

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

MAR 31 1980

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GARY WAECHTER,

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Plaintiff-appellee,

)

Filed March 31, 1980

vs.

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BOARD OF ADJUSTMENT OF
CALHOUN COUNTY, IOWA,

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2-63492

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Defendant-appellant.

Appeal from Calhoun District Court - R. K. Richardson, Judge.

Defendant appeals from district court certiorari review, wherein defendant's denial of plaintiff's application for a building permit was annulled, and granting of permit was allowed on the merits. District court order vacated and cause remanded for order voiding purported action of the board of review for lack of subject matter jurisdiction.

David L. Willis of Willis Law Office, Lake City, for defendant-appellant.

Greg Knoploh of Kersten, Opheim, Estes, Carlson & Trevino, Fort Dodge, for plaintiff-appellee.

Submitted to Oxberger, C.J., Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from district court order entered following certiorari review of defendant's denial of plaintiff's application for a building permit. Defendant asserts plaintiff did not timely file his petition for writ of certiorari and that his proposed hog farrowing house does not fall within the agricultural exemption in section 358A.2, The Code 1977, and a corresponding county ordinance, section 410, Calhoun County Zoning Ordinances.

Our scope of review is limited to correction of errors at law. Brock v. Dickinson County Board of Adjustment, 287 N.W.2d 566, 568 (Iowa 1980) (quoting Vogelaar v. Polk County Zoning Board of Adjustment, 188 N.W.2d 860, 863 (Iowa 1971)); Weldon v. Zoning Board of Des Moines, 250 N.W.2d 396, 400-01 (Iowa 1977); Iowa R. App. P. 4. The findings of fact of the district court have the effect of a special verdict of a jury and an appeal to this court is like that in an ordinary proceeding. Weldon, 250 N.W.2d at 401; see Johnson v. Board of Adjustment of West Des Moines, 239 N.W.2d 873, 889 (Iowa 1976).

I.

Plaintiff applied on April 13, 1978, to the zoning administrative officer for a permit to build a hog farrowing house on his property. The zoning administrative officer signed and submitted this application, dated April 13, 1978, to defendant on April 25, 1978; defendant denied the application on the grounds the building would violate a county ordinance and present a health hazard to plaintiff's neighbors. The zoning administrative officer, however, subsequently mailed to plaintiff a signed building permit along with his application that had written on it the notation: "Turned down because to [sic] close to neighbors." Plaintiff called the zoning administrative officer to clarify this discrepancy and testified the zoning administrative officer assured him he could build the building. The zoning administrative officer denied making any such statements. Allegedly relying on the permit and the zoning administrative officer's assurances, plaintiff demolished a barn on his property to clear land for the farrowing house and began construction.

In September 1978 the zoning administrative officer received a complaint from some of plaintiff's neighbors concerning plaintiff's construction of the proposed building. The zoning administrative officer contacted plaintiff and notified him his permit was invalid. After their visit, the zoning administrative officer contacted the chairman of

the defendant-board to discuss this matter. The chairman authorized the zoning administrative officer to send plaintiff a letter notifying him to discontinue construction. Plaintiff did not request a hearing with the board nor did he request an adjustment or variance.

Plaintiff filed on October 11, 1978, a petition for writ of certiorari to review defendant's action. Defendant filed a motion to dismiss the petition and quash the writ, contending the petition was not filed timely since it had not been filed within thirty days of its decision on April 25, 1978, as required by section 358A.18, The Code 1977. The district court overruled this motion on the ground defendant's letter of September 13, 1978, was defendant's final decision on plaintiff's application and he filed his petition within thirty days of that decision.

II.

Initially, we must determine whether the defendant board and the district court had subject matter jurisdiction to hear this case on the merits. Although the issue has not been raised by either party, we must make sua sponte our own examination to ensure defendant's actions were in accordance with Chapter 358A, The Code 1977. Weldon, 250 N.W.2d at 399-400. Subject matter jurisdiction cannot be acquired through waiver or estoppel, Steffens v. Proehl, 171 N.W.2d 297, 300 (Iowa 1969), it must be conferred by law, O'Kelly v. Lochner, 259 Iowa 710, 715, 145 N.W.2d 626, 629 (1966). Boards of adjustment as well as courts are subject to these jurisdictional requirements. See Weldon, 250 N.W.2d at 400.

A building permit application is made to the county board of supervisors, § 358A.3, The Code 1977, or its agent, the zoning administrative officer, § 358A.9, The Code 1977. Based on information in the application showing the proposed structure complies with all applicable zoning regulations, the board or its agent must issue a permit to the applicant. § 358A.3, The Code 1977. Any aggrieved person or any officer, department, board, or bureau of the county affected by any decision of the zoning administrative officer may appeal to the board of adjustment. § 358A.13, The Code 1977. This appeal must be taken "within a reasonable time, as provided by the rules of the board of adjustment, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof." Id.

Here, the zoning administrative officer completed and signed plaintiff's permit after receiving his application. He then took the application and the permit to the meeting of defendant-board on April 25, 1978. But Chapter 358A, The Code 1977, neither requires nor authorizes such action. The board of adjustment has no jurisdiction to act on an issued permit until an appeal is properly filed. Id. Since a notice of appeal was not filed with either the zoning administrative officer or defendant, defendant was not empowered to hear an appeal regarding plaintiff's permit. § 358A.13, The Code 1977. Nor does the present proceeding involve any of the other circumstances where a board of adjustment has original jurisdiction to act under section 358A.15, The Code 1977. Thus, defendant lacked jurisdiction to act on plaintiff's application or permit. As a result, there was nothing for the district court to review on the merits under sections 358.18-21, The Code 1977. We express no opinion on the validity of the building permit granted plaintiff. We only hold such issue was not properly before the board of review. We vacate the district court's decision on the merits and remand this case for entry of order voiding any purported action of defendant for want of subject matter jurisdiction.