STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1450

Waldorf Corporation, d/b/a RockTenn Company,
a Delaware corporation,
Relator,

vs.

Metropolitan Council,
Respondent.

Filed April 20, 2010
Writ of certiorari discharged
Crippen, Judge[*]

Metropolitan Council

Gary A. Van Cleve, Julie N. Nagorski, Larkin Hoffman Daly & Lindgren Ltd., Minneapolis, Minnesota (for relator)

Paul T. Meyer, Timothy C. Cook, Paul S. Almen, Hammargren & Meyer, P.A., Edina, Minnesota (for respondent)

Considered and decided by Lansing, Presiding Judge; Worke, Judge; and Crippen, Judge.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

Under Minnesota's statutory scheme governing management of the metropolitan wastewater sewage system, respondent Metropolitan Council is authorized to charge

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

local government units for wastewater discharges and for reducing reserve capacity of the system. Respondent grants credits to local government units that build reserve capacity to the system. Relator Waldorf Corporation, d/b/a RockTenn Company, an industrial user of the metropolitan system, disputes respondent's calculation of the number of credits made available by relator's reductions in wastewater discharge. Because it is evident as a matter of law, unrefuted by matters submitted for the record, that respondent's determination of credit entitlements is singularly in favor of the City of St. Paul and not a particular user, relator has no standing to dispute respondent's determination, and we discharge the writ.

FACTS

Respondent Metropolitan Council is responsible for the management of the metropolitan sewer system and for the allocation of the system's costs to the local government units that discharge sewage into it. Respondent developed the Service Availability Charge (SAC) program as a means to charge local government units for the cost of building reserve capacity into the system. Respondent imposes SAC for new or increased volume use of the sewer system upon local government units, which may recoup these costs by charging fees to property owners within their jurisdictions. SAC assessments are based on the maximum potential daily wastewater flow in each jurisdiction, which is based upon the usage of individual properties. A SAC unit is defined as 274 gallons of daily wastewater flow capacity, and units per property are assessed based on whether the property is residential, industrial, or commercial.

Respondent also grants credits (SAC credits) to local government units for permanent reductions in the wastewater capacity needs of individual properties. Local government units can use these credits to expand their use of the sewer system without paying additional SAC; in essence, SAC credits enable local government units to avoid double payment for using the same capacity that they had earlier removed from the system. SAC credits have no monetary value, and cannot be transferred between local government units without respondent's approval. When a local government unit receives SAC credits, the local government unit may designate these credits as site-specific, available only for the benefit of the property from which the credits arose, or as city-wide, available for use anywhere within the municipality.

Respondent established Grandparent SAC credits in reference to those users and industries that were connected to the metropolitan sewer system in 1973, when the SAC program was adopted. Grandparent SAC credits are determined based upon a property's 1973 wastewater volume, and have the effect of crediting these properties as though SAC had already been paid for them. But no Grandparent SAC credits are available for a property's non-contact clean water (NCCW) discharge, and respondent excludes a property's 1973 NCCW discharge volume from its total wastewater discharge volume when determining the Grandparent SAC credits attributable to that property.

Relator operates an industrial property that has existed in the City of St. Paul since before 1973. From 1982 through 1986, relator adopted measures to reduce its wastewater discharge. In January 1987, the city asked relator for documentation of its wastewater volume from 1973 to that date, so that the city could obtain SAC credits from respondent

for the reduction in relator's wastewater discharge. The city informed relator that it intended to use these credits for its combined sewer separation program. Relator provided the requested documentation to the city.

After receiving the documentation, representatives of the city met with respondent's representatives. Relator was not represented at this meeting, nor does it appear that relator participated any further in this process. Relator's documentation showed that its 1973 total wastewater discharge was the equivalent of 27,995 SAC units. But relator's NCCW discharge was not separately metered in 1973, so respondent estimated relator's 1973 NCCW discharge by averaging relator's 1982-86 NCCW discharge and arrived at an estimate of 10,239 SAC units. Subtracting relator's NCCW discharge from its total 1973 discharge, respondent determined that usage at relator's facility justified 17,756 Grandparent SAC credits. Because 5,968 of these credits could be attributed to relator's average total discharge from 1982 to 1986, 5,968 SAC credits were treated as site-specific for use at relator's facility, and respondent allocated the remaining 11,788 credits to the city.

In 1992, respondent calculated relator's "SAC Baseline," which is a measure of an industrial user's average daily wastewater discharge volume during the 1991 reporting period, and notified relator that its SAC Baseline was 5,804 SAC units. In 1999, respondent calculated relator's "Modified SAC Baseline," a calculation that could exceed the previously determined SAC Baseline and was directly affected by Grandparent SAC

credits.[1] In relator's case, its Modified SAC Baseline should have been 5,968, the number of Grandparent SAC credits the city assigned to relator in 1987. But respondent erroneously determined that relator had 29,971 potential Grandparent SAC credits.[2] Respondent did not notice this error until 2009, and continued to notify relator that its Modified SAC Baseline was 29,971.

This certiorari appeal arises from respondent's 2009 correction of relator's Modified SAC Baseline, which rested on respondent's 1987 Grandparent SAC credit determinations, reflecting relator's 1973 wastewater discharges. In February 2009, respondent conducted a review of relator's wastewater discharge to determine if relator had any excess SAC credits available for release to the city. Respondent discovered its 1999 error, and notified relator that it had reduced relator's Modified SAC Baseline from 29,971 to 5,970, which equaled relator's 5,968 Grandparent SAC credits plus two additional SAC credits.

Relator responded in a May 2009 letter, arguing that respondent's 1987 determination was incorrect and that respondent should have determined that its Modified SAC Baseline should reflect 29,971 Grandparent SAC credits attributable to relator's operations. Relator further argued that, subtracting the 11,788 credits taken by the city in 1987, 18,183 credits remained available for calculating relator's Modified SAC Baseline. And, because relator projected that it would need only 4,000 credits for its own use, due

[1] Respondent defined "Modified SAC Baseline" as "the greater of (1) the Baseline and any SAC units paid after 1991 or (2) paid SAC units plus any Grandparent Credit."

[2] Respondent explains that it committed this error by (1) overestimating relator's 1973 wastewater discharge volume, (2) underestimating relator's 1973 NCCW discharge volume, and (3) failing to make any adjustment for the SAC credits taken by the city.

to process improvements that further reduced relator's wastewater discharge, relator had 14,183 excess credits, with its prerogative to release these to the city. Respondent replied in a June 2009 letter, explaining the errors behind the 29,971 credit figure and asserting that its 1987 determination of relator's Grandparent SAC credits was correct.

Relator asked respondent for reconsideration of its decision, and the parties met on August 5, 2009 to discuss this request. Relator brought additional documents to this meeting, which respondent asserts had never been presented to it before that meeting. On August 7, before respondent informed relator that it had denied its request for reconsideration, relator filed its petition for certiorari review. Respondent objects, claiming that any SAC-credit entitlements in excess of those that have already been determined are entitlements of the city, that the city is the only party able to raise these arguments, and that relator has no standing.

D E C I S I O N

The threshold issue of standing to bring this appeal, raised by respondent, may be asserted at any time. *Stansell v. City of Northfield*, 618 N.W.2d 814, 818 (Minn. App. 2000), *review denied* (Minn. Jan. 26, 2001). "To have standing to petition successfully for writ of certiorari," a party "must articulate with a degree of clarity some legally cognizable interest" that has sustained injury in fact as a result of the agency action. *In re Sandy Pappas Senate Comm.*, 488 N.W.2d 795, 797 (Minn. 1992). The injury-in-fact requirement may be satisfied by economic injury or the prospect of economic injury. *In re Application of Crown CoCo, Inc.*, 458 N.W.2d 132, 135 (Minn. App. 1990), *review withdrawn* (Minn. Sept. 14, 1990). Mere participation in an agency's proceedings is

insufficient to confer standing upon a party to challenge the agency's determination in court. *Pappas*, 488 N.W.2d at 798.

In order to demonstrate that it has standing to pursue this appeal, relator must show that it had a legally cognizable interest in the SAC credits assigned to its facility. But under the scheme of law governing the subject, respondent is required by law to pay the estimated costs of operation, maintenance, and improvement to the metropolitan sewer system, and to allocate these costs, according to a "method determined by [respondent]," among all local government units that will discharge sewage. Minn. Stat. § 473.517, subd. 1 (2008). Although the city can designate site-specific credits, neither respondent's rules governing the SAC program, nor the statute authorizing it to manage the metropolitan sewer system, provide that an industrial user is entitled to SAC credits.

Respondent is required to allocate the costs of reserve capacity among local government units "for which system capacity unused each year is reserved for future use, in proportion to the amounts of such capacity reserved for each of them." *Id.*, subd. 3 (2008). The relationship between respondent and local government units in these statutory provisions is reflected in the SAC Policy Manual, which states that SAC credits "are for the information of [respondent] and the Local Government Unit only and imply no benefit of any type whatsoever for particular property owners or any other third parties."

Minn. Stat. § 473.517 (2008) gives respondent discretion in determining how the current costs of the system are allocated among local government units, and although it requires that the costs of reserve capacity be allocated proportionally among individual

users, it contains no language implying that these users are entitled to any of the reserve capacity that is recovered by reductions in their own wastewater discharge. This fact is also reflected in respondent's SAC Policy Manual, which assigns only the local government unit the power to designate whether SAC credits are city-wide or site-specific.

Despite what we have related with respect to the designations of credits, the record suggests that respondent calculated in 1987 that 5,968 credits were an appropriate allocation for relator's facility, and this could be interpreted as a designation of those credits. Under the rubrics we have outlined, this designation is one that should be made by the city. But the parties have repeatedly observed respondent's 1987 allocation, and respondent substantially employed this designation in 2009.

Despite relator's earnest assertion that the 1987 designation gave it an entitlement to that extent, it has failed to demonstrate what consequence that asserted designation might have. First, relator's current discharge volume is substantially less than the 5,968 SAC units designated in 1987, and relator's May 2009 letter to respondent indicates that it needs only 4,000 SAC credits for future purposes.

Second, if respondent's 1987 designation constitutes an entitlement, the calculation of that entitlement, premised on usage between 1982 and 1986, has never been and is not now challenged by relator as an incorrect estimation of its usage in 1987 or 2009. This suggests that the entitlement, as they chose to recognize it, was no more than 5,968, which respondent has since expanded to 5,970. Relator essentially disputes respondent's 1987 calculation that a total 17,756 Grandparent SAC credits were

available. But 5,968 of these were reserved for relator based on its estimated usage needs; the city retained the excess. Accepting as true relator's assertion that 29,971 were actually available, respondent's records of its calculations indicate that relator would still have retained only 5,968 credits, and that a greater excess would have been designated as city-wide credits. If there is any miscalculation on respondent's part with respect to relator's usage data, it is evident from the face of what has been put in the record that these credits would have been taken by the city in 1987.

Relator also asserts that it has standing to pursue this appeal by virtue of an agreement it entered into with the city. In this document, relator and the city recognize that a decision by this court in relator's favor would benefit both parties, and relator agrees to release any excess SAC credits it obtains to the city in return for compensation. But the designation of SAC credits as city-wide or site-specific is made by the city, and relator has not demonstrated that it has, in an upward modification of SAC credits, any interest that it could sell to the city. Given the structure of respondent's SAC program and the applicable provisions of law, the city's choice to pay relator for credits is either mistaken, gratuitous, or inappropriately compensates relator for instituting and advancing these proceedings. If, despite the record, the city must pay for additional credits attributable to relator's operations, the legal basis for that conclusion has not been demonstrated. Relator has not shown that it has standing to bring this appeal, and we discharge the writ on that ground.

Relator's appendices include documents that respondent asserts were not part of the record that led to the determination that is the subject of this appeal, and respondent

has filed a motion to strike these documents. "Appellate courts may not consider matters outside the record on appeal and will strike references to such matters from the parties' briefs." *Brodsky v. Brodsky*, 733 N.W.2d 471, 479 (Minn. App. 2007) (quotation omitted). But because these documents do not affect our conclusion that relator lacks standing to bring this appeal, we need not reach the merits of this motion. *See Berge v. Comm'r of Pub. Safety*, 588 N.W.2d 177, 180 (Minn. App. 1999) (finding it unnecessary to reach the merits of a motion to strike portions of a brief that were not relied upon in reaching a decision).

Writ of certiorari discharged.