IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

CONWAY BUICK-OPEL, INC.; DEWEY FORD, INC.; RIETZ & JACKSON TIRE CO., d/b/a BUTTERWORTH TIRE CO.; RAMSEY PONTIAC; SIMON TIRE COMPANY; JACK WALLACE AUTO RADIO, INC.; HAL SCHMIDT FURNACE CO.; MITCHELL AUTOMATIC TRANSMISSION CO.; ARTIS FURNITURE CO.; HOLMES OLDSMOBILE CO., INC.; METRO FORD INC.; AND STEW HANSEN'S DODGE CITY, INC.,

Plaintiffs-Appellants,

vs.

CITY OF DES MOINES, IOWA,

Defendant-Appellee.

REUBEN BODMER AND LEUVEDA BODMER, d/b/a FAIRGROUND CAFE,

Plaintiffs-Intervenors,

vs.

CITY OF DES MOINES, IOWA,

Defendant to Petition of Intervention.

Filed November 24, 1981

1-307
2-66064

Appeal from Polk District Court, Van Wifvat, Judge.

The plaintiffs appeal from a dismissal of their petition for declaratory judgment alleging that certain portions of the city's zoning ordinance are unconstitutional on their face. AFFIRMED.

James R. Bowers of Scalise, Scism, Gentry, Brick & Brick, Des Moines, for plaintiffs-appellants.

J. M. Sullivan, Assistant City Attorney, for defendant-appellee.

David Shinkle of Tesdell, Rydell, Hall & Shinkle, Des Moines, for plaintiffs-intervenors.

Submitted to Oxberger, C.J., and Snell, Carter, and Johnson, JJ. Donielson, J., takes no part.

PER CURIAM

The plaintiffs appeal from a dismissal of their petition for declaratory judgment alleging that certain portions of the city's zoning ordinance are unconstitutional on their face. We affirm.

The plaintiffs, twelve businesses in Des Moines, filed a petition for declaratory judgment against the city on June 30, 1980. On July 30, 1980, an amended petition was filed. The petition alleges that certain portions of the city's zoning ordinance relating to the size and placement of signs and billboards are unconstitutional on their face. The petition asked for a declaratory judgment that the named portions of the ordinance are void and for an injunction. The city filed a motion to dismiss on the ground that the plaintiffs failed to exhaust their administrative remedies before bringing the action. The plaintiffs have never sought variances from the Board of Adjustment. The trial court, in a ruling filed October 23, 1980, sustained the motion to dismiss. The plaintiffs appeal, alleging that the trial court erred in dismissing the petition because (1) it failed to construe the petition in the light most favorable to the plaintiffs and to accept the allegations as true, and (2) no adequate administrative remedy existed because the relief sought was a declaration that the ordinance was facially invalid.

The trial court relied on Matters v. City of Ames, 219 N.W.2d 718 (Iowa 1974). In Matters, the Iowa court discussed the issue of whether a plaintiff challenging the facial constitutionality of a statute must exhaust his administrative remedy prior to bringing his case to court. The court stated that the rule is "that since the administrative remedy cannot resolve a constitutional challenge, exhaustion will not be required unless the administrative action might make judicial determination of the constitutional question unnecessary." Matters at 720. The trial court was correct in stating that if the plaintiffs receive a variance from the Board of Adjustment, judicial determination of the constitutional challenge may be unnecessary. If the plaintiffs receive variances, they will be allowed to leave their signs where they are. In that case, they would not need to challenge the constitutionality of the ordinance and, indeed, they would have difficulty showing any standing to do so. Therefore, the ruling of the trial court dismissing the petition is correct.

The plaintiffs are correct in stating that the trial court erred when it stated in its ruling that if the plaintiffs' efforts to receive variances fail, they may resort to judicial review pursuant to section 17A.19, The Code. The City of Des Moines and its Board of

Adjustment are not "agencies" within the meaning of the Iowa Administrative Procedure Act. Section 17A.2(1). Therefore, the IAPA provisions for judicial review are not applicable in this case. The plaintiffs will not be limited to the procedures of the IAPA when they seek judicial review. However, as in Matters, the plaintiffs still must exhaust their possible administrative remedy before seeking judicial review.

AFFIRMED.

All judges concur except Donielson, J., who takes no part.