its Project. SCWRD has no jurisdiction to take Landowners' statutorily defined rights away. If the Project meets the requirements of N.D.C.C. § 61-16.1-17 *et seq.* (as alleged in Plaintiffs' complaint), the provisions in those

statutes must be applied. SCWRD is powerless to change the procedures set by the Legislative Assembly, and it therefore lacks jurisdiction to deny Landowners the right to notice, hearing, and a vote on this Project. Although SCWRD notes this Court's statement in *Olson* that "an action taken by a person or persons entirely lacking jurisdiction over the substance of the action may be challenged collaterally," SCWRD's briefing appears to contain no analysis of why SCWRD believes that it had jurisdiction. SCWRD simply argues in conclusory fashion that its decision was "correct" with no explanation.

[¶7] In ¶ 40 of its Brief, SCWRD argues that the project "involves an established drain, and not the creation of a new drain." SCWRD misses the point here. The issue is not at all whether the Project is a "new drain." The issue, as alleged in Landowners' complaint and in Landowners' opening brief to this Court, is that SCWRD converted a century-old drain previously managed under N.D.C.C. ch. 61-21 into a new "Project" managed under N.D.C.C. ch. 61-16.1 for the first time. This is clearly documented in the Resolution of Necessity, which refers to Chapter 61-16.1 multiples times while also using words such as "improvement," "construction," "reconstruction," and "acquisition of rights of way" in reference to this Project. Appellants' App. 141-143. SCWRD's suggestion that whatever process may have existed nearly one hundred years ago when Drain 11 was first built is sufficient process to cover the conversion of the Drain to a new multi-million dollar "Project" to now be managed under Chapter 61-16.1 is unavailing.

[¶8] In ¶ 42, SCRWD argues that the mere fact that a Resolution of Necessity is labeled as such does not determine which statute applies to the Project. But SCWRD ignores that the text of its Resolution explains in detail that the Project will be managed for the first time as a "Project" under Chapter 61-16.1. Appellants' App. 142. Further, SCWRD

argues in ¶ 42 that the Resolution of Necessity was for maintenance. Notably, the operative language of the Resolution does not include the word "maintenance." It does, however, discuss construction, reconstruction, improvements, and even acquisition of land. Appellants' App. 141-143. Moreover, the detailed allegations in the Landowners' complaint, documents (including affidavits) in support of their preliminary injunction motion (Doc. IDs 76 through 83), and their opening brief to this Court indicate that the project significantly exceeds the allowable cost for maintenance and does not meet the legal definition of "maintenance" set forth in N.D.A.C. § 89-02-01-08(8). SCWRD has provided no response to Appellants' arguments set forth in ¶¶ 60-61 of their opening brief to this Court to explain why its project is maintenance, other than to generally argue that SCWRD has an obligation to maintain its drains.

[¶9] In a further apparent attempt to characterize this Project as maintenance, in ¶ 44 of SCWRD's brief, SCWRD states that "[t]he Resolution of Necessity further outlined the Project would not require acquisition of new properties." This statement is at best misleading, and at worst is simply wrong. The Resolution specifically designated a law firm and an engineering firm to "negotiate with landowners and otherwise administer right of way acquisition" and to "acquire … permanent right of way to accommodate the Project…" App. 142.

[¶10] In ¶ 55 of its brief, SCWRD says "it is clear" that the Landowners knew of the Resolution. This statement has no citation, and it is not supported. Every landowner did not know. There are seventeen Landowner plaintiffs in this case. There are not seventeen

statements in the record that each landowner knew of this statement in time to appeal.[1] But perhaps more importantly, SCWRD's argument that each landowner somehow knew (or should have known through the open records laws) of the statement in the Resolution is hyper-technical and misses the forest for the trees. This is because SCWRD lacks jurisdiction to circumvent mandatory duties imposed upon it by state law, be it in a motion, Resolution, or otherwise.

[¶11] At the end of the day, the Landowners simply seek a declaratory judgment as to their prospective rights. The Landowners want to know: (1) whether they have the right to vote on this Project, and (2) whether SCWRD has a mandatory duty to hold this vote along with other procedures outlined in N.D.C.C. § 61-16-17 *et seq*. If necessary, the suit brought below would enforce those rights with an injunction. At this stage of the case, no discovery has even been conducted. Plaintiffs/Appellants moved for a preliminary injunction without the opportunity to complete any discovery. The district court ruled on a motion to dismiss, and as such, the statements in the complaint generally must be taken as true at this stage of the case. The district court's conclusion that it lacked subject matter jurisdiction to hear this case is in error, and this Court should not extend the district court's decision into a precedent that blocks both the public and the judiciary from oversight of public bodies.

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[1] SCWRD makes much of the fact that <u>one</u> Plaintiff/Appellant—Mr. Banderet—asked the State Engineer's Office questions about the Project. However, even these statements give no indication at all that Mr. Banderet was aware of the Resolution of Necessity, let alone the specific statement in the back of the Resolution purporting to waive all legal process. *See* Doc. 125; Doc. 100, at pp. 53-54.

II. REPLY TO RCWRD

[¶12] The discussion in ¶ 16 of RCWRD's brief regarding the standard of review is in error. Specifically, RCWRD argues that "[i]f a Rule 12(b) motion is based on the pleadings, and if matters outside the pleadings are considered, the motion must be treated as a motion for summary judgment under North Dakota Rule of Civil Procedure 56." RCWRD Brief, ¶ 16 (citing *Overlie v. State*, 2011 ND 191, ¶11, 804 N.W.2d 50). This standard, however, only applies to a motion to dismiss for failure to state a claim. It does not apply to a motion to dismiss for lack of subject matter jurisdiction. N.D.R.Civ.P. 12(d). The statement of the standard of review in the Landowners' Opening Brief is the correct characterization of the standard of review for this case.

[¶13] In ¶¶ 22-25, RCWRD argues that the veracity of Landowners' evidence regarding the benefit from the Project that would accrue to Ransom County is insufficient. This is easily explained. The Landowners had no meaningful opportunity to conduct discovery below. Regardless, though, the Landowners did allege in detail in their complaint that the watershed would benefit from the Project and that the watershed extends into Ransom County. App. 19, ¶¶ 38-39. Just like the water board in *Klindt,* SCWRD concluded that the entire watershed would benefit. *Klindt v. Pembina Cty. Water Res. Bd.*, 2005 ND 106, ¶ 15, 697 N.W.2d 339. RCWRD, on the other hand, provided no evidence from its own water board. It only cited to SCWRD's minutes to allegedly conclude that RCWRD had decided that Ransom County would not benefit. The fact that one County believes the project will benefit Ransom County, while the other does not underscores the need for declaratory relief to provide clarity as to the proper entity to assess lands in Ransom County under these circumstances.

[¶14] RCWRD's position that the Landowners lack standing to obtain this declaratory relief is not correct. Several Landowners explained in sworn affidavits that they are concerned that they will have to shoulder the cost of the Project's benefits to Ransom County. *See, e.g.*, Hayen Aff., Doc. ID 46, ¶ 10. Economic harm is a "threatened or actual injury" and the "harm is not a generalized grievance," and these circumstances are therefore sufficient to support standing. *North Dakota Fair Hous. Council, Inc. v. Peterson*, 2001 ND 81, ¶ 65, 625 N.W.2d 551.

III. CONCLUSION

[¶15] The Landowners respectfully request that the Court reverse the District Court's judgment and remand this case for further proceedings.

Signed this 21st day of September 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents in the above-captioned matter:

1. Reply Brief of Appellants

and on September 21, 2018 served the same by electronic mail upon the following counsel for all parties to this appeal:

- Daniel Lee Gaustad, counsel for Appellee Sargent County Water Resource District, at dan@grandforkslaw.com;
- Joseph Elmer Quinn, counsel for Appellee Sargent County Water Resource District, at jquinn@grandforkslaw.com;
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/s/ *JJ England*
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