

IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 17-0752
Scott County No. EQCE128560

**PAUL J. BURROUGHS, KENNETH BURROUGHS, TERRI
SPINNER, DAVID SPINNER, SEAN HARVEY, AND TY
HARVEY,**
Plaintiffs-Appellants,

v.

**THE CITY OF DAVENPORT ZONING BOARD OF
ADJUSTMENT, THE CITY OF DAVENPORT, IOWA, an Iowa
Municipal corporation, and MZ. ANNIE-RU DAYCARE
CENTER, LLC, an Iowa limited liability company.**

Defendant-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR SCOTT
COUNTY
THE HONORABLE JUDGE MARK J SMITH

APPELLEES'S FINAL BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT DID NOT ERR WHEN IT DISMISSED PLAINTIFF'S PETITION FOR UNTIMELINESS AND CORRECTLY APPLIED IOWA LAW

Preservation of Error and Standard of review

Iowa R. App. P. 6.903(3).

Danish Book World, Inc. v. Board of Adjustment, 447 N.W.2d 558 (Iowa App. 1989).

Argument

CASES

Citizens Against the Lewis and Clark Landfill v. Pottawattamie County Bd. Of Adjustment, 277 N.W.2d 921(Iowa 1979).

Sergeant Bluff-Luton School District v. City Council of the City of Sioux City, 605 N.W.2d 294 (Iowa 2000).

STATUTES

Iowa Code Section 414.9 (2017).

Iowa Code Section 414.12 (2017).

Iowa Code Section 414.15 (2017).

MUNICIPAL CODES

City of Davenport Municipal Code 17.52020(B).

**II. THE DISTRICT COURT DID NOT ERR WHEN IT
DISMISSED PLAINTIFF'S PETITION FOR
UNTIMELINESS AND CORRECTLY CALCULATED
THE 30-DAY PERIOD**

Preservation of Error and Standard of review

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RULES

IOWA R. CIV. P. 1.1410

ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals because it is a case involving the application of existing legal principles. IOWA R. APP. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Pursuant to Iowa Rule of Appellate Procedure 6.903(2)(e) and 6.903(3), Appellee states the following:

Nature of the Case: The Appellee, Mz. Annie-Ru Daycare Center, asks this Court to affirm the Ruling on Defendants' pre-answer motion to dismiss entered April 13, 2017 by the Iowa District Court for Scott County. The Honorable Judge Mark J. Smith presided over the hearing. App. p. 77.

Course of Proceedings: On November 14, 2016, Plaintiffs filed a petition to revoke the special use permit of Mz. Annie-Ru Daycare Center. On December 8, 2016, the Board held a hearing on Plaintiffs' petition and voted 4-0 to deny the petition. On January 25, 2017, the plaintiffs filed a Petition for Writ of Certiorari under Iowa Code Section 414.15 and Iowa Rules of

Civil Procedure 1.1401. On February 3, 2017, the City of Davenport (“**City**”) filed a pre-answer motion to dismiss stating plaintiffs’ writ is untimely and the district court did not have subject matter jurisdiction.

Disposition of the Case in the Trial Court: On April 13, 2017, the district court held a hearing on the City’s pre-answer motion and entered a ruling that Plaintiffs’ Petition for Writ of Certiorari of was untimely. App. p. 78-79.

Plaintiffs filed a timely Notice of Appeal.

FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Pursuant to Iowa Rule of Appellate Procedure 6.903(2)(f) and 6.903(3), Appellee states the following.

Appellants have misapplied Iowa Rule of Appellate Procedure 6.903(2)(f). Appellants are not permitted under the appellate rules to include statements of facts prior to the facts relating to the issue on appeal. Appellants’ statement of facts of their proof brief should be disregarded because they are not relevant to the issues presented on appeal and are not part of

the current record. The current record begins on January 25, 2017 with plaintiffs' filing of a petition for writ of certiorari with the district court. The issues raised in appellants' statement of facts are not currently before this Court.

The facts relating to the issues on appeal are straightforward. On December 8, 2016, the Board voted on the petition to revoke the special use permit of Mz. Annie-Ru Daycare Center. On January 25, 2017, the plaintiffs' filed a petition for writ of certiorari with the district court and was later held to be untimely in a ruling on April 13, 2017 by the district court. App. p. 77-79.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR WHEN IT DISMISSED PLAINTIFFS' PETITION FOR UNTIMELINESS AND CORRECTLY APPLIED IOWA LAW

Pursuant to Iowa Rule of Appellate Procedure 6.903(3), appellee agrees with appellants' statements on error preservation, scope of review and standard of review.

Preservation of Error. The issue of timeliness of Plaintiff-Appellants' petition for certiorari was tried before the district court on April 13, 2017. The district court decided the issue in its Ruling. App. p. 79. The appellants timely filed a notice of appeal and brief in support of their appeal.

Standard of Review. A review of a certiorari appellate ruling is at law. Danish Book World, Inc. v. Board of Adjustment, 447 N.W.2d 558, 560 (Iowa App. 1989). The standard of review is correction of errors at law under Iowa Rule of Appellate Procedure 6.907.

Argument. A petition for writ of certiorari was filed with the appellate court. The City and the Board filed a pre-answer motion to dismiss stating the court lacked subject matter

jurisdiction. The district court found that plaintiffs' petition was not timely filed. App. p. 79.

Appellants argue the district court failed to correctly interpret Iowa Code Section 414.15 and that Iowa case law requires the board to file written decisions containing findings of fact in an evidentiary hearing. Proof brief p. 10-11. The board is not required to adhere to common law, rather it must comply with its own municipal code and Iowa Code Section 414. See 414.12 (setting out the powers conferred to a board of adjustment).

The Davenport Municipal Code 17.52.020(B) states the board is required to include findings of fact in its minutes. Minutes of the December 8, 2016 meeting is in Exhibit B of the City of Davenport's memorandum of law in support pre-answer motion to dismiss [hereinafter "City's Memo"].

The board's minutes contain a specific heading "Recommendations and Findings of Fact". Appellants cite Citizens Against Lewis and Clark Landfill, quoting the language "boards of adjustment shall make a written findings of fact on all issues presented in any evidentiary proceeding". Proof Brief

p. 11. Citizens Against the Lewis and Clark Landfill v. Pottawattamie County Bd. Of Adjustment, 277 N.W.2d 921, 925 (Iowa 1979). The language of Citizens is codified in Iowa Code Section 414.9. It states the board shall keep minutes, state the vote of each member on each question and keep records of its examinations and other official actions.

In the current case, the board fully complied with the 414.9. The December 8, 2016 minutes (1) state the vote of each member on each question; and (2) state a recommendation and findings of fact. The action of the board also complies with it's own Chapter 17.52.020(B) and includes language of 414.9 verbatim as shown below:

CHAPTER 17.52.020(B)	CHAPTER 414.9
"The board shall keep minutes of its proceedings showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall also keep	"The board shall keep minutes of its proceedings showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall

records of its hearing and other official actions.	also keep records of its hearing and other official actions,
Findings of fact shall be included in the minutes of each a case of a requested variation and the reasons for recommending or denying such variation shall be specified.	
Every . . . decision or determination of the board shall be filed immediately in the office of the board and shall be a public record."	all of which shall be immediately filed in the office of the board and shall be a public record."

As shown above, the City of Davenport board of adjustment municipal code requires more than the Iowa Code. Neither the Iowa Code nor the City of Davenport's Municipal Code requires a publication of the information, only that it

“shall be immediately filed in the office of the board and shall be a public record.” 414.9 and 17.52.020(B).

Appellants’ argument that a “filed decision” is akin to a written decision similar to a district court is unsupported by the statute and case law. The statute does not require a published decision, it requires the immediate filing of minutes of the board’s proceedings and that the minutes shall be public record. 414.9 (Iowa 2017). Appellants do not argue the minutes were not immediately filed and available for public record. To the extent that the phrase “filed decision” in 414.15 requires interpretation, this Court may rely on the holding in Sergeant Bluff-Luton School District; a certiorari petition must be filed within 30 days from the time the board exceeded its jurisdiction or acted illegally. Sergeant Bluff-Luton School District v. City Council of the City of Sioux City, 605 N.W.2d 294, 297-298 (Iowa 2000) (citing I.R. Civ. P. 307(c), now numbered 1.1402(3)).

The district court correctly applied the law the facts of this case. The petition was not timely filed.

II. THE DISTRICT COURT DID NOT ERR WHEN IT DISMISSED PLAINTIFFS' PETITION FOR UNTIMELINESS AND CORRECTLY CALCULATED THE 30-DAY PERIOD

Pursuant to Iowa Rule of Appellate Procedure 6.903(3), appellee agrees with appellants' statements on error preservation, scope of review and standard of review.

Preservation of Error. The issue of timeliness of Plaintiff-Appellants' petition for certiorari was tried before the district court on April 13, 2017. The district court decided the issue in its Ruling. App. p 79. The appellants timely filed a notice of appeal and brief in support of their appeal.

Standard of Review: A review of a certiorari appellate ruling is at law. Danish Book World, Inc. v. Board of Adjustment, 447 N.W.2d 558, 560 (Iowa App. 1989). The standard of review is correction of errors at law under Iowa Rule of Appellate Procedure 6.907.

Argument: A petition for writ of certiorari was filed with the appellate court. The City and the Board filed a pre-answer motion to dismiss stating the court lacked subject matter

jurisdiction. The district court found that plaintiffs' petition was not timely filed. App. p. 79.

Appellants go to great lengths in their second argument to say the district court incorrectly applied case law to the current case. Proof brief p. 16-20. The appellants, however, did not direct the court to case law that support their argument that the 30 days does not begin at the time of the board's decision. If this Court prefers to cite to another case to affirm the Plaintiffs' petition was untimely it can rely on Sergeant Bluff-Luton that states that the time the board acted illegally is when the proceeding becomes final. 605 N.W.2d 294, 297 (Iowa 2000) (citing Rater v. Iowa Dist. Ct., 548 N.W.2d 588, 590 (Iowa App. 1996)).

Appellants extend their first argument into the second and continue to state the board is required to issue a "written decision". Proof brief p. 18-19. In Chrischilles, the issue before the court was what board action could be challenged under petitioner's certiorari action. Chrischilles v. Arnolds Park Zoning Bd. of Adjustment, 505 N.W.2d 491, 493 (Iowa 1993). A challenge to the board of adjustment decisions are decided

under 414.15. Id. The written notice provided to the plaintiffs in Chrischilles was a final decision of the board. Chrischilles v. Arnolds Park Zoning Bd. of Adjustment, 505 N.W.2d 491, 493 (Iowa 1993). The facts in Chrischilles state the board notified the aggrieved party in October 1990 that their actions went beyond the variance granted by the board. Id. at 492. The order was modified a month later. Id. The board provided its modified order to the plaintiffs on December 19, 1990. Id. The court held the plaintiff petition for certiorari was timely, using the notice of decision, its final decision, to the plaintiffs as the start of the 30-day period. Id. at 494. In the current case, the plaintiffs were present at the hearing and observed the 4-0 vote against its application, thus they were notified of the final decision.

Appellants seem to be searching for a document akin to a judicial order or decree for the purpose of an appeal to the district court. See Proof Brief p. 19-20. The minutes show a vote was taken on the issue at the meeting of the board. In the event a plaintiff was not at the meeting, he or she could contact

the board regarding its decision, the vote being part of a public record. App. p. 49.

Appellants' argument that the plaintiffs were deprived of due process also fails. An aggrieved party, in a certiorari proceeding is provided extensive procedural due process. In addition to the record made by the return of the writ, the reviewing court may receive other oral or written evidence explaining the records in the return. I.R. Civ. P. 1.1410.

The district court correctly calculated the 30-day period to appeal. The petition was not timely filed.

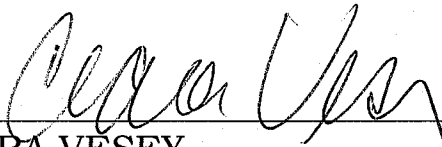
CONCLUSION

For the reasons stated above, this Court should affirm the order for dismissal entered by the district court.

REQUEST FOR ORAL ARGUMENT

Appellant requests to be heard in oral argument on all issues to be decided by this Court.

Respectfully submitted,



CIARA VESEY
ATTORNEY FOR APPELLEE

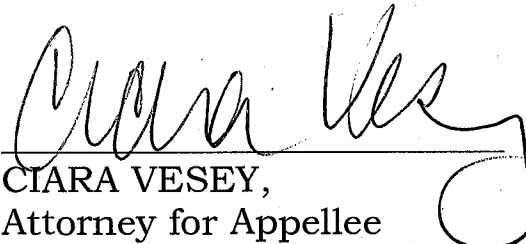
CERTIFICATE OF COST

I hereby certify that the cost of filing this brief was the sum of \$0.00.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 1,957 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in Bookman Old Style 14.

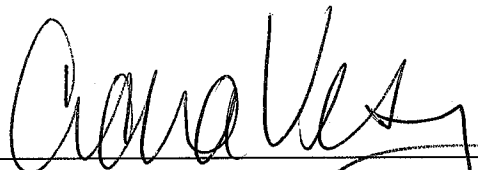

CIARA VESEY,
Attorney for Appellee

CERTIFICATE OF SERVICE

The undersigned certifies this Appellee's Final Brief was served on the 5th day of October, 2017, upon all necessary parties, by a notice of electronic filing through the electronic document management system (EDMS) to all registered filers for the above-mentioned matter. A review of the filers in this matter indicate all necessary parties have been or will be served. Any unregistered filer will be served with a written copy and so noted in a Certificate of Service.

CERTIFICATE OF FILING

I, Ciara Vesey hereby certify that I will file the attached Final Brief through the electronic document management system (EDMS) for the above-mentioned matter on the 5th day of October, 2017.



CIARA VESEY,
Attorney for Appellee