COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1290 **Cir. Ct. No. 2008CV1693**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

KENT HAEGER, RON JARECKI, JOHN SONDEREGGER, DALE ROBLE, EAGLE SPRINGS LAKE MANAGEMENT DISTRICT AND PHANTOM LAKES MANAGEMENT DISTRICT,

PLAINTIFFS-APPELLANTS,

V.

VILLAGE OF EAST TROY AND STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: DIANE M. NICKS, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Hoover, JJ.

¶1 LUNDSTEN, J. This is an action for declaratory relief. The plaintiffs asked the circuit court to issue an order declaring that a Department of

Natural Resources (DNR) decision authorizing the Village of East Troy to construct and operate a municipal well, Well #7, is a void decision. The plaintiffs asked for an order declaring DNR's approval void and directing the Village to cease construction and operation of Well #7. The circuit court granted defendants' motions to dismiss the action. We affirm the circuit court.

Background

¶2 On September 4, 2003, DNR issued a decision authorizing the Village to construct a municipal water supply, Well #7. The authorization stated that it would be "void" after two years. Specifically, the decision stated:

> This approval is valid for two years from the date of approval and is subject to the conditions listed above. If construction or installation of the improvements has not commenced within two years the approval shall become void and a new application must be made and approval obtained prior to commencing construction or installation.

¶3 For reasons that do not affect this appeal, construction was delayed. In 2005, the Village requested an extension of the well authorization. On September 6, 2005, two days after the 2003 approval became void, DNR issued an "extension" of the 2003 approval for Well #7. This decision stated: "[T]he original approval is valid until September 4, 2007, subject to the conditions listed in the original approval." Like the 2003 decision, the 2005 decision included statements regarding appeal rights under WIS. STAT. ch. 227[1] and the right to request a contested case hearing.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Plaintiffs Kent Haeger, Ron Jarecki, John Sonderegger, and Dale Roble own property adjacent to Lake Beulah, in Walworth County. They allege that they have an interest in Well #7 because the operation of the well will lower the groundwater level adjacent to Lake Beulah, resulting in less groundwater discharge into the lake and a reduction in the lake's water quality.

¶5 Plaintiffs Eagle Springs Lake Management District and Phantom Lakes Management District are lake management districts responsible for the management, protection, and preservation of bodies of water in the Mukwonago River watershed. They allege that Lake Beulah flows into this watershed and, therefore, a reduction in the quality of water in Lake Beulah will have a negative effect on the entire watershed.

¶6 None of the plaintiffs requested a contested case hearing or sought judicial review under WIS. STAT. ch. 227. Rather, on April 15, 2008, plaintiffs filed an action in the circuit court seeking declaratory relief. The complaint contains several specific claims of improper behavior on the part of DNR and the Village.[2] The thrust of the complaint was a request for an order declaring that the 2005 DNR decision had no legal effect and, therefore, that the Village had no authority to continue construction on or operation of Well #7.

¶7 DNR and the Village moved to dismiss plaintiffs' claims, and the circuit court granted their motions. The plaintiffs appeal.

[2] The plaintiffs filed an amended complaint, and all of our references to the complaint are references to the amended complaint.

Discussion

A. Claims Against DNR

¶8 Plaintiffs' complaint contains several counts alleging that DNR acted improperly in issuing the September 6, 2005, decision. But we do not address the merits of these claims because the dispositive issue before us is whether the plaintiffs' failure to seek review under WIS. STAT. ch. 227 is fatal to their action for declaratory relief. We agree with DNR and the Village that it is.

¶9 The original 2003 DNR decision approving construction of Well #7 stated: "If construction or installation of the improvements has not commenced within two years the approval shall become void and a new application must be made and approval obtained prior to commencing construction or installation." Two years and two days later, on September 6, 2005, DNR approved an "extension" of the 2003 approval for an additional two years. The 2005 decision stated: "[T]he original approval is valid until September 4, 2007, subject to the conditions listed in the original approval."

¶10 The plaintiffs did not challenge DNR's 2005 decision under WIS. STAT. ch. 227. And, apart from the argument we address below, they do not allege that anything prevented them from seeking review under ch. 227. Rather, plaintiffs brought an action seeking declaratory and injunctive relief under WIS. STAT. § 806.04.[3]

[3] Count II, in addition to seeking declaratory relief under WIS. STAT. § 806.04, asserts a right to declaratory relief under WIS. STAT. § 227.40(1). We agree with DNR, the Village, and the circuit court that ***Sewerage Commission of Milwaukee v. DNR***, 102 Wis. 2d 613, 307 N.W.2d 189 (1981), requires dismissal of this portion of Count II. As the ***Sewerage Commission*** court explained, the failure to challenge a permit in a timely fashion under WIS. STAT. ch. 227, (continued)

¶11 There is no dispute that the 2003 approval became "void" prior to the issuance of DNR's 2005 "extension." Neither the Village nor DNR argues otherwise. Regardless, we need not address whether DNR had the authority to extend the "void" 2003 approval. Similarly, under the facts here, we do not address whether DNR had the authority to approve a new two-year window of time in which to construct a well. Rather, as explained below, we conclude that the plaintiffs were required to challenge the validity of the 2005 decision under WIS. STAT. ch. 227 and, therefore, their declaratory judgment action was properly dismissed.

¶12 The plaintiffs state that the "core" of their argument is that a void agency decision—that is, an agency decision without legal significance—is not a final and reviewable "decision" for purposes of WIS. STAT. ch. 227. The plaintiffs contend that, because the 2003 decision became void on September 4, 2005, it necessarily follows that DNR's September 6, 2005, extension was itself void. The plaintiffs argue that DNR had no administrative or statutory authority to extend a void approval. Consequently, according to the plaintiffs, they may bring a declaratory action because a void order or judgment may be challenged at any time.

¶13 There is a gap in plaintiffs' legal analysis. They do not cite any authority for an assumption that underlies their "core" proposition: that an allegedly void administrative decision may not be challenged and declared void via WIS. STAT. ch. 227 review. To the contrary, the most obvious means of

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and then later seek declaratory relief under § 227.40(1), is an impermissible "end run around administrative and judicial review of the department's action at the time the permits are issued." ***Id.*** at 631-32.

arguing that an agency acted without authority when it issued a decision is a challenge under ch. 227. *E.g.*, ***Barron Elec. Coop. v. PSC***, 212 Wis. 2d 752, 774, 569 N.W.2d 726 (Ct. App. 1997) (in ch. 227 review proceeding, electric company argued that the Public Service Commission lacked authority to require the company to remove its lines or to sell them to another electric company).

¶14 Regardless how the DNR decision is characterized—as an extension of the prior approval or as a new approval—it is plainly a decision that purports to authorize the Village to construct Well #7 so long as the conditions listed in the 2003 approval are met and so long as construction commences on or before September 4, 2007. The plaintiffs can dispute whether DNR had the authority to issue this decision, but it is beyond dispute that DNR issued a decision. Moreover, the plaintiffs suggest no reason why the decision is not final or why it does not otherwise qualify as a decision reviewable under WIS. STAT. ch. 227.

¶15 Furthermore, we agree with the Village and DNR that the plaintiffs' argument runs headlong into ***Turkow v. DNR***, 216 Wis. 2d 273, 576 N.W.2d 288 (Ct. App. 1998). In ***Turkow***, the plaintiff brought a declaratory judgment action seeking a declaration that DNR lacked the authority to order him to remove obstructions from a waterway on plaintiff's land. ***Id.*** at 275-76. This court concluded that the plaintiff's declaratory judgment action must be dismissed because the sole means of challenging the agency's decision was under WIS. STAT. ch. 227. Pertinent here, we wrote:

> DNR argues that declaratory judgment is inappropriate because it improperly bypasses the exclusive means of administrative review provided by the legislature. We agree.
>
> The principle of state sovereign immunity is clearly established, and this immunity has been extended to state agencies. A plaintiff must point to a legislative enactment

> authorizing suit against the state to maintain his or her action. The consent to suit against a state agency is set forth in ch. 227, Stats., and constitutes the exclusive method for judicial review of agency determinations.
>
> Here, the state has expressed its consent to be sued in § 227.52, Stats., which provides in relevant part, "Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter." The remedy available to a person aggrieved by an agency decision is set forth in § 227.53(1), Stats., which states, "Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter." Chapter 227 provides for both administrative review of agency action and judicial review of agency decisions and orders. *See* §§ 227.42, 227.44, 227.52, 227.53, and 227.57, Stats. The record establishes that [plaintiff] did not pursue any remedy available in ch. 227.
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> ....
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> Based on state sovereign immunity principles and ch. 227, Stats., we conclude the proper method for challenging the DNR's navigability determination is to pursue the relief afforded in ch. 227, and the DNR's motion to dismiss should have been granted on that basis.

Id. at 281-83 (citations omitted).

¶16 Accordingly, we conclude that plaintiffs could have challenged the 2005 decision under WIS. STAT. ch. 227. This being so, Counts I, II, III, IV, and V of the complaint were properly dismissed.

B. Claims Against The Village

¶17 In Count VI of their amended complaint, plaintiffs seek a declaration that the Village violated its statutory duty to protect navigable waters. The plaintiffs allege that the Village violated its duty by conducting an improper search for a well location, improperly annexing and approving a development plan,

improperly applying for a well permit, and taking various actions to prevent public participation in the permitting process and to mislead the public. Assuming for argument sake only that the allegations constitute violations of the Village's duty to protect navigable waters, none of the allegations warrant declaratory or injunctive relief.

¶18 The allegations against the Village concern past behavior in seeking to obtain a permit to construct Well #7. Thus, there is nothing to enjoin—the behavior is not ongoing. *See* ***Lister v. Board of Regents***, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976) (declaratory judgment actions bring before courts "controversies of a justiciable nature ... *prior to the time that a wrong has been threatened or committed.* The purpose is facilitated by authorizing a court to take jurisdiction *at a point earlier in time than it would do under ordinary remedial rules and procedures.*" (emphasis added)).

¶19 Moreover, the plaintiffs do not explain what they stand to gain from a declaration that the alleged prior behavior was unlawful. Obviously, the plaintiffs want a declaration that the DNR action approving construction of Well #7 is void and, therefore, the Village has no authority to continue construction on or operation of Well #7. But the plaintiffs do not connect the dots—they do not explain why a declaration that the Village violated the public trust doctrine advances their cause. Accordingly, the circuit court properly dismissed Count VI.

¶20 The plaintiffs' appellate briefs do not contest the dismissal of another claim against the Village, Count VII. In that count, the plaintiffs assert that the Village does not have a valid permit to construct or operate the well. Regardless, we agree with the Village that, in substance, Count VII is an attack on whether DNR properly issued the well permit and, therefore, suffers the same fate

as other counts seeking a declaration that the DNR decision was invalid. Thus, we affirm dismissal of Count VII.[4]

Conclusion

¶21 For the reasons stated, we affirm the circuit court's order dismissing all claims against DNR and the Village.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[4] In light of our conclusion that declaratory relief was unavailable against either DNR or the Village, we need not address other arguments made by the Village and DNR in support of affirming the circuit court.