

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 2007

David R. Schanker
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 No. 2006AP943

**Cir. Ct. Nos. 2005CV669
2004CV719**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

WASHINGTON COUNTY WISCONSIN,

PLAINTIFF,

V.

VILLAGE OF JACKSON WISCONSIN,

DEFENDANT-RESPONDENT,

ST. JOSEPH'S COMMUNITY HOSPITAL OF WEST BEND, INC.,

INTERVENING DEFENDANT-APPELLANT.

VILLAGE OF JACKSON,

PLAINTIFF-RESPONDENT,

V.

ST. JOSEPH'S COMMUNITY HOSPITAL OF WEST BEND, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: PAUL V. MALLOY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 ANDERSON, J. St. Joseph's Community Hospital of West Bend, Inc. and the Village of Jackson entered into a contract whereby the Village agreed to provide water and sewer services to the Hospital in exchange for \$1,080,000 in fees. The Hospital now refuses to pay the fees. The Hospital, pointing to extrinsic evidence, contends that these charges are actually impact fees imposed in violation of WIS. STAT. § 66.0617 (2005-06)¹ and therefore the contract cannot be enforced. The Public Service Commission of Wisconsin argues in its nonparty brief that we should apply the doctrine of primary jurisdiction and defer to its expertise on public utility questions.

¶2 We conclude that because the case involves the interpretation of a contract, a question of law with which we have significant experience, the doctrine of primary jurisdiction does not compel us to defer to the PSC. We further conclude that the contract unambiguously provides that the charges are connection fees, not impact fees, and that the contract is enforceable. We affirm the judgment of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

FACTS

¶3 The Village and the Hospital entered into the contractual arrangement for water and sewer services in 2003.² In return for the services, the Hospital agreed to pay the Village all Village fees for ninety water residential equivalency units (REUs) and ninety sewer REUs. The agreement set the rate per REU both for water and for sewer at \$6000. The agreement required the Hospital to pay the total amount due, or \$1,080,000, at the time of the issuance of the occupancy permit for the facilities it planned to construct on its property. Provision 1M, the contract provision reciting these fees, does not classify them. However, the subsequent provision in the contract, 1N, specifically refers to the fees as “connection fees.”³

² The Hospital owns land in the Town of Polk, Washington County. A 1999 agreement between the Village of Jackson, the Town of Polk, the Town of Jackson and Washington County obligated the Village of Jackson to make water and sewer service available to property owners in portions of the Town of Polk and Town of Jackson.

³ The two provisions together read:

(continued)

¶4 In 2005, the Village filed a complaint against the Hospital. The Village claimed it had billed the Hospital for the \$1,080,000 in REU charges, but that the Hospital refused to pay. The Hospital responded that the fees assessed in the agreement violated the impact fee and public utility statutes and the Village could not collect them.

¶5 The Village also sought an injunction that would prevent the Hospital from proceeding with sewer and water plans for an addition to the Hospital. Rather than connect the addition's water and sewer pipes directly to the

[1]M. At the time of the issuance of the occupancy permit for the facilities to be constructed upon its property (per the appropriate occupancy permit), the Hospital will pay to the Village all Village fees for 90 water residential equivalency units (REUs) and 90 sewer residential equivalency units (REUs). The rate per REU for water shall be \$6,000.00 and the rate per REU for sewer shall be \$6,000.00 per Village resolution (see attached resolution). The amount of REUs for sewer and water shall be reviewed and recalculated two years after the first use of sewer and water services by the Hospital and the number of REUs shall be adjusted according to actual use. If the Hospital's use is more than 90 water REUs and/or 90 sewer REUs, the Hospital shall pay for the increase at the rate of \$6,000.00 per REU and if the use is less, the Village shall credit the excess REU payment of the Hospital against current service charges or the Hospital can use the same for credit against a future increase in use resulting in additional REUs. After the two year adjustment period, the REUs will be reviewed and recalculated on an annual basis and the Hospital will be assessed or credited additional REUs based upon the actual use by the Hospital.

N. If the Village and the Town of Polk enter into a revenue sharing agreement and cooperative boundary plan prior to the issuance of the occupancy permit for the constructed hospital facilities, the terms of which are materially the same as that between the Village and the Town of Jackson or as otherwise acceptable to the Village in Village's sole discretion, and which agreement provides for lower water and sewer REU connection fees than those charged against the Hospital in Section 1M above; then the amount to be paid by the Hospital shall be recalculated using such lower REU connection fees.

Village's water and sewer services through separate laterals, the Hospital intended to extend the sewer and water pipes from the Hospital to the addition.

¶6 The parties filed cross motions for summary judgment. The trial court denied the Hospital's motion for summary judgment. The court ordered the Hospital to pay the Village the \$1,080,000 in REU charges, among other things. The Hospital appeals from this portion of the court's decision.

¶7 The trial court further declared that the Hospital could proceed with its sewer and water plans for the addition without establishing separate laterals so long as the Hospital placed a permanent transfer restriction on the deed. The Village filed a cross-appeal on this issue, but the parties have since voluntarily dismissed the cross-appeal.

¶8 Around the same time the case began winding its way through the circuit court, the Hospital filed a complaint with the PSC. The Hospital alleged that the Village was requiring it to pay fees that were not in the Village's filed rates and that were unjust, unreasonable and discriminatory. The Hospital also challenged the Village's requirement that it construct the water and sewer infrastructure for the addition.

¶9 After briefing by the parties in this appeal, the PSC filed a motion seeking leave to file a nonparty brief. The PSC maintained that it had primary jurisdiction over the dispute between the Hospital and the Village because it has expertise regarding disputes over municipal water and sewer services rates and conditions. We granted the PSC's motion.

STANDARD OF REVIEW

¶10 We review summary judgment decisions de novo, using the same well-known methodology as the circuit court. See *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. We will uphold the circuit court’s summary judgment decision when the prevailing party is entitled to judgment as a matter of law and where no genuine issue of material fact exists. *Id.*, ¶24. The interpretation of a statute and the construction of a contract are questions of law, subject to de novo review. See *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 233, 568 N.W.2d 31 (Ct. App. 1997) (statutory interpretation); *Rock Lake Estates Unit Owners Ass’n, Inc. v. Lake Mills*, 195 Wis. 2d 348, 355, 536 N.W.2d 415 (Ct. App. 1995) (contract interpretation).

DISCUSSION

Primary Jurisdiction

¶11 We begin our analysis by dispensing with the PSC’s primary jurisdiction claim. Primary jurisdiction is a doctrine of comity. *Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 420, 491 N.W.2d 484 (1992). Under the primary jurisdiction doctrine, when an administrative agency and the court both have jurisdiction over an issue, the court has the discretion to defer to the agency to resolve the issue. See *id.* The doctrine is based on the principle that “[a]dministrative agencies are designed to provide uniformity and consistency in the fields of their specialized knowledge [and] [w]hen an issue falls squarely in the very area for which the agency was created, it is sensible to require prior administrative recourse before a court decides the issue.” *Id.* at 421.

¶12 Our supreme court has discussed the doctrine of primary jurisdiction in several cases and has distinguished those issues best left to administrative agencies and those best resolved by the courts. *Id.* at 420-21. The court has held that when factual issues are significant, the better course may be for the court to decline jurisdiction; when statutory interpretation or issues of law are significant, the court may properly choose in its discretion to entertain the proceedings. *Id.*

¶13 This case involves the interpretation of a contract. Construction of a contract is a question of law to which we give no deference to the decision of an administrative agency. *See Wisconsin End-User Gas Ass'n v. PSC*, 218 Wis. 2d 558, 565, 581 N.W.2d 556 (Ct. App. 1998) (concluding that the courts are more experienced in contract construction than are administrative agencies). Indeed, matters of contract interpretation come before this court with frequency, and it is an area of law in which we have a great deal of experience and expertise. *Id.* We, therefore, exercise our discretion to retain jurisdiction and resolve the merits of the case.

Impact Fees

¶14 In order to impose and collect impact fees, a municipality must adhere to the requirements of WIS. STAT. § 66.0617. The Hospital contends that the REU charges are actually impact fees and the Village cannot collect impact fees pursuant to their agreement because it has not complied with § 66.0617.

¶15 To support its argument that the REU charges are in fact impact fees, the Hospital directs our attention to the statements and testimony of various Village employees, officials and attorneys in which they referred to the REU charges as impact fees. However, the law is clear that, unless the contractual language is ambiguous, the contract must be enforced as written. *Yee v. Giuffre*,

176 Wis. 2d 189, 192-93, 499 N.W. 2d 926 (Ct. App. 1993). The type of extrinsic evidence the Hospital offers is admissible only when it clarifies an existing ambiguity in a written contract and cannot be admitted to establish an understanding at variance with the terms of the written document. See *Stevens Constr. Corp. v. Carolina Corp.*, 63 Wis. 2d 342, 354, 217 N.W.2d 291 (1974); *Huml v. Vlazny*, 2006 WI 87, ¶52, 293 Wis. 2d 169, 716 N.W.2d 807.

¶16 Here, the contract does not even mention impact fees. Rather, the document on its face unambiguously classifies the water and sewer REU charges as “connection fees.” In view of this lack of ambiguity as to the nature of the REU charges, we will not permit the Hospital to circumvent its obligations under the negotiated contract. The Hospital does not have a defense of duress or coercion. Further, the Hospital has not demonstrated that the Village lacked the authority to impose connection fees. The contract provision is enforceable as it stands.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

