APR 28 1978

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GRACE REID,

Appellant,

vs.

JAMES F. LEVY; JAMES F. LEVY d/b/a JAMES LEVY ASSOCIATES; PIONEER VILLAGE OF TAMA ASSOCIATES, A PARTNERSHIP, and ROBERT J. HAZARD, ZONING OFFICER, CITY OF TAMA, IOWA,

Appellees.

Filed April 28, 1978

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2-59773

Appeal from Tama District Court - Harold D. Victor, Judge.

Plaintiff homeowner seeking to enjoin the construction of a multiple housing structure as in violation of city ordinances appeals the granting of defendants' motion for summary judgment based on the ground § 414.15, The Code, provided plaintiff's exclusive remedy. - Reversed and remanded.

Gary F. Anderson, of Morris & Anderson, Tama, for Appellant.

John Werner, of Mickelson, Roan & Werner, Toledo, John J. Willett, Tama, and Daniel Rathjen, Tama, for Appellees.

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

PER CURIAM

Plaintiff Grace Reid appeals the trial court's order sustaining defendants' motions for summary judgment. Defendant James Levy d/b/a James Levy Associates, is a real estate developer who made application to the Tama Board of Adjustment for a special use exception permitting construction of multiple housing on certain land abutting that of Grace Reid, the aggreived property owner. Defendants Levy, Levy Associates and Pioneer Village of Tama Associates are the owners of the land in question.

Proper notice of the hearing on defendant Levy's application was published and mailed to concerned property owners, including plaintiff Reid. Subsequently, the board of adjustment granted defendants' request for a special use exception "for the construction of multiple housing units for senior citizens," subject to five stipulations. One of those stipulations provided that construction was to conform to the zoning and building ordinances of the city of Tama. Thereafter, defendant Robert Hazard, the city zoning officer, issued a building permit for the construction of the proposed multiple housing. Several months later, the developer began construction.

At that point, Reid thought the construction was in violation of certain provisions of the zoning ordinance and the board of adjustment's ruling granting the special use exception. She filed a petition in equity requesting a mandatory injunction against Hazard to enforce the zoning ordinance and against the developer to prohibit construction in violation thereof. Developer Levy filed a motion for summary judgment, alleging primarily that the construction did not violate the ordinance in any respect. Hazard filed a similar motion alleging the developer's compliance with the zoning ordinance. Additionally, both Levy and Hazard argued that since Reid did not appeal from the board of adjustment's grant of the special use exception, as required by § 414.15, The Code, she could not now seek to enjoin the construction.

Reid resisted both motions pointing out that the notice of the hearing before the board of adjustment had referred only to a request for a special use exception and that the board's order specifically required construction be in conformity with

the zoning ordinance. It was claimed that it was only when the developer began construction, that the possibility of the ordinance's violation became apparent. Therefore plaintiff argued the requirement of § 414.15, that certiorari relief be taken within thirty days of the board's decision, was not the exclusive remedy in the instant case. However, the trial court granted defendants' motions for summary judgment on the grounds the certiorari relief provided for in § 414.15 was the exclusive relief of the aggrieved property owner. From that ruling, Grace Reid appeals.

Section 414.15, The Code, provides that:

> Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment under the provisions of this chapter, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty days after the filing of the decision in the office of the board.

In order to appeal the board of adjustment's ruling, the aggrieved party must petition the district court for the writ of certiorari within thirty days after the filing of the board's decision. Absent procedural irregularities, the time period appears to be jurisdictional with respect to issues properly subject to such review. See Zimmerman v. O'Meara, 215 Iowa 1140, 1149-50, 245 N.W. 715, 719 (1933). In the instant case, had Reid intended to appeal the board of adjustment's issuance of the special use exception, she had to appeal to the district court within thirty days. Otherwise, her petition would not have been timely. Section 414.15, The Code.

However, Reid claims she is not contesting the granting of the special use exception but the fact that the defendants' initial construction violates one of the stipulations contained in the use exception, that the zoning laws of the city of Tama be adhered to. Defendants counter by emphasizing the fact that the record on the summary judgment hearing contains a stipulation that the actual construction is being conducted in accordance with the plat submitted to the Board of Adjustment in support of the application for special use exception. They contend that because the Board was made fully aware of what was proposed, the subsequent approval of the building permit was, in effect, the granting of a special

use exception for the construction being undertaken by defendants, even if it is shown to be violative of zoning regulations.

If this were in fact correct perhaps such action by the Board would be reviewable only by the certiorari procedure provided in § 414.15, The Code. But we cannot conclude on the present record that it has been established as a matter of law that the special use exception granted by the Board was so broad as to excuse all possible zoning violations. A reading of defendants application for special use exception, the notice of public hearing with respect thereto, and the formal resolution of the Board approving such exception suggests that the exception involved no more than permitting the construction of multiple family housing in a zone where it would otherwise be prohibited. If other zoning violations were also excepted the burden is upon defendants to establish such fact upon trial. Stated somewhat differently, plaintiff is entitled to a trial on the scope of the special use permit granted by the Board and whether the proposed construction offends against it.

If we were to accept defendants' argument that § 414.15 is Reid's exclusive remedy, then a plaintiff would never be able to question a contractor's plans once the thirty day period had run. This would permit an unscrupulous builder to acquire a building permit, wait 30 days, and then build in complete defiance of the building permit. It is only after construction begins, that a violation becomes apparent. Reid's proper remedy with respect to such a claim is in equity through an injunction and not in law through certiorari. See Zimmerman, supra at 1150.

Summary judgment is provided for by rule 237, Rules of Civil Procedure. It is only appropriate when, after considering all of the supporting documents, "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 237(c), R.C.P. The issue before the trial court was whether defendants' proposed plan violated the city zoning laws in a manner in which a special use exception had not been granted.

In their motions for summary judgment, defendants alleged the proposed plan complied with the respective zoning laws; they also alleged § 414.15 was plaintiff's exclusive remedy. In her resistence, Reid denied such compliance and the exclusive

nature of § 414.15. The trial court erroneously found § 414.15 provided the exclusive remedy. Therefore, it did not consider the question of whether defendants' plan as commenced violated the terms of the special use exception. The ruling of the trial court is reversed and remanded for a determination of whether defendants are in violation of their building permit and their special use exception.

REVERSED AND REMANDED.