

STATE OF MICHIGAN
COURT OF APPEALS

CHIPPEWA COUNTY BOARD OF ROAD
COMMISSIONERS,

UNPUBLISHED
October 9, 2012

Plaintiff-Appellee,

v

No. 302486
Chippewa Circuit Court
LC No. 10-010796-AA

DEPARTMENT OF NATURAL RESOURCES &
ENVIRONMENT,

Defendant-Appellant.

Before: SAAD, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Respondent Michigan Department of Natural Resources and Environment (the Department)¹ appeals by leave granted the January 21, 2010, circuit court order remanding this case for an administrative evidentiary hearing concerning a dispute between the Department and petitioner, Chippewa County Board of Road Commissioners (the County). On appeal, the Department argues that the circuit court lacked subject matter jurisdiction because the County did not exhaust its administrative remedies. We reverse and remand.

I. FACTS

The County graded and lifted a section of road in a regulated wetlands area and altered an inland stream as part of a heavy maintenance project, without receiving the necessary permits. On April 6, 2007, the County submitted an after-the-fact application for a permit to conduct the project under Part 301² and Part 303³ of the Natural Resources and Environmental Protection

¹ At the time this case commenced, Executive Order No. 2009-45 had consolidated the Michigan Department of Environmental Quality with the Michigan Department of Natural Resources and Environment. Executive Order No. 2011-1 reestablished the Michigan Department of Environmental Quality as a separate entity on March 13, 2011.

² MCL 324.30101 *et seq.*

³ MCL 324.30301 *et seq.*

Act. On June 18, 2007, the Department issued a permit that allowed the County to widen the road from 37 feet to 48 feet and to install a wider culvert on a tributary to the McMahon Creek. The permit also required the County to create 0.67 acres of wetlands, to mitigate the project's impact on 0.45 acres of wetlands.

The County filed a petition for a contested case hearing, challenging the mitigation requirement. The County then filed a motion for summary disposition, arguing that an activity under Part 301, which regulates wetland protection, is exempt from an additional regulation under Part 303, which regulates inland lakes and streams. The hearing referee denied on the County's motion on July 21, 2008.

On November 3, 2009, the County's counsel sent the hearing referee a letter, which requested permission to withdraw its petition for a contested hearing:

This letter is and [sic] to memorialize the conversations I had with opposing counsel . . . and with your office, regarding the remaining issues in [this case]. In short, [the County] withdraws that portion of its Petition for a Contested Case Hearing as it relates to MCL 324.30305(2)(k). As you know, you have previously ruled on [the County's] Motion for Summary Disposition as it relates to 324.30305(1), and that ruling along with [the County's] right to appeal is preserved.

On November 3, 2009, the referee issued an order of dismissal, which reads in full:

In a letter dated November 3, 2009, [the County's counsel] indicated [the County] is withdrawing its petition as to the remaining issue in this contested case. This Order is entered based on that filing.

NOW THEREFORE, IT IS ORDERED:

The petition of [the County] is DISMISSED.

On January 4, 2010, the County filed a petition for circuit court review of "the interlocutory Opinion and Order entered July 21, 2008 that was made final by the Order of Dismissal entered November 3, 2009." The Department responded that the circuit court did not have subject matter jurisdiction to hear the petition, because the County did not exhaust its administrative remedies. The circuit court recognized that the County did not exhaust its administrative remedies, but remanded the case for an evidentiary hearing. The Department applied for leave to appeal in this Court, which we granted.

II. SUBJECT MATTER JURISDICTION

A. STANDARD OF REVIEW

We review de novo questions of law, including issues of statutory interpretation and whether a circuit court had subject matter jurisdiction to review an agency decision.⁴

B. SUBJECT MATTER JURISDICTION

A circuit court has “appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law.”⁵ “When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void.”⁶

The Administrative Procedures Act and the Department’s administrative rules govern the proceedings of the Department.⁷ The Department’s decision is not final until a party has exhausted its administrative remedies, as evidenced by a final order from the agency’s final decision maker.⁸ The circuit court has subject matter jurisdiction to review the case if the party has exhausted its remedies:

When a person has exhausted all administrative remedies available within an agency, *and* is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. . . . A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency’s final decision or order would not provide an adequate remedy.^[9]

The circuit court may also review an agency’s declaratory ruling.¹⁰

⁴ *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *Sierra Club Mackinac Chapter v Dep’t of Environmental Quality*, 277 Mich App 531, 544; 747 NW2d 321 (2008).

⁵ Const 1963, art 6, § 13.

⁶ *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1998); *Fox v Univ of Michigan Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965).

⁷ MCL 24.201 *et seq.*; 2003 AACS, R 324.1(e); 2003 AACS, R 324.3(2); 2003 AACS R 324.74(5).

⁸ 2003 AACS, R 324.74(5).

⁹ MCL 24.301 (emphasis supplied).

¹⁰ MCL 24.263.

An order is only a final order after agency officials issue a proposal for decision; the proposal is served on the parties; each party is given an opportunity to file exceptions to the proposal for decision; and either (1) no party files exceptions, or (2) the agency reviews the proposal for decision after the parties have filed exceptions, and issues a final determination.¹¹

C. APPLYING THE STANDARDS

We conclude that the County did not exhaust its administrative remedies, and thus the circuit court did not have subject matter jurisdiction to consider the County's claim. The circuit court may review an agency's decision under MCL 24.201 if (1) the party has exhausted its administrative remedies *and* the decision is a final decision or order, or (2) the decision is an intermediate ruling *and* the agency would be unable to provide an adequate remedy if the circuit court failed to review it.

The order that the County appealed from—dismissing the County's petition at its request—did not exhaust the County's administrative remedies or follow the procedures that would have made it a final order. The order was not reached after a contested hearing, there was no proposed decision, the parties did not file exceptions, there was no review and final determination, and no waiver of any of these procedures. In short, there was no compliance with the procedures necessary to render the order “a final decision or order in a contested case.” Indeed, the circuit court explicitly determined that the County's appeal was *not* of a final order, and that the County did not exhaust its administrative remedies.

Instead, the County attempted to appeal the referee's denial of summary disposition, which was an intermediate ruling. The circuit court appropriately determined that the County had not followed the appropriate procedures for an interlocutory appeal. The circuit court has jurisdiction to hear an appeal of an intermediate order only when a party shows that the agency would be unable to provide an adequate remedy if the circuit court does not review the ruling. The County made no such argument before the circuit court.

Finally, the circuit court may review a declaratory ruling of the Department.¹² However, because the parties did submit uncontested facts and ask specifically about the applicability of Part 301 and 303 to those facts,¹³ the County did not follow those procedures either. Thus, there was no declaratory ruling over which the circuit court could exercise subject matter jurisdiction.

The circuit court properly determined that the County had not exhausted its administrative remedies, and the circuit court does not have the jurisdiction to hear an appeal

¹¹ MCL 24.281; 2003 AACCS, R 324.71-75.

¹² MCL 24.263.

¹³ MCL 24.263; 2003 AACCS, R 324.81.

unless the party appealing has exhausted its administrative remedies.¹⁴ At that point, the circuit court should have recognized the limits of its jurisdiction, and dismissed the petition.¹⁵

The County argues that the Department has waived this issue because the Department did not challenge its “express preservation of its right to appeal.” Even assuming that the referee’s order referred to the County’s attempt to preserve a right of appeal and that the Department had the opportunity to challenge this issue below, it is well-established that a party’s failure to challenge subject matter jurisdiction does not bar a court’s consideration of the issue.¹⁶ “Parties cannot give a court jurisdiction by stipulation where it otherwise would have no jurisdiction.”¹⁷ Thus, the County’s uncontested attempt to preserve a right to appeal did not give the circuit court subject matter jurisdiction to hear and decide the appeal.

We reverse and remand for the circuit court to enter an order dismissing the County’s petition. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Michael J. Kelly

¹⁴ MCL 24.301.

¹⁵ *Bowie*, 441 Mich at 56.

¹⁶ *Id.*; *In re Estate of Fraser*, 288 Mich 392, 394; 285 NW 1 (1939).

¹⁷ *Bowie*, 441 Mich at 56 (internal citation omitted).