IN THE COURT OF APPEALS OF IOWA

No. 0-735 / 00-0196
Filed April 27, 2001

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CLERK SUPREME COURT

JANE MARIE WATSON-BOEHMER,
Plaintiff-Appellant,

vs.

THE CITY OF WINTERSET, IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Madison County, James Brown, Judge.

Plaintiff Jane Watson-Boehmer appeals from the district court ruling granting summary judgment in favor of the City of Winterset in her action for judicial review of a decision by the Board of Adjustment denying her request for a zoning variance and a building permit. **AFFIRMED.**

Jane M. Watson-Boehmer, Bondurant, pro se.

Anne L. Clark of Hopkins & Huebner, P.C., Des Moines, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ.

PER CURIAM

Plaintiff Jane Watson-Boehmer appeals from the district court ruling granting summary judgment in favor of the City of Winterset in her action for judicial review of a decision by the Board of Adjustment denying her request for a zoning variance and a building permit. She claims summary judgment was improper in this case. We affirm on appeal.

Plaintiff purchased an old house in Winterset, which she sought to renovate.[1] Denny Clayton, an employee of Conard Construction requested a building permit for plaintiff's property from Robert Hendricks, the assistant city manager. Clayton stated the house was to be raised from its foundation and a basement constructed beneath it. Hendricks denied the request for a building permit because the house did not meet current front-yard setback requirements.

Plaintiff appealed to the Winterset Board of Adjustment. A hearing on the matter was held on July 20, 1999. The Board determined the home could remain as a nonconforming structure as long as it was not structurally altered. The Board decided that if plaintiff planned to add a new basement and an addition, the home would be required to conform to the setback requirements. Plaintiff's appeal was denied.

On July 21, 1999, Hendricks issued a building permit to plaintiff, with the condition the house be moved back from the street to meet setback requirements. After that date, the house was raised from its old foundation and

[1] Plaintiff is proceeding pro se in this case. The appellant's brief and appendix contain many facts outside the record. We have limited our recitation of the facts to those found in the record.

a new foundation put in place. The location of the new foundation conforms to the City's zoning ordinances.

On August 17, 1999, plaintiff filed a petition in district court.[2] The relevant portion of her petition provides:

> The City of Winterset has further injured Jane Watson Boehmer. They have now--besides refusing her safety needs--have made the shelter needs more costly. They have made a ruling that the property she purchased must be set back 17 or 20 feet or so from the front street to meet existing code. The property is older than the city maps and other buildings near it are closer to the street in front. The city has refused to cite any other person forced to do such a thing so Jane thinks she is a precedent of some sort. Setting the house back diminishes its historic value and is a ridiculous unusual request of Ms. Watson Boehmer designed to cause her more personal and financial grief.

Plaintiff requested a jury trial and an "unspecified financial award to compensate for her added mental, physical, and financial distress."

The City filed a motion for summary judgment, claiming the setback provisions of the City's zoning ordinance were a valid exercise of its police powers, and the City did not abuse its discretion in requiring plaintiff to meet current setback requirements. On November 15, 1999, the district court granted plaintiff until December 20, 1999, to file her resistance to the motion for summary judgment. The hearing was scheduled for December 27, 1999. Plaintiff filed her resistance to the summary judgment motion on December 27, 1999. On that same day, in a calendar entry, the district court ruled, "Respondent's motion for summary judgment is granted--no timely resistance & failure to follow appropriate admin. steps." Plaintiff appeals.

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[2] Plaintiff's petition also contained allegations concerning the actions of Winterset police officers during the exchange of her children for visitation. These claims were later voluntarily dismissed by plaintiff.

I. SCOPE OF REVIEW

We review a summary judgment ruling for error. *Shriver v. City of Okoboji,* 567 N.W.2d 397, 400 (Iowa 1997). Summary judgment is properly entered where the record shows no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c). In considering the record, we view the facts in the light most favorable to the party who opposes the motion for summary judgment. *General Car & Truck Leasing Sys., Inc. v. Lane & Waterman,* 557 N.W.2d 274, 276 (Iowa 1996).

II. SUMMARY JUDGMENT

A. Failure to Follow Administrative Procedures

The City's motion for summary judgment does not allege plaintiff failed to follow proper administrative procedures. The accompanying brief in support of the motion contains no arguments relating to administrative procedures. The district court's terse ruling does not state which administrative procedures plaintiff failed to follow.

It is true that under Iowa Code section 414.15, a person aggrieved by a decision of a board of adjustment should file a petition for writ of certiorari in district court. *See Danish Book World, Inc. v. Board of Adjustment,* 447 N.W.2d 558, 559 (Iowa Ct. App. 1989). Here, plaintiff's petition in district court did not contain a specific heading, and thus, it could be interpreted as a petition for writ of certiorari. Furthermore, under Iowa Rule of Appellate Procedure 304, a notice of appeal may be considered as a petition for writ of certiorari. *Tindell v. Iowa Dist. Ct.,* 600 N.W.2d 308, 310 (Iowa 1999). This same argument could be

applied to actions brought in district court. We find there has been no showing plaintiff failed to follow proper administrative procedures.

B. Failure to File a Timely Resistance

Plaintiff contends she did file a timely resistance, but for some reason it was not received by the court or the opposing party prior to December 27, 1999. The copy in the trial court file clearly shows it was file stamped on December 27, 1999, and has a handwritten date above the signature of December 27, 1999. We agree plaintiff's resistance was untimely.

Iowa Rule of Civil Procedure 237(c) provides, "Any party resisting the motion shall file a resistance within 15 days, unless otherwise ordered by the court, . . . " However, a failure to file a resistance to a motion for summary judgment is fatal only if the moving party has sustained its burden of proof. *In re Estate of Eickman,* 291 N.W.2d 308, 312 (Iowa 1980). If no resistance is filed, the party takes the risk of standing on the record established by the moving party. *Hunter v. Board of Trustees,* 481 N.W.2d 510, 515 (Iowa 1992). Thus, the failure to file a timely resistance, standing alone, is not sufficient reason to grant summary judgment.

C. Other Grounds

Although it is not clear from the district court's ruling, an argument could be made that by stating there was no timely resistance and granting the motion for summary judgment, the court in fact found the motion for summary judgment adequately established sufficient grounds to grant the motion. The City's motion claimed the setback provisions of the zoning ordinance were a valid exercise of the City's police powers and requiring plaintiff to meet current setback

requirements when structurally altering her residence was not an abuse of the City's discretion.

Zoning decisions are an exercise of the police powers delegated by the State to municipalities in chapter 414. *Neuzil v. City of Iowa City,* 451 N.W.2d 159, 163 (Iowa 1990). Under section 414.1, a city may regulate "the size of yards" for the purpose of "promoting the health, safety, morals, or the general welfare of the community." *Shriver,* 567 N.W.2d at 400. "Setback restrictions are a valid exercise of police power, and therefore, the proper subject of a municipal zoning ordinance." *Id.* at 402. *See also City of Denison v. Clabaugh,* 306 N.W.2d 748, 755 (Iowa 1981). We conclude the Winterset setback requirements were a valid exercise of the City's police powers.

Courts will not interfere with the zoning decisions of a municipality unless there is a clear abuse of discretion. *City of Denison,* 306 N.W.2d at 755. In considering a similar claim that a City exercised its zoning power in an arbitrary and oppressive manner when enforcing its setback ordinance, the supreme court stated:

> We find no such abuse here. The City acted according to fixed standards. There was no showing that the City allowed other persons to violate the zoning ordinance and that the Clabaughs received discriminatory treatment. On the basis of the record, it appears that the City pursued remedies provided by law in enforcing its zoning ordinance; the Clabaughs did not prove that the City acted arbitrarily and oppressively.

Id. at 755-56. Because plaintiff in the present case failed to file a timely resistance to the motion for summary judgment, she also failed to show she received discriminatory treatment. In her petition, plaintiff makes a bald claim the zoning ordinance was not applied to others who failed to conform to the setback

requirement, but she has not presented any evidence on this issue to rebut the motion for summary judgment. For these reasons, we determine the district court's grant of summary judgment to the City was proper.

We affirm the decision of the district court which granted summary judgment to defendant City of Winterset.

AFFIRMED.