STATE OF MICHIGAN

COURT OF APPEALS

DEANNA HUGHES, HEATHER SCHIELE, and BAN MICHIGAN FRACKING, Plaintiffs-Appellants,	UNPUBLISHED February 11, 2014
v	No. 312902 Ingham Circuit Court
DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant-Appellee.	LC No. 12-000497-CE

Before: BOONSTRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

In this case involving the process known as hydraulic fracturing (or "fracking"),[1] plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition, thereby affirming defendant's construction of Mich Admin Code, R 324.102(x). We affirm.

On April 27, 2012, plaintiffs e-mailed to defendant their request for a declaratory ruling that Rule 324.102(x), which defines the term "injection well," includes wells completed using hydraulic fracturing, i.e. "frack wells." See Mich Admin Code, R 324.81. Plaintiffs contended that a frack well is an injection well and is subject to the environmental regulations applicable to injection wells. On June 28, 2012, defendant issued its declaratory ruling. Defendant determined that a frack well is not an injection well under Rule 324.102(x) because a frack well injects fluids for the "initial stimulation" of oil or gas, whereas Rule 324.102(x) limits injection wells to wells that are used for disposal, storage, or secondary recovery of oil or gas.

Subsequently, plaintiffs filed a second supplemental complaint pursuant to MCL 24.264. Plaintiffs alleged that the declaratory ruling was devoid of any legal significance because it was

[1] According to the undisputed facts from the administrative proceedings, "[h]ydraulic fracturing is the one-time procedure that is part of the completion of some types of oil or natural gas wells. . . . Hydraulic fracturing involves pumping water at high pressure to create fractures in reservoir rock that allow the oil or natural gas to flow more freely to the well bore."

issued 62 days after their request for a declaratory ruling, whereas Rule 324.81 obligates defendant to respond to a request for a declaratory ruling within 60 days. Plaintiffs requested that the trial court disregard the declaratory ruling and issue a declaratory judgment holding that a frack well is an injection well under Rule 324.102(x).[2] Cross-motions for summary disposition were thereafter filed.

The trial court granted defendant's motion for summary disposition and denied plaintiffs' motion for summary disposition. The trial court first held that the declaratory ruling was legally valid because it was issued precisely 60 days after plaintiffs delivered a paper copy of their request for a declaratory ruling to defendant. The trial court then held that a frack well is not an injection well as defined by Rule 324.102(x). The trial court reasoned that under the administrative regulations governing the extraction of oil and gas from the ground, there is a distinction between an "oil and gas well" and an "injection well." The trial court explained that a well used for the initial recovery of hydrocarbons is an oil and gas well, and a well used for the secondary recovery of hydrocarbons is an injection well. The grant of summary disposition is now challenged. We review the grant or denial of summary disposition de novo. *Calhoun Co v Blue Cross & Blue Shield of Michigan*, 297 Mich App 1, 11; 824 NW2d 202 (2012).

Plaintiffs argue that the declaratory ruling issued has no legal effect because Rule 324.81(2) requires action within 60 days. Construction of administrative rules is governed by the principles of statutory construction. *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm*, 489 Mich 27, 37; 799 NW2d 155 (2011). Rule 324.81 reads in relevant part as follows:

> (1) An interested person requesting a declaratory ruling as to the applicability of a licensing statute, rule, or order administered by the department to an actual state of uncontested facts may do so on a form provided by the department. Requests regarding enforcement issues are not a proper subject for a declaratory ruling. . . .
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> (2) Within 60 days of receipt of the request, the department shall take 1 of the following actions:
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> (a) Deny the request and state the reasons for the denial.
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> (b) Grant the request and issue the declaratory ruling.

[2] MCL 24.264 provides in relevant part that the validity or applicability of a rule may be determined by the circuit court in an action for declaratory judgment if "the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously."

(c) Advise the person requesting the ruling that further clarification of the facts must be provided, or that the department requires additional time to conduct a review, including, but not limited to, an on-site investigation.

(3) If subrule (2)(c) of this rule is invoked, the department shall either deny or grant the request within 60 days after receiving satisfactory clarification of facts from the requesting person or from the date the department notifies the requesting person of the need for additional time to investigate.

First, the 60-day period was not triggered because Rule 324.81(2) refers to the "receipt of the request," not the sending of the request. Defendant only concedes that the e-mail was sent on April 27, 2012. In addition, Rule 324.81(1) requires that the request for a declaratory ruling be submitted "on a form provided by the department," which suggests that the request must be in written form. Moreover, plaintiffs' request for a declaratory ruling was styled in the form of a complaint that would be prepared by an attorney and filed in court. There is no indication that the request was submitted on a form provided by defendant.

Even if the time limit was triggered, no error occurred. In *People v Smith*, 200 Mich App 237; 504 NW2d 21 (1993), this Court summarized the principles governing statutory time limits as follows:

> A great many cases involve the determination of whether time provisions shall have mandatory or directory effects. This includes statutes that limit things to be done within a certain time or prescribe the date on which a thing is to be done. Notwithstanding legislative intent, the determination is based on grounds of policy and equity to avoid harsh, unfair or absurd consequences.
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> It is difficult to conceive of anything more absolute than a time limitation. And yet, for obvious reasons founded in fairness and justice, time provisions are often found to be directory where a mandatory construction might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest. *The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory.* However, if the time period is provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed.
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> *A provision requir[ing] a decision of a court, referee, administrative agency, or the like, to be entered or filed within a certain time has been held to be directory*. [*Id*. at 242, quoting 3 Sutherland, Statutory Construction (5th ed), § 57.19, pp 47-48 (omission and brackets in *Smith*; emphasis added).]

When a statutory time limit is directory, not mandatory, failure to comply with the time limit generally does not compel a certain outcome. See *People v Yarema*, 208 Mich App 54, 57; 527 NW2d 27 (1994). Here, Rule 324.81 is directory because it does not contain any language

compelling or prohibiting a certain outcome on a request for a declaratory ruling when defendant fails to take action on the request within 60 days. While Rule 324.81(2) uses the word "shall," the absence of any language prohibiting defendant from issuing a declaratory ruling beyond the 60-day period shows that defendant is not prohibited from doing so. See *Smith*, 200 Mich App at 242.

Second, plaintiffs argue that the trial court erred in disregarding their hearsay evidence that industry experts orally agreed at an industry conference that frack wells are used to "increase the ultimate recovery of hydrocarbons," which is language contained in Rule 324.102(x). We disagree. A trial court cannot decide a motion for summary disposition on the basis of inadmissible hearsay. *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 254; 805 NW2d 217 (2011). There is no dispute that the statements reflected in the affidavit at issue were inadmissible hearsay, so the trial court correctly refused to consider these statements.

We now turn to the central issue in this case—the construction of Rule 324.102(x). "As a general rule, [the Court] reviews de novo the interpretation and application of unambiguous statutes and administrative rules." *City of Romulus v Michigan Dep't of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003). Further, construction of statutes and administrative rules presents a question of law reviewed de novo. *Schreur v Dep't of Human Servs*, 289 Mich App 1, 9; 795 NW2d 192 (2010), aff'd in part, vacated in part on other grounds 488 Mich 1042 (2011). An agency declaratory ruling, when the facts are undisputed, is reviewed to determine "whether the ruling was in violation of the constitution or a statute." *Sierra Club Mackinac Chapter v Dep't of Environmental Quality*, 277 Mich App 531, 549; 747 NW2d 321 (2008).

Rule 324.102(x) reads as follows:

> "Injection well" means a well used to dispose of, into underground strata, waste fluids produced incidental to oil and gas operations or a well used to inject water, gas, air, brine, or other fluids for the purpose of increasing the ultimate recovery of hydrocarbons from a reservoir or for the storage of hydrocarbons.

Under the plain language of the rule, an "injection well" is either "a well used to dispose of . . . waste fluids" or "a well used to inject . . . fluids for the purpose of increasing the ultimate recovery of hydrocarbons from a reservoir or for the storage of hydrocarbons." There is no contention that a frack well is not used to dispose of waste fluids or that it involves the storage of hydrocarbons. Thus, the issue here is whether a frack well is "a well used to inject . . . fluids for the purpose of increasing the ultimate recovery of hydrocarbons."

Rule 324.102(x) is unambiguous. A guiding principle of statutory construction (and thus construction of administrative rules) is that each word be given meaning. See *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 345; 745 NW2d 137 (2007). "This Court must consider both the plain meaning of the critical words or phrases, as well as their placement and purpose . . . ." *Id*. Rule 324.102(x) refers to "the purpose of increasing the recovery of hydrocarbons." The word "increase" means "to add something to or enlarge something already in existence." *Gwynn v McKinley*, 30 Cal App 381, 389; 158 P 1059 (1916). A newly constructed frack well does not add to or enlarge the recovery of hydrocarbons. Rather, it initiates the recovery of hydrocarbons

when recovery was nonexistent. Further, the use of the word "increasing" presupposes that the recovery of hydrocarbons already exists, as words that end in "-ing" suggest continuing action. See *Verizon New Jersey, Inc v Hopewell Borough*, 26 NJ Tax 400, 417 (2012). In other words, for a well to be categorized as an "injection well" under the contested language of Rule 324.102(x), the well must be used for the purpose of recovering hydrocarbons before and after the injection of fluid. Here, however, it is not disputed that the frack wells at issue are not used for the purpose of recovering hydrocarbons before the injection of fluid. Had Rule 324.102(x) been intended to encompass *all* recovery of hydrocarbons, not only the *increased* recovery of hydrocarbons, it could have simply read in relevant part, "the purpose of the recovery of hydrocarbons" or "the purpose of recovering hydrocarbons."

Accordingly, because a newly constructed frack well does not involve the continuing recovery of hydrocarbons, but rather the initial recovery of hydrocarbons when such recovery was nonexistent, the wells at issue here do not fall within the scope of the unambiguous language of Rule 324.102(x).

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald