

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2009AP1871
2009AP2181
STATE OF WISCONSIN**

Cir. Ct. No. 2007CV2608

**IN COURT OF APPEALS
DISTRICT III**

No. 2009AP1871

TOWN OF ROCKLAND,

PETITIONER-RESPONDENT,

V.

GREEN BAY METROPOLITAN SEWERAGE DISTRICT,

RESPONDENT-RESPONDENT,

CITY OF DE PERE,

INTERESTED PARTY-APPELLANT.

No. 2009AP2181

TOWN OF ROCKLAND,

PETITIONER-RESPONDENT,

V.

GREEN BAY METROPOLITAN SEWERAGE DISTRICT,
RESPONDENT-APPELLANT,
CITY OF DE PERE,
INTERESTED PARTY.

APPEALS from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Reversed; appeal dismissed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. In appeal No. 2009AP2181,¹ Green Bay Metropolitan Sewerage District (GBMSD) appeals a circuit court judgment that modified a GBMSD Commission decision annexing the City of De Pere to the District. The Commission decision had incorporated an “Annexation and Consolidation Agreement” between De Pere and GBMSD. The circuit court modified the Commission decision by invalidating a provision of the annexation agreement regarding future sewer service to the Town of Rockland. GBMSD argues Rockland both lacked standing to petition for WIS. STAT. ch. 227 review and forfeited its right to review by failing to preserve its arguments.² Alternatively, GBMSD argues the circuit court lacked the authority to review any

¹ GBMSD initially filed a cross-appeal in appeal No. 2009AP1871. The clerk of this court, however, determined the appeal did not qualify as a cross-appeal and assigned a new appeal number to GBMSD’s appeal. We subsequently consolidated the cases, which share a record.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

issues except whether the Commission properly applied the three statutory annexation criteria.

¶2 We affirm the Commission's decision because Rockland's challenge, as raised, was brought in the wrong forum. The circuit court had the authority to determine not only whether the Commission had applied the proper factors, but also whether the Commission exceeded the scope of its authority. *See* WIS. STAT. § 227.57(8). However, because Rockland argues not that the Commission lacked authority to create rules via an annexation decision, but that a particular rule is invalid, Rockland must challenge that rule in a WIS. STAT. § 200.45(1)(d) declaratory judgment proceeding. Thus, the circuit court lacked authority to modify or reverse the Commission's decision.

¶3 In appeal No. 2009AP1871, De Pere, which was not a party below, appeals the same circuit court judgment that GBMSD appeals, as well as an order denying De Pere's motion to intervene or specially appear in the WIS. STAT. ch. 227 review proceeding. As De Pere abandons any argument that the circuit court erroneously denied its motion to appear, we dismiss De Pere's appeal because it is not a party.

BACKGROUND

¶4 GBMSD is a metropolitan sewerage district organized under WIS. STAT. ch. 200. Its territory includes the City of Green Bay and other municipalities in Brown County. Rockland, which annexed to GBMSD in 2006, shares a border with De Pere. Generally, De Pere is south of Green Bay, and Rockland is south of De Pere.

¶5 De Pere petitioned to annex to GBMSD in August 2007. GBMSD’s Commission convened a public hearing in October 2007, and approved De Pere’s petition in a written decision later that month. GBMSD’s decision annexing De Pere incorporated a separate annexation agreement that included financial terms for GBMSD’s acquisition of De Pere’s treatment plant and main interceptor sewers.³ However, under the agreement De Pere maintained ownership and control of its local sewers. The annexation agreement also included the following provision addressing future sewer service to Rockland:

8.13 Town of Rockland Border Agreement. Promptly after the execution of this Agreement, De Pere agrees to offer to the Town of Rockland (“Rockland”) a border agreement in the form attached hereto as Exhibit 8.13 (the “Border Agreement”). The offer to Rockland of the Border Agreement shall be open for acceptance from the date of submission to Rockland and for a period of six months thereafter. In the event that Rockland does not accept the terms and conditions of the Border Agreement, GBMSD agrees that for a period of 20½ years from the date hereof, sewer service to the area outlined in red on the map included in Exhibit 8.13 (the “Subject Territory”) will only be provided by sewers built, owned and operated by De Pere. De Pere acknowledges and agrees, however, that no sewers may be constructed by it in the Subject Territory without GBMSD’s prior approval regarding engineering issues[,] consistent with GBMSD’s past practices.

³ The Commission decision states: “The terms of the annexation ... are described in the Annexation and Consolidation Agreement. ... The Commission’s decision to approve De Pere’s annexation to GBMSD is made pursuant to the terms of the Annexation and Consolidation Agreement.” Further, the decision orders that De Pere “be annexed to the GBMSD in accordance with the terms of the Annexation Agreement.” De Pere’s petition for annexation provides:

This Annexation Petition is submitted pursuant to the Annexation and Consolidation Agreement entered into between the City of De Pere and [GBMSD] This Annexation Petition is conditioned on [GBMSD] stating in any decision annexing De Pere pursuant to this petition that ... it acknowledges and agrees to all of the terms and condition[s] set forth in the Agreement

¶6 Rockland objected to the annexation agreement both at the public hearing and during a subsequent comment period, asserting the agreement would illegally discriminate against Rockland by requiring it to annex to De Pere to receive sewer service from GBMSD. The Commission’s decision acknowledged and rejected Rockland’s objection.

¶7 Rockland sought WIS. STAT. ch. 227 review of the Commission’s annexation decision. The circuit court agreed with Rockland that the Commission exceeded its statutory annexation authority by adopting paragraph 8.13 of the annexation agreement. The court stated, “I’m satisfied that the inclusion of Section 8.13 was a discriminatory act by a sewerage district. I’m satisfied it was outside the statutory enabling authority, and I’m going to adopt the arguments set forth in [Rockland’s] brief.”

¶8 After inquiring of the parties whether it would be best to reverse the Commission’s decision entirely or to modify it, the circuit court struck paragraph 8.13 and affirmed the remainder of the decision and agreement.⁴ After the circuit court’s decision, De Pere sought a stay to move to intervene, and subsequently moved to “appear specially for the purpose of invalidating judgment.” The court denied De Pere’s motion to appear. De Pere appeals that order. De Pere and GBMSD both appeal the judgment modifying and affirming the annexation decision.

⁴ At the April 2009 hearing, the circuit court explained it modified, rather than reversed, the annexation decision in order to preserve a bid process that was already underway. GBMSD represented that \$30 million worth of construction projects would be held up and stimulus funds would be lost if the annexation decision was not affirmed. Neither party objected to the court’s selection of modification, rather than reversal, as the remedy.

DISCUSSION

¶9 We first address De Pere’s challenge to the order denying its motion to appear in the WIS. STAT. ch. 227 proceeding. In its brief, De Pere acknowledges it is appealing from both the order denying its motion to appear and the judgment modifying the Commission’s annexation decision. De Pere’s brief, however, contains no assertion, much less argument, that the circuit court erred by denying De Pere’s motion to appear. Then, in its reply brief, De Pere states it “has not and does not seek to intervene in the underlying administrative review action.” We view this as a concession that De Pere was not a party to the ch. 227 proceeding and has abandoned its position that it had a right to intervene or appear. Because the present appeal is otherwise from the final judgment of the ch. 227 proceeding, De Pere is not a proper party on appeal.⁵ Therefore, we dismiss De Pere’s appeal.

¶10 We next address GBMSD’s challenges to the circuit court judgment modifying the Commission’s annexation decision. GBMSD first argues Rockland lacked standing to petition for WIS. STAT. ch. 227 review or forfeited its appellate arguments. Because we ultimately reverse the judgment on the merits, we need not address GBMSD’s standing and forfeiture arguments. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

⁵ “A person who is not a party to an appeal may file in the court of appeals a petition to intervene in the appeal.” WIS. STAT. RULE 809.13. De Pere has not, however, moved to intervene in this appeal.

¶11 In agency appeals, we review the decision of the agency, not that of the circuit court. *Estate of Hagenstein ex rel. Klemmer v. DHFS*, 2006 WI App 90, ¶19, 292 Wis. 2d 697, 715 N.W.2d 645. An agency's factual findings will be upheld on appeal if supported by substantial evidence. *Id.* Review of the agency's decision is confined to the record. WIS. STAT. § 227.57(1); *Barnes v. DNR*, 178 Wis. 2d 290, 302, 506 N.W.2d 155 (Ct. App. 1993), *aff'd*, 184 Wis. 2d 645, 516 N.W.2d 730 (1994). The nature and scope of an agency's authority is a matter of statutory interpretation or construction. *City of Appleton v. Transportation Comm'n*, 116 Wis. 2d 352, 357, 342 N.W.2d 68 (Ct. App. 1983). Administrative agencies have only such power as is expressly conferred or necessarily implied by the statutes under which they operate. *Id.* at 357-58. Any reasonable doubt about whether an agency has power implied by a statute should be resolved against the exercise of such authority. *Id.* at 358.

¶12 GBMSD argues the Commission decision complied with the statutory annexation standards and, therefore, as an act of legislative discretion, is not subject to further review by the courts. We reject that argument for two reasons.

¶13 First, GBMSD's argument is incomplete and misleading because it addresses only two of the three statutory criteria. When a municipality petitions to be added to a metropolitan sewerage district's territory, the process is governed by WIS. STAT. § 200.15(2), which states in relevant part:

Upon receipt of the petition ..., the commission shall hold a public hearing The commission may approve the annexation upon a determination that the standards of ss. 200.05(4)(b) and (c) and 200.15(3) are met. Approval actions by the commission under this section shall be subject to review under ch. 227.

WISCONSIN STAT. § 200.05(4)(b), (c), in turn, provide:

(b) The [annexation to] the district will promote sewerage management policies and operation and will be consistent with adopted plans of municipal, regional and state agencies; and

(c) The [annexation to] the district will promote the public health and welfare and will effect efficiency and economy in sewerage management, based upon current generally accepted engineering standards regarding prevention and abatement of environmental pollution and federal and state rules and policies in furtherance thereof.

The third standard, found in WIS. STAT. § 200.15(3), provides:

Annexations ... may be subject to reasonable requirements as to participation by newly annexed areas toward the cost of existing or proposed district facilities.

¶14 GBMSD argues the Commission decision must be affirmed because the Commission determined the two standards of WIS. STAT. § 200.05(4)(b) and (c) were satisfied. But GBMSD fails to acknowledge, much less address, the third standard regarding a commission's authority to impose reasonable cost requirements on the *newly annexed areas*. Because this is the only provision granting authority to impose conditions as part of the annexation approval action, one might reasonably argue that a commission lacks the authority to impose any requirements or restrictions on previously annexed areas. However, as we discuss below, we do not perceive this to be Rockland's argument.⁶

⁶ To the extent Rockland does contend the third standard restricts a commission's authority to impose requirements on areas already within a sewerage district, it fails to adequately develop the argument. See *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we will not decide issues that are not, or inadequately, briefed).

¶15 Second, GBMSD’s failure to address the third factor aside, we cannot accept its argument that the scope of WIS. STAT. ch. 227 review is limited only to reviewing the Commission’s application of the three statutory annexation standards. WISCONSIN STAT. § 227.57 sets forth the applicable scope of review. Rockland argues, and we agree, that we may also determine whether the Commission acted beyond its authority. Clearly, for example, the Commission could not have authorized a new casino or imposed a stadium tax as part of its annexation approval action, even if the three annexation criteria were satisfied. As relevant here, WIS. STAT. § 227.57(8)⁷ states: “The court shall reverse or remand the case to the agency if it finds that the agency’s exercise of discretion is outside the range of discretion delegated to the agency by law”

¶16 We turn now to Rockland’s argument for reversing or modifying the Commission’s decision. Rockland asserts paragraph 8.13, which impairs its ability to connect to GBMSD sewers, unfairly discriminates against Rockland because all District rules must be applied consistently throughout a sewerage district’s territory. Rockland cites numerous sections within WIS. STAT. ch. 200, from WIS. STAT. §§ 200.31 through 200.59, that Rockland believes set forth a district’s powers. Particularly, Rockland relies on WIS. STAT. §§ 200.37 and 200.45, which concern connections to the sewerage system and district rulemaking, respectively.

⁷ Rockland cites, generally, multiple subsections of WIS. STAT. § 227.57 for the proposition that the circuit court had the discretion to choose whether to modify or to reverse the Commission’s decision. However, Rockland argues only that the Commission exceeded the scope of its authority. That argument comes under the purview of subsec. 227.57(8).

¶17 However, as GBMSD aptly points out, specifically in regard to §§ 200.37 and 200.45, Rockland fails to comprehend ch. 200’s general structure and application. WISCONSIN STAT. §§ 200.01 through 200.15 are located in subchapter I, titled “Districts Generally.” Subchapter II, titled “Districts Including 1st Class Cities,” in turn, contains WIS. STAT. §§ 200.21 through 200.65. Thus, generally speaking, the sections Rockland cites are inapplicable because GBMSD’s territory does not include a first class city.⁸

¶18 Instead, GBMSD’s powers and duties are set forth in WIS. STAT. § 200.11, which is conspicuously titled, “Powers and duties.” Thus, connections to the sewerage system are governed not by WIS. STAT. § 200.37, but by § 200.11(3), which, again, is conspicuously titled, “Connections with system.” As to rulemaking, WIS. STAT. § 200.11(1)(d) provides: “The commission may adopt rules for the supervision, protection, management and use of the systems and facilities operated by the district.” As it happens, however, § 200.11(1)(d) adopts the rulemaking section set forth for first class cities, stating: “Rules of the district shall be adopted and enforced as provided by s. 200.45.”

¶19 Thus, it appears Rockland is fortuitously correct that WIS. STAT. § 200.45 governs GBMSD’s rulemaking. WISCONSIN STAT. §§ 200.11(1)(d) and 200.45(1) both grant sewerage districts the authority to adopt rules concerning connections to, and use of, the district’s sewerage system. However, Rockland

⁸ To be classified a first class city, a city must have a population of at least 150,000. WIS. STAT. § 62.05.(1)(a). We take judicial notice of the widely known fact that Milwaukee is the only first class city in the state. *See* Wisconsin Blue Book, 249 (2009-10), <http://www.legis.wisconsin.gov/lrb/bb/09bb/pdf/243-252.pdf>. (“Milwaukee currently is the only ‘first class’ city. Although Madison meets the population requirements to change from ‘second class’ to ‘first class,’ it has not chosen to do so.”).

does not argue that GBMSD lacked authority, generally, to adopt such rules, or, specifically, to do so in the context of an annexation approval action. Instead, Rockland argues paragraph 8.13 of the annexation agreement was such a rule, and that it violates WIS. STAT. § 200.45(1)(b), which provides: “The rules shall apply throughout the territory served by the sewerage system”⁹

¶20 While Rockland curiously fails to cite or discuss it, GBMSD has adopted a “GBMSD Sewer Use Ordinance,” pursuant to its WIS. STAT. § 200.11(1)(d) rulemaking authority. *See* GREEN BAY METROPOLITAN SEWERAGE DISTRICT, WIS., GBMSD SEWER USE ORDINANCE §§ 1.05, 1.30 (Jan. 2006), <http://www.gbmsd.org/resources/seweruseordinance.pdf>. In fact, GBMSD SEWER USE ORDINANCE § 1.10(1) provides: “It is the intent and purpose of these rules to ... establish rules regulating connections to the GBMSD sewerage system.” (Emphasis omitted.) A cursory review of the ordinance reveals that GBMSD requires an individualized application and review process for all municipality sewer connection requests. *See* GBMSD SEWER USE ORDINANCE §§ 4.05, 4.10, 4.12.

¶21 However, even if we were to ignore Rockland’s improper reliance on WIS. STAT. § 200.37, rather than WIS. STAT. § 200.11(3) and the GBMSD Sewer Use Ordinance, there is still a fatal flaw in Rockland’s argument. Because Rockland challenges the *validity* of the paragraph 8.13 rule regulating Rockland’s connection to the district’s sewerage system, instead of GBMSD’s *authority to create rules* via an annexation approval action, Rockland’s challenge is brought in

⁹ Although not cited by Rockland, we observe WIS. STAT. § 200.45(1)(a) similarly states: “Such rules are applicable to all users.”

the wrong forum. Rockland must challenge the rule’s validity in a declaratory judgment action. The sewerage district rulemaking statute on which Rockland relies provides: “Except as provided in [WIS. STAT. §] 227.40(2), the exclusive means of judicial review of the validity of a rule is an action for declaratory judgment as to the validity of the rule brought in the circuit court” WIS. STAT. § 200.45(1)(d).¹⁰ We therefore reverse the circuit court judgment modifying the Commission’s annexation approval action decision. The Commission’s decision is affirmed.

By the Court.—Judgment reversed; appeal dismissed.

Not recommended for publication in the official reports.

¹⁰ WISCONSIN STAT. § 227.40(2) permits the determination of a rule’s validity in a WIS. STAT. § 227 review proceeding “when material therein.” Because here the annexation approval action involved merely the *creation*, rather than *application*, of the paragraph 8.13 sewer connection rule, the validity of the rule is not material in the present action.

