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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-407 / 89-1881

CLOYD FOLAND,

Appellee,

vs.

IOWA DEPARTMENT OF NATURAL RESOURCES,

Appellant.

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Appeal from the Iowa District Court for Decatur County, Dale B. Hagen, Judge.

Iowa Department of Natural Resources appeals a district court decision finding an administrative order improperly issued. **REVERSED.**

Thomas J. Miller, Attorney General, John P. Sarcone, Assistant Attorney General, and David L. Dorff, Assistant Attorney General, for appellant.

Lylea Dodson Critelli of Nick Critelli Associates, P.C., Des Moines, and Scot M. Halverson, Leon, for appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

OXBERGER, C.J.

Cloyd and Doris Foland own approximately 200 acres of farmland in Decatur County. Long Creek borders their land on the north. A levee existed on the Foland land for many years. In the early 1970s Foland moved the levee to its current location. Foland failed to obtain a permit for the levee from the Iowa Department of Natural Resources (DNR) as required by Iowa Code section 455B.275(3).

In 1982 one of Foland's neighbors filed a complaint with the DNR expressing concern about the effect of Foland's levee on the water flow across their land. This complaint prompted an investigation by the DNR. Another neighbor complained about Foland's levee in 1983. From 1982 to 1988 the DNR, Foland, or Foland's attorney had numerous written communications concerning the levee. During the course of this communication the DNR notified Foland of the need to file a form 36 to start formal proceedings for approval and also sent him a copy of the form.

In 1988, the DNR issued an administrative order finding that Foland's levee constituted a public nuisance under Iowa Code section 455B.275(1). The order filed February 5, 1988 ordered Foland to either degrade the levee or submit and seek approval of certified engineering plans for the relocation and lowering of the levee and pay an administrative penalty of $800.00. Two months after the

order Foland submitted form 36 applying for after-the-fact approval of his existing levee.

Foland appealed the DNR order to the Environmental Protection Commission, pursuant to Iowa Code section 455B.278(1). An administrative law judge and the Commission upheld the administrative order. Foland then sought judicial review in the district court. The court reversed the agency action, determining that although Foland failed to submit form 36, applying for after-the-fact approval prior to the issuance of the administrative order, the correspondence between Foland and the DNR prior to issuance of the order constituted an application for after-the-fact approval. The court then found the DNR never issued an order denying Foland's application from which Foland could appeal pursuant to Iowa Code section 455B.278(2). The court concluded the DNR's failure to issue a denial order deprived Foland of his administrative remedies, and precluded the DNR from issuing the administrative order in 1988.

The DNR appeals the district court's decision. It contends Foland did not apply for after-the-fact approval until two months after the issuance of the administrative order when Foland first submitted form 36. The DNR argues that the prior correspondence from Foland did not constitute an application for after-the-fact approval because Foland did not file form 36. The DNR asserts it

need not take formal action on Foland's application filed two months after initiation of its enforcement action via the administrative order. The DNR further claims Foland failed to establish his nonconforming levee's entitlement to a variance. The DNR requests reversal of the district court decision and reinstatement of the final agency action.

Henry v. Iowa Dep't of Transp., M.V.D., 426 N.W.2d 383, 385 (Iowa 1988) sets out the scope of our review:

> In reviewing a district court decision on the validity of an agency action, we decide only whether the district court has correctly applied the law. The district court itself acts in an appellate capacity to correct errors of law on the part of the agency. When we review such action by the district court, we merely apply the standards of section 17A.19(8) to determine whether our conclusions are the same as those of the district court. If the conclusions are the same, we affirm; otherwise we reverse. (Citations omitted.)

The pivotal question in this appeal is whether or not Foland filed an application for after-the-fact approval prior to the DNR order filed February 5, 1988. The parties both agree Foland did not file a form 36 prior to the DNR order. Foland contend a March 2, 1987 DNR intra-office memo clearly showed the DNR understood Foland had applied for after-the-fact approval. The memo stated:

> Foland decided to request the after-the-fact approval, despite the earlier warning that approval 'as is' is unlikely, and submitted engineering plans in June or July 1986. A review of the engineering plans showed that the Foland levee would have to be set back approximately 500 feet from the stream bank to meet departmental criteria. Foland's attorney was advised in a

> letter dated January 28, 1987 and asked to inform us within 20 days whether Foland wanted to modify his levee of degrade it. No response has been received to date.

An October 8, 1987 letter written by the DNR to the Foland's attorney inquiring "if Mr. Foland wants the Department to take formal action to disapprove the existing levee alignment, an application form would have to be filed" negates Foland's contention that the DNR knew he applied for after-the-fact approval prior to March 1987. Foland's contention is further weakened by his lack of knowledge about the memo when he received the October 8, 1987 letter.

Iowa Admin. Code 567-70.4(4) (1988) provides:

> Applicants and prospective applicants are encouraged to communicate with the department's engineering staff before submitting plans to identify the engineering data required for review of a project and to discuss project modifications reasonably required to make the project conform to applicable criteria. When staff review of submitted plans discloses need for plan modification to conform to one or more criteria, the applicant is encouraged to submit revised plans. (emphasis added).

This language leads us to the conclusion the DNR serves to assist the public in conforming with regulations relating to floodplains as well as issuing permits for construction within floodplains. With this background information we do not find, as Foland urges, that form 36 served only as an information gathering device and the correspondence between Foland and the DNR served the same purpose as filing a form 36. We find form 36 serves to

notify the agency that the the person filing the form no longer wants only assistance in complying with state floodplain requirements but seeks formal proceedings to acquire a permit or an appealable denial. Foland was told several times a form 36 needed to be filed to initiate formal proceedings for approval of a levee, sent a copy of form 36 to fill out, and directly asked by the DNR if he wished to file the form to start formal proceedings. Foland's failure to file form 36 until after the DNR finally decided to formally proceed against him did decrease Foland's options but Foland had attempted for years before the DNR order to keep every option open as well as find other people to share the blame for the changes in the floodplain.

We find the trial court incorrectly found Foland filed an after-the-fact approval form before the DNR order. Since Foland failed to request approval for the levee, the DNR acted within its power to abate a nuisance when ordering the levee removed and penalties be paid. Consequently, we reverse the trial court's decision and reinstate the administrative law judge's order.

Foland also argues the other claims in the original petition filed in district court regarding the agency's actions should be evaluated by the district court and therefore we should remand this case for further review. Foland fails to cite any authority for this proposition,

therefore we deem this argument waived. Iowa R. App. P. 14(a)(3). Additionally, we find a remand in this circumstance procedurally improper. Osborne v. Iowa Natural Resources Council, 336 N.W.2d 745, 748 (Iowa 1983) directed:

> If on judicial review of an administrative action the district court finds one issue dispositive and thus does not address other issues, we can review those issues when reviewing the district court's decision. If we disagree with the district court's ruling on the "dispositive" issue, we will then examine the other issues to determine whether the district court correctly applied the law in not considering the additional issues.

This court could address Foland's other claims if they had been argued to us, but failure to argue serves essentially as a waiver of the claims. We will not remand in this circumstance where Foland fails to develop his arguments to us and the district court is serving only as an appellate court.

REVERSED.