

IN THE COURT OF APPEALS OF IOWA

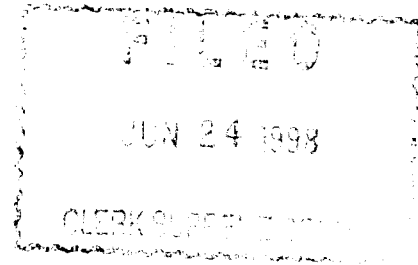
No. 8-257 / 96-1735

Filed June 24, 1998

JOSEPH J. THOMPSON and MARLENE BOUSKA,
Appellants,

vs.

CITY OF McGREGOR, NORMAN LINCOLN,
and DENNIS DENNING,
Appellees.



Appeal from the Iowa District Court for Clayton County, Margaret L.
Lingreen, Judge.

The plaintiffs appeal from the district court order granting the defendants'
motion to dismiss for failure to exhaust administrative remedies. **AFFIRMED.**

Dale L. Putnam of Putnam and Strand Law Office, Decorah, for appellants.

Terry J. Abernathy, Thad Collins and Stephanie L. Hinz of Pickens, Barnes &
Abernathy, Cedar Rapids, for appellees.

Heard by Cady, C.J., and Streit and Vogel, JJ.

STREIT, J.

Plaintiffs Joseph Thompson and Marlene Bouska argue the district court erred in dismissing their claim because they failed to exhaust administrative remedies. Because an appeal to the McGregor Board of Adjustment offered the plaintiffs a remedy which would make judicial determination of their claim unnecessary, and the plaintiffs did not pursue that remedy before seeking judicial review, the district court correctly dismissed the claim for lack of jurisdiction.

I. Background Facts & Proceedings.

Thompson and Bouska own property in the city of McGregor, Iowa. The property was zoned for commercial use (C-1). In September of 1989, before they owned the property, they appeared before the McGregor City Zoning Commission seeking permission to use the sight as a recycling center. The city had no zoning classification for a recycling center. The zoning commission recommended to the McGregor City Council the ordinance be amended to allow a recycling business to be operated within a C-1 zone. Later in September of 1989 the plaintiffs appeared before the city council. The city council recommended plaintiffs locate the recycling center in the city's industrial park, zoned M.

In November of 1989, a public hearing was held on the issue of whether to amend the zoning ordinance as suggested by the zoning commission. The ordinance was not amended.

Plaintiffs appeared in front of the zoning commission in September 1994 and again requested to use the C-1 zoned property for a recycling business. As a result of the meeting, the zoning commission again recommended the city council amend the zoning ordinance to allow operation of a recycling business in a C-1 zone. Another public hearing was held in October of 1994. At that meeting, the city council requested the zoning administrator draft an amended ordinance which would allow a recycling business in a C-1 zone as a conditional use. At a special council meeting in February 1995, the city council voted not to amend the ordinance.

Plaintiffs did not request the city council reconsider the matter at another meeting or the property be rezoned as industrial. Plaintiffs did not appeal to the McGregor Board of Adjustment. Plaintiffs claim they did not appeal the decision to the board of adjustment because Norman Lincoln, the McGregor Zoning Administrator, informed them there was no authorized board of adjustment and the board could not overturn the council's decision. At the time, there was one vacancy on the five-member board.

The plaintiffs filed a petition against the city and various city employees in the District Court for Clayton County on April 30, 1996. They alleged defendants intentionally discriminated against them by refusing to allow them to operate a recycling center on the property and intentional interference with their proposed business. Plaintiffs allege the property owners next to them operate a business which is not designated for a C-1 zone. On May 2, 1996, defendants filed a motion to

dismiss, claiming the plaintiffs did not exhaust administrative remedies and failed to state a claim under for interference with prospective business advantage. On August 6, 1996, the court sustained the motion to the extent the plaintiffs claimed they were discriminated against by the city. The court denied plaintiffs' Iowa Rule of Civil Procedure 179(b) motion. Plaintiffs appeal.

II. Standard of Review.

Our review is for correction of errors at law. Iowa R. App. P. 4. Because we are reviewing a district court ruling sustaining a motion to dismiss, we view the plaintiffs' allegations in their petition in a light most favorable to them, resolve doubts in their favor, and will uphold the ruling only if they cannot establish jurisdiction under any state of facts provable under the allegations in the petition. *IES Utilities Inc. v. Iowa Dept. of Revenue and Finance*, 545 N.W.2d 538, 539 (Iowa 1996).

III. Exhaustion of Remedies Requirement under the Iowa Administrative Procedure Act.

Judicial review proceedings are fundamentally different from original actions commenced in the district court in their jurisdictional basis, the manner of disposition, and the types of relief provided to a successful petitioner.¹ *Black v. University of Iowa*, 362 N.W.2d 459, 462 (Iowa 1985). A district court lacks jurisdiction to review an agency action if the challenge meets the criteria of section 17A.19 of the Iowa Code. *Id.* (citations omitted).

¹ The petitioner is specifically limited to the relief provided in chapter 17A of the Iowa Code.

Under Iowa Code chapter 17A, the Iowa Administrative Procedure Act (APA), a litigant seeking judicial review of an adverse agency action must first have fulfilled certain administrative prerequisites. *Id.*; *see also* Iowa Code §17A.19(1) (1995). One of the prerequisites is that the litigant has exhausted his administrative remedies prior to seeking judicial review. *Id.*

There are exceptions to the general rule that a litigant must exhaust his remedies before seeking judicial review. Litigants have been allowed to bypass the exhaustion of remedies requirements in three situations. First, a litigant can seek judicial review when she alleges the agency action was in violation of the rulemaking procedures set forth under the APA. *See Lundy v. Iowa Dept. of Human Serv.*, 376 N.W.2d 893, 894(1985). Second, if the plaintiff claims no adequate administrative remedy exists for the alleged wrongful agency action. *See Rowen v. LeMars Mut. Ins. Co.*, 230 N.W.2d 905, 909 (Iowa 1975). A constitutional challenge to an agency decision fits under this exception.² Third, when the plaintiff claims the applicable statute does not expressly or implicitly require all adequate administrative remedies be exhausted prior to bringing an action in district court. *See id.*

² When a constitutional challenge is made to an agency action, the administrative remedy cannot resolve the constitutional challenge, exhaustion will not be required. *Matters v. City of Ames*, 219 N.W.2d 718, 719-20 (Iowa 1974).

IV. Appeal to the Board of Adjustment.

Plaintiffs did not claim in their petition their case fell within an exception to the exhaustion of remedies requirement. Nevertheless, on appeal they argue their case fits within the second exception to the exhaustion requirement because an appeal to the board of adjustment would have been futile. Plaintiffs also argue that exhaustion is not required because they make a constitutional challenge to the zoning ordinance.

The plaintiffs' futility argument is based on their impression that no board of adjustment existed at the time they should have appealed and that the board did not have the authority to overturn the city council's decision.

In fact, there was an authorized McGregor Board of Adjustment at the time the plaintiffs should have sought their appeal. The McGregor Board of Adjustment was a five-member board as authorized by section 414.8 of the Iowa Code. There was one vacancy on the board at the time the plaintiffs should have appealed, leaving a four-member board. A five-member board is not prohibited from transacting business while there is a vacancy on the board. *See* Iowa Code § 414.14 (1995)(a five-member board needs only a quorum of three to transact business.). Therefore, plaintiffs' argument that an appeal to the board of adjustment was futile.

Likewise, plaintiffs argument the board did not have the authority to overturn the council's decision fails. A board of adjustment has the authority to overturn the decision of the city counsel. *Matters v. City of Ames*, 219 N.W.2d 718, (Iowa 1974)(interpreting section 414.10 of the Iowa Code).

The plaintiffs argue their knowledge of what administrative remedies were available to them was based on representations allegedly made to them by Norman Lincoln, the McGregor Zoning Administrator. They argue Lincoln told them no authorized board of adjustment existed and the board did not have the authority to amend an ordinance. They argue they did not appeal because of what Lincoln told them and they should not be penalized for counting on Lincoln's representations.

Plaintiffs cannot blame Lincoln for the fact they did not exhaust their administrative remedies. The fact the board of adjustment could have overturned the city council's decision was part of the McGregor City Zoning Ordinance and is authorized by Iowa Code section 414.10. Every person of ordinary intelligence is presumed to know the law. Iowa Code § 701.6; *Sullivan v. Iowa Departmental Hearing Bd. of Iowa Beer and Liquor Control Dept.*, 325 N.W.2d 923, 926 (Iowa App. 1982). Thus, if a statute has sufficient publication that it is discoverable by reasonable means, a person is charged with knowledge of the statute. *Saadiq v. State*, 387 N.W.2d 315, 321 (Iowa 1986).

The plaintiffs last argue they do not need to exhaust their administrative remedies because their challenge is constitutional. Their challenge is not that the zoning ordinance is unconstitutional on its face, but rather that the board discriminatorily applied the ordinance. Thus, the board of adjustment could have provided the plaintiffs with an adequate remedy by overturning the city council's decision. For this reason, the plaintiffs were required to exhaust their administrative

remedies in spite of the fact their challenge was constitutional. *See Matters*, 219 N.W.2d at 719-20.

Because an appeal to the McGregor Board of Adjustment offered plaintiffs a remedy which would make judicial determination of their claim unnecessary and the plaintiffs did not pursue that remedy before seeking judicial review, the district court lacked jurisdiction over the plaintiffs' claim. The district court correctly dismissed Count I of the petition.

AFFIRMED.