FILED
SEP 9 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ALBERT HUSER and JUNE D. HUSER,

Appellants,

vs.

DWAINE MILLER, THE CITY OF SIOUX CITY, A Municipal Corporation and MARK RODMAN,

Appellees.

Filed September 9, 1977

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2-58568

Appeal from Woodbury District Court - James P. Kelley, Chief Judge.

Appeal from trial court's ruling which granted defendants' motion to dismiss mandamus action against city officials.

AFFIRMED.

J. Allen Orr, of Sioux City, counsel for appellants.

James C. Hanks, of Stewart, Hatfield, Klass & Whicher, of Sioux City, and Lavern Rens, Assistant City Attorney, of City of Sioux City, counsel for appellees.

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

DONIELSON, J.

Plaintiffs, the Husers, owners of lots 153 and 154 in the Belmont Addition to the City of Sioux City, appeal the trial court's granting of the motion to dismiss made by defendants Sioux City and Mark Rodman, head of Sioux City's building department.[1] Plaintiffs sought a writ of mandamus in order to force defendants Sioux City and Rodman to rescind a building permit issued to defendant Dwaine Miller, the owner of adjacent lot 152, and an injunction to prevent the defendants from issuing a building permit for the construction of any dwelling on lot 152. In support of this prayer for equitable relief, the Husers asserted below that the defendants lacked discretion to issue the permit to Miller after both the Zoning Commission and the Board of Adjustment had refused to grant one for this same parcel on two occasions.

In 1975, defendant Miller applied to the Zoning Commission and Board of Adjustment for a building permit and zoning variance, both of which were denied because § 25.32.050(2), 1969 Municipal Code of Sioux City, required a minimum lot width of 60 feet, and the plot plan submitted indicated a lot of only 40 feet in width.[2]

After being turned down by the Board of Adjustment, Miller applied to defendants Sioux City and Rodman for a building permit, which they granted, pursuant to § 25.18.120, 1969 Municipal Code of Sioux City, after they had apparently decided that Miller had complied with this ordinance. The ordinance provides:

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[1] On January 19, 1976, the supreme court granted defendant Miller's motion to dismiss this appeal as it relates to him. Consequently, he will only be considered in relation to the cause of action against the other two defendants. This court considers appellants' other issue regarding the res judicata effects of a Board decision to be frivolous and without merit. The doctrine of res judicata only applies to final judgments of a court regarding the same cause of action. See, e.g., Lynch v. Lynch, 250 Iowa 407, 94 N.W.2d 105 (1959); In re Marriage of Kurtz, 199 N.W.2d 312 (Iowa 1972).

[2] In 1974, prior to Miller's acquisition of the property, the previous owner, Kerr Enterprises, applied for a building permit for lot 152, but the Zoning Commission and Board of Adjustment denied the requests for the same reasons.

25.18.120

Lot area exception-Existing platting. A single-family dwelling may be built on any platted lot of record containing seventy-five percent of the required lot area for the district in which the lot is located if the lot was in separate ownership and separate control at the effective date of the ordinance codified in this title provided the front, side and rear yard requirements for the district in which the lot is located are met and provided dwellings are permitted in the district in which the lot of record is located. It is not the intention of this exception to allow building as a matter of right on a platted parcel which was never intended as a building site, but rather was numbered on a plat for identification purposes under a scheme in which multiple lots were intended to provide one building site.

The motion to dismiss of the defendant-city and building department official is in several divisions but only paragraph 3 of the amendment to motion filed on June 12, 1975, relates to the mandamus and injunction claims against said defendants. The sole ground advanced in this portion of the motion is the assertion that the issuance of the building permit in question was a discretionary act. The order sustaining the motion therefore had to be based on this ground.

While we are not convinced that an act of discretion was involved, if, as alleged by plaintiffs, Miller's property did not meet the conditions specified in the quoted ordinance. But we do not determine this issue.

The more important and fatal flaw in this case is the failure of the plaintiffs to follow the procedures set forth in Chapter 414, The Code, for seeking a redress of grievances with regard to municipal zoning. Section 414.1 empowers cities to regulate the construction of buildings, and § 414.7 provides for the establishment of a Board of Adjustment to grant exceptions to the terms of local zoning ordinances where necessary. Clearly, then, § 414.7 reserves the power of variance and adjustment of zoning ordinances to the Board of Adjustment, Anderson v. Jester, 206 Iowa 452, 459, 221 N.W. 354 (1928). Even if an owner of adjacent property wishes to object to the issuance of a building permit, he must initially pursue his grievance before the Board of Adjustment, Call Bond & Mortgage Co. v. Sioux City, 219 Iowa 572, 585, 259 N.W. 33 (1935), and then may seek a writ of certiorari in district court, § 414.15, The Code.

In the instant case, plaintiffs did not follow the prescribed statutory procedures in challenging the issuance of this building permit. When the defendants issued the building permit to Miller, the Husers only recourse was to the Board of

Adjustment. Since a Board of Adjustment cannot disregard the provisions of, nor exceed the powers conferred by, a zoning ordinance, Johnson v. Board of Adjustment, etc., 239 N.W.2d 873, 886 (Iowa 1976), the Board of Adjustment would initially be required to determine whether the defendants exceeded or violated the provisions of §§ 25.32.050(2) and 25.18.120 of the Municipal Code. See, Board of Adjustment of City of Des Moines v. Ruble, 193 N.W.2d 497 (Iowa 1972).

Had plaintiffs originally sought relief in the Board of Adjustment, they could then have filed a petition for writ of certiorari in district court, as permitted by § 414.15, The Code, in order to challenge the legality of the Board's action. However, they did not do so.

Where the issue involved is one of law determinable in certiorari, mandamus is not the proper remedy. Stith v. Civil Service Commission of City of Des Moines, 159 N.W.2d 806, 807-809 (Iowa 1968). See also Hirsch v. City of Muscatine, 233 Iowa 590, 595, 10 N.W.2d 71 (1943). Section 661.7, The Code, also provides:

> "Other plain, speedy and adequate remedy. An order of mandamus shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of the law, save as herein provided." See also Charles Gabus Ford v. Iowa State Highway Com'n., 224 N.W.2d 639, 644-645 (Iowa 1974).

Furthermore, in Reed v. Gaylord, 216 N.W.2d 327, 331-332 (Iowa 1974), the supreme court stated several well-established statutory or judicial principles governing the use of mandamus:

> "Mandamus can compel an inferior tribunal to act but cannot control its discretion. Section 661.2, The Code; Stith v. Civil Service Com'n of Des Moines, 159 N.W.2d 806, 808 (Iowa 1968). If there is a plain, speedy and adequate remedy in the ordinary course of the law mandamus does not lie. Section 661.7. Mandamus will not lie where certiorari is available, because certiorari offers a plain, speedy and adequate remedy in the ordinary course of the law. Stith v. Civil Service Com'n of Des Moines, 159 N.W.2d at 809; Riley v. City of Des Moines, 203 Iowa 1240, 1244, 212 N.W. 716, 718; Sullivan v. Robbins, 109 Iowa 235, 238-239, 80 N.W. 340, 341. Where there is right to appeal or to take writ of error such is a plain, speedy or adequate remedy in the ordinary course of the law and therefore mandamus is improper. Pierce v. Green, 229 Iowa 22, 45, 294 N.W. 237, 251; 55 C.J.S. Mandamus § 22; 52 Am.Jur.2d, Mandamus, section 9.
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> "Since mandamus is a summary and extraordinary writ it will not be issued in doubtful cases but only where the rights and duties are clear and there is no other speedy and adequate remedy in the ordinary course of the law. Headid v. Rodman, 179 N.W.2d 767, 770-771 (Iowa 1970)."

Consequently, mandamus will not lie where certiorari is "available". In the instant case, the Husers did not seek review in the Board of Adjustment, and thus were not able to pursue the statutory procedures in district court through a writ of certiorari. In Allgood v. City of Oskaloosa, 231 Iowa 197, 199-200, 1 N.W.2d 211 (1941), the court resolved the meaning of the term "available" in the following manner:

> "... an order of mandamus shall not issue where there is a plain, speedy and adequate remedy in the ordinary course of the law. Provisions of this nature have been said to be merely declaratory of the common-law practice. 34 Am.Jur. 837.
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> "As a general rule where a statutory remedy has been provided it will bar the right to mandamus. 34 Am.Jur. 840. Lanphier v. Tracy Consolidated School District, 224 Iowa 1035, 277 N.W. 740, 118 A.L.R. 801; Pierce v. Green, 229 Iowa 22, 45, 294 N.W. 237, 251, 131 A.L.R. 335. To serve as a bar the other remedy must be clear. It must be equally convenient, beneficial and effective. Ordinarily, it must be such as will enforce the right or compel the performance of the particular duty in question--in effect specific performance. Pierce v. Green, supra.
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> "It should be noted that in order to serve as a bar it is not necessary that the other remedy be available at the time of applying for mandamus. If such other remedy was at one time available but has since been lost through failure and neglect of the applicant to avail himself thereof, the writ will not lie. 34 Am.Jur. 837, 838." (emphasis added)

Therefore, we affirm the district court's order sustaining defendants' motion to dismiss, not because the plaintiffs failed to state a cause of action in mandamus, but because they failed to pursue the exclusive statutory procedures of Chapter 414, The Code. [3] In so doing, we note that our resolution of this case is not based upon the merits.

AFFIRMED.

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[3] We note, however, that § 20.04.030, 1972 Municipal Code of Sioux City, provides that every building permit issued under the Code shall expire and become null and void if the work authorized by such permit is not commenced within 60 days from the date of such permit, or if the work is suspended or abandoned at any time after the work is commenced for a period of 120 days. Before any such work can be recommenced a "new" permit shall first be obtained.

Although the record does not indicate the date on which the building permit was issued to Miller, we do not imply by the holding of this case that the Husers would be precluded from pursuing the procedures set forth in Chapter 414, The Code, assuming that construction on lot 152 was halted pending the outcome of this case and that the building permit has therefore expired.