IN THE COURT OF APPEALS OF IOWA

No. 0-575 / 99-0096
Filed February 7, 2001

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CLERK SUPREME COURT

RICHARD SCHLOEMER, MARY FREDENBURG, GERALD ALES, JANET ALES, MARIAN FREI, JAMES HUGHES, LOUISE WAECHTER, JOHN HEIN, LORI HEIN, DANIEL WHITAKER, STEVEN C. ENDERTON, ROXANNA MORITZ, TIMOTHY MORITZ, PAMELA MORITZ, RICHARD D. ADAMS, and JOSEPH M. WAECHTER,
Plaintiffs-Appellants,

vs.

THE CITY OF DAVENPORT, IOWA, PHIL YERINGTON, Mayor of the City of Davenport, JOE SENG, BOB, LANK, ROBERT E. TAPPENDORF, GEORGE T. NICKOLAS, DAN VANCE, RAYMOND A. AMBROSE, JIM HAYEK, THOMAS R. CARROLL, MORRIS BARNHILL, RUTH REYNOLDS, as Members of the City Council of the City of Davenport,
Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, David H. Sivright, Jr., Judge.

The plaintiffs appeal from the district court's ruling dismissing their petition for writ of certiorari challenging the defendants' use of tax increment financing to retire a debt associated with a municipal urban renewal development project under Iowa Code chapter 403. The plaintiffs claim that the district court erred in determining certiorari review was inappropriate because the defendant city was not acting in a judicial manner when it passed resolutions approving the land use plan for the project and a construction contract for the project. The plaintiffs further claim the district court erred in determining that their certiorari petition was untimely filed. **AFFIRMED.**

Robert S. Gallagher of Gosma & Gallagher, P.L.C., Davenport, for appellant.

John R. Martin and Michael J. Meloy, Davenport, for appellee.

Considered by Streit, P.J., and Vogel and Miller, JJ.

MILLER, J.

The plaintiffs appeal from the district court's ruling dismissing their petition for writ of certiorari challenging the defendant, the City of Davenport's ("the City"), use of tax increment financing to retire debt associated with a municipal urban renewal development project under Iowa Code Chapter 403 (1997). The plaintiffs claim the district court erred in determining certiorari review was inappropriate because the City was not acting in a judicial or quasi-judicial manner when it passed a resolution approving revisions to the comprehensive plan and land use map and a resolution approving a grading and storm water management contract for the project. The plaintiffs also assert that the court erred in determining their certiorari petition was untimely filed. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS

In 1986 the City of Davenport established the North Economic Development Area as a tax increment financing district. This area was expanded in September of 1997 to include the 53rd Street/Eastern Avenue area, the area involved in the present dispute. On May 6, 1998 the Davenport city council passed resolutions 98-225 and 98-234 which involved the property in this expanded area. Resolution 98-225 approved a land use plan for the project which amended the prior comprehensive land use plan and projected land use map. Resolution 98-234 approved a grading and storm water management contract for the area. These resolutions were approved and signed that same day by the mayor pro tem due to the absence of the mayor. When the mayor returned from vacation he apparently issued a memorandum stating his intention to veto the resolutions. Thus, on the advice of its legal department and to ensure

the validity of the resolutions the city council re-passed them on May 20, 1998 as resolutions 98-271 and 98-272. The substantive language of resolutions 98-271 and 98-272 was identical to that of prior resolutions 98-225 and 98-234.

On June 19, 1998 the plaintiffs, several city taxpayers, filed a petition for a writ of certiorari and for declaratory judgment, asserting that the May 20 resolutions were illegal because they violated several provisions of Iowa Code chapter 403. The City moved to dismiss the certiorari petition on several grounds, including jurisdictional grounds. The jurisdictional grounds included claims that certiorari was not a proper form of action to challenge the City's acts because those acts were legislative in nature, and that the petition for certiorari was not timely filed under Iowa Rule of Civil Procedure 307(c).

The district court granted the City's motion to dismiss the certiorari action. The court concluded the City's acts approving the resolutions did not violate the provisions of Chapter 403 because the acts were legislative in nature and not judicial or quasi-judicial. The court further found the petition was not timely filed because the thirty-day period began to run on May 6, 1998 when the mayor pro tem approved and signed the resolutions. The court determined the re-passage of the resolutions on May 20th had no effect. Thus, the district court concluded certiorari was unavailable to the plaintiffs.

Plaintiffs filed a motion to enlarge pursuant to Iowa Rule of Civil Procedure 179(b) which was denied by the district court. Plaintiffs appealed. The district court subsequently denied the plaintiffs' request for declaratory judgment on June 14, 1999 following a two-day bench trial. The current appeal deals solely with the court's grant of the City's motion to dismiss the certiorari petition.

The City moved to dismiss this appeal claiming the appeal was taken from an interlocutory order. The supreme court denied the City's motion to dismiss. Assuming, without deciding, that the plaintiffs' appeal was from an interlocutory order the supreme court granted the plaintiffs permission to take an interlocutory appeal.

II. STANDARD OF REVIEW

Our review of proceedings concerning subject matter jurisdiction is at law, not de novo. *Horsman v. Wahl*, 551 N.W.2d 619, 619-20 (Iowa 1996); *Tigges v. City of Ames*, 356 N.W.2d 503, 512 (Iowa 1984). Our scope of review is for correction of errors at law. *Keokuk County v. H.B.*, 593 N.W.2d 118, 122 (Iowa 1999); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 137 (Iowa 1996). We are not bound by the trial court's conclusions of law or application of legal principles. *Shirley v. Pothast*, 508 N.W.2d 712, 713 (Iowa 1993).

III. MERITS

The controlling issue here is whether the plaintiff-taxpayers' petition for writ of certiorari was filed in a timely manner pursuant to Iowa Rule of Civil Procedure 307(c). This is a threshold issue because an untimely petition for writ of certiorari deprives the reviewing court of subject matter jurisdiction. *Sergeant Bluff-Luton Sch. Dist. v. City of Sioux City*, 605 N.W.2d 294, 297 (Iowa 2000).

> When its very power to proceed is at issue, a court has the power and duty to determine whether it has jurisdiction of the matter presented. Subject matter jurisdiction should be considered before the court looks at other matters involved in the case . . . .

Tigges, 356 N.W.2d at 511 (citation omitted).

The court's lack of subject matter jurisdiction based on the untimeliness of the plaintiffs' petition was argued by the City in its motion to dismiss and was one

of the reasons given by the district court for granting dismissal. The court found, as urged by the City, that the May 6th signing by the mayor pro tem of the resolutions was the relevant date for purposes of rule 307(c).

The question of subject matter jurisdiction may be raised at any time, even for the first time on appeal, *In re Melodie L.*, 591 N.W.2d 4,6 (1999), and, "A motion to dismiss based on jurisdictional grounds, as opposed to one alleging a failure to state a claim on which relief may be granted, may be supported by affidavits or other forms of evidence outside the petition." *State ex rel. Miller v. Grodzinsky*, 571 N.W.2d 1, 2 n.2 (Iowa 1997).

> Every court has inherent power to determine whether it has jurisdiction over the subject matter of the proceedings before it. It makes no difference how the question comes to its attention. Once raised, the question must be disposed of, no matter in what form or stage presented. The court on its own motion will examine grounds of its jurisdiction before proceeding further.

Tigges, 356 N.W.2d at 510 (citing *Walles v. International Brotherhood of Electrical Workers*, 252 N.W.2d 701, 710 (Iowa 1977)).

Certiorari under rule 306 of the Iowa Rules of Civil Procedure is an action at law to determine the legality of an action taken by a court or tribunal. *Sergeant Bluff-Luton Sch. Dist. v. City of Sioux City*, 562 N.W.2d 154, 156 (Iowa 1997). Iowa Rule of Civil Procedure 307(c) provides in relevant part:

> The petition [for writ of certiorari] must be filed within *thirty days from the time the tribunal, board or officer exceeded its jurisdiction or otherwise acted illegally.* An extension of such time, however, may be allowed by the reviewing court upon a showing that failure to file the petition within the time provided was due to a failure of the tribunal, board or officer to notify the petitioner of the action complained of.[1]

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[1] There is no indication in the record, nor is there any claim by the plaintiffs, that a motion for such an extension was filed or such an extension was allowed.

(Emphasis added). Therefore, in order to resolve this issue we must determine the date from which the thirty-day time period for filing of the petition began to run.

For purposes of rule 307(c) the time at which a tribunal acted illegally occurs when the underlying proceeding becomes final. *Sergeant Bluff-Luton Sch. Dist. v. City of Sioux City*, 605 N.W.2d 294, 297 (Iowa 2000) (citing *Rater v. Iowa Dist. Ct.*, 548 N.W.2d 588, 590 (Iowa App. 1996)). In order to determine when the thirty-day period began to run we must identify the action taken by the City that the plaintiffs allege was illegal.

The City argues the relevant action occurred either on September 3, 1997 when the city council initially included the 53rd Street/Eastern Avenue area in the tax increment financing district, or May 6, 1998 when the mayor pro tem signed the resolutions and they went into effect. The plaintiffs contend the relevant action occurred on May 20, 1998 when the City re-passed the resolutions because the May 20th resolutions replace and supersede the May 6th resolutions.

The plaintiffs state in their brief that the purpose of their petition for a writ of certiorari was to challenge the City's "use of tax increment financing to retire debt associated with the 53rd Street and Eastern Avenue mixed use development project." The City's decision to include the 53rd Street/Eastern Avenue area in the pre-existing tax increment financing district and amend the urban renewal plan to include this area occurred in September of 1997. It appears from the record the only action taken by the City in passing the resolutions in May of 1998 was to amend the comprehensive plan, in effect rezoning some of the land in this district to allow for alternative uses, and approve a grading and storm water

management contract for the area. Nothing was done in May 1998 to either increase or decrease the total land area included in the tax increment financing district or the amount of tax money involved.

Based on the statement made by the plaintiffs in their brief, it is possible to find that the underlying action which the plaintiffs allege to be illegal took place when the City decided to include the 53rd Street/Eastern Avenue area in the tax increment financing district on September 3, 1997. *See Sergeant Bluff-Luton*, 605 N.W.2d at 298. ("[T]he relevant date for purposes of rule 307(c) is the date of the alleged illegal decision or act by the city, not the date of the alleged injury to the [plaintiffs]."). Thus, September 3, 1997 would be the date from which the thirty-day time period under rule 307(c) began to run. As the plaintiffs did not file their petition for certiorari until June 19, 1998 it is clear they did not comply with the thirty-day time limit of rule 307(c).

However, the plaintiffs' petition for writ of certiorari claimed that the resolutions passed on May 20th violated several provisions of Iowa Code chapter 403. Generally, the plaintiffs alleged in their petition that the amendment to the comprehensive plan, which rezoned some of the land so as to allow it to be utilized for uses other than those set forth in the original plan, together with the contract approved by the second resolution, violated the spirit, intent and plain meaning of Chapter 403 and violated the due process rights of the plaintiffs. Therefore, based on the language in the petition for writ of certiorari the illegal action alleged by the plaintiffs can be seen as the passage and approval of the two resolutions in May 1998. Assuming this is in fact the action challenged in the

plaintiffs' petition as illegal, the question then becomes when these resolutions became effective, May 6th or May 20th.

Iowa Code section 380.6(1)(b) (Supp. 1997) provides, "A resolution signed by the mayor becomes effective immediately upon signing." The Code also provides in relevant part, "When the mayor is absent. . . the mayor pro tem shall perform the mayor's duties. . . . Official actions of the mayor pro tem when the mayor is absent. . . are legal and binding to the same extent as if done by the mayor. Iowa Code §372.14(3) (1997). Therefore, resolutions 98-225 and 98-234 became effective immediately upon their signing by the mayor pro tem on May 6, 1998. The resolutions the plaintiffs challenge were in effect before their re-passage on May 20th. The city council's later re-passage of the identical resolutions to assure their validity due to the mayor's attempted veto was without effect. *See, e.g., Salisky v. City of Garfield*, 34 A.2d 884, 885 (N.J. Sup. Ct. 1943) (holding that when in the absence of the mayor a resolution is approved by the mayor pro tem, a subsequent attempt by the mayor to veto the resolution is invalid).

Therefore, because the effective date of the resolutions challenged as illegal by the plaintiffs in their petition for certiorari was May 6, 1998, the plaintiffs' petition filed on June 19, 1998 did not comply with the rule 307(c) thirty-day time limit for filing such a petition.

VI. CONCLUSION

We conclude the plaintiff-taxpayers' petition for writ of certiorari, filed June 19, 1998, was not filed in a timely manner because it was not filed within the required thirty days of the City's alleged illegal act, whether that is seen as the

decision to include the 53rd Street/Eastern Avenue area in the tax increment financing district or the signing of the resolution to amend the comprehensive plan for that same area and the resolution to award a contract. The untimely petition deprived the district court of subject matter jurisdiction. *See Sergeant Bluff-Luton Sch. Dist. v. City of Sioux City*, 605 N.W.2d at 297. Based on our conclusion concerning the jurisdictional issue, we need not address the other issues raised on appeal. The district court did not err in granting dismissal of the plaintiffs' petition for the writ of certiorari.

AFFIRMED.