IN THE SUPREME COURT OF IOWA

No. 17-0752

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 AND MZ. ANNIE-RU DAYCARE CENTER

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONORABLE MARK J. SMITH, JUDGE
SEVENTH JUDICIAL DISTRICT
Scott County Equity No. EQCE128560

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. Defendants Appellees Fail to Read Sections 414.9 and 414.15 of the Iowa Code in their Entirety.

In the interpretation of multiple statutes, the Court assesses each statute in its entirety to determine its meaning, not just individual words or phrases of a statute. *Schaefer v. Putman*, 841 N.W.2d 68, 75 (Iowa 2013). Thus, this Court must interpret § 414.9 and § 414.15 as a whole together to determine the legislature's intent.

Defendant's argument that the December 8, 2016 Hearing and vote by the Davenport Zoning Board of Adjustment (Board) commenced the 30 day appellate filing period is erroneous and a misapplication of Iowa zoning statutes § 414.9 and § 414.15.

It was imperative and mandated by reading § 414.9 and § 414.15 of the Iowa Code for the Board to issue a written decision in a contested evidentiary hearing case. Without a written decision, the Board operates as a star chamber with no accountability to Plaintiffs or to the appellate court. It violates Plaintiffs' due process rights to receive a ruling they can read and understand and timely appeal. The Board's failure to issue a written final decision contravenes the statutory language of § 414.15 requiring their issuance of a written decision. Lack of a decision defeats the purpose of appellate review.

Appellee Mz. Annie-Ru Daycare Center (Annie-Ru) claims that "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." Appellee's argument fails to recognize the written decision requirement of § 414.15 following the Board's vote and Iowa caselaw supporting that procedure. *Citizens Against Lewis and Clarke (Mowery) Landfill v. Pottawattomie County Bd. of Adjustment* at 925. There can be no final decision until the written decision is issued.

II. Defendants-Appellees Fail to Interpret Section 17.52.020(B) of the Davenport City Code Correctly. Filing the Minutes of a Meeting is Separate and Distinct from Filing a Decision in a Contested Case.

Appellees reliance on § 17.52.020(B) of the Davenport City Code to support their claim that filing the minutes of a meeting constitutes a written decision is erroneous. Section 17.52.020(B) states: "Findings of Fact shall be included in the minutes of each case of a requested variation and the reasons for recommending or denying such variation shall be specified." (underlining added).

First, the findings of fact specified municipal § 17.52.020(B) applies only to a variance, not to an appeal of an administrative decision or the revocation of a special use permit. Second, this language is in direct conflict with and does not supersede Iowa Code § 414.15 which requires a written

decision on a contested case be filed in the office of the Board. Third, Appellees ignore the next sentence of § 17.52.020(B) which states: "Every rule or regulation, every amendment or repeal thereof, and every order, requirement, decision or determination of the Board shall be filed immediately in the office of the Board and shall be a public record." The Board's own internal rules do not designate a posting on a website as an official filing. The Board failed to follow their own rules and statute.

Appellees' response that the Board did not have to file the decision in this "electronic age" is without legal merit. Decisions were required to be filed in 2017. The Board violated Plaintiffs' due process rights by not filing a written decision in the Plaintiffs' Petition for revocation of the Annie-Ru special use permit denying them from operating at the site eighteen months after the first daycare center closed.

III. Appellant Timely Filed their Appeal. The Board has Dirty Hands in this Contested Case.

The official Board files did not contain the minutes of the meeting or the written decision from the October 13, 2016 and December 8, 2016 hearings regarding the daycare center. *February 20, 2017 Affidavit of John F.H. Lonergan, II; App. p. 067-068.* John F.H. Lonergan, II (Lonergan) went to Davenport City Hall on February 13, 2017 and requested the Board file on the daycare property. Lonergan received the file electronically from

Davenport and swore in his affidavit under oath that there was no minutes of meeting nor was there a written decision in the Board's file on February 13, 2017. *February 20, 2017 Affidavit of John F. H. Lonergan, II, App. p. 067-068*. Appellee's reliance on the Flynn Affidavit does not resolve the issue of the Board's statutory compliance. Flynn's Affidavit states that: "5. The minutes for the December 8, 2016 meeting of the Zoning Board of Adjustment were posted on the City's website and available for public inspection no later than December 22, 2016."

Posting of the staff minutes of meeting does not mean that the minutes were actually approved by the Board. The Flynn Affidavit fails to state whether or not these minutes were approved or amended by the Board. Under administrative law procedures, the Board had to approve any staff minutes. The Flynn Affidavit fails to state the date of approval for these minutes. Further, Flynn could not have posted them before December 22, 2016 because the Board's next held lawful meeting following their December 8, 2016 meeting was at 7:00 P.M. on December 22, 2016.

Further, the Flynn Affidavit fails to state with particularity the contents of the minutes of meeting that the Board approved. The Flynn Affidavit fails to illuminate the appellate court in a discernable fashion regarding the contents of these minutes. Placing minutes on a City website

does not meet the statutory test of a decision under the City and State Code. The Flynn Affidavit should be given little or no weight in this matter.

Even if arguendo, the minutes constituted a written decision, Plaintiffs appeal filed on January 25, 2017 was within the 30 day appeal period. The 30 day time period cannot commence until a written decision was filed. Plaintiffs seeking appellate review of the Board's decision must file their petition "within thirty days after the filing of the decision in the office of the board." *Section 414.15 of the Iowa Code.* Plaintiffs timely filed their Petition.

However, filing of the minutes of a meeting is not the same as filing a written decision with findings of fact on a fully contested evidentiary case. The Board admits that no written decision on this contested case was ever issued and filed in the office of the Board at City Hall. The Board has dirty hands by their failure to comply with their own city statute. Davenport City Code §17.50.020(B) clearly requires that "every decision or determination of the board shall be filed immediately in the office of the board and shall be a public record." This municipal requirement is separate and distinct from placing the findings of fact of a requested variance in the minutes of the meeting. The Board never filed a written decision and admits that. Thus, the Board violated § 17.50.020(B) of the Davenport City Code.

Appellees now seek to claim that this Court can disregard the fact that the District Court erred in its interpretation of the *Chrischilles v. Arnolds Park Zoning Bd. of Adjustment,* 505 N.W.2d 491 (Iowa 1993) and *Arkae Development Inc. v. Zoning Bd. of Adjustment of City of Ames,* 312 N.W. 2d 574 (Iowa 1981) holdings in dismissing this case and rely upon on alternate ground for dismissal. This is not correct statement of law in a limited Writ of Certiorari proceeding. Contrary to Appellees assertion, Plaintiffs did not waive any right of an appeal in this matter. In *Regent,* Plaintiff never presented or properly urged an alternate ground for dismissal of the case. Appellees do not allege any alternate ground in their Motion to Dismiss for the alleged waiver by Plaintiffs. Accordingly, Iowa caselaw cited by Appellees, *Regent Ins. Co., v. Estes Co.,* 564 N.W.2d 846, 848 (Iowa 1997) is inapplicable to this certiorari appeal specifically governed by Chapter 414 of the Iowa Code, § 17.52.020(B) of the Davenport City Code and I. R. Civ. P. 1.1401-1.1415. *Regent* involved a summary judgment ruling not a motion to dismiss.

Appellees misrepresent and misapply *Sergeant Bluff-Luton School Dist. v. City Council of City of Sioux City,* 605 N.W.2d 294 (Iowa 2000) holding. *Sergeant Bluff* stands for the proposition that "any illegal act occurs when the underlying proceeding becomes final." (underlining added) *Id.* at

297. Appellee Annie-Ru claim that the challenged actions of the Board occurred on October 13, 2016 and December 8, 2016. *Zoning Board of Adjustment Proof Brief, p. 7, Arg. II, Section "A", par. 2.* Appellee Board claims that "both of these decisions were final decisions by the Board at the time they were made." *Zoning Board of Adjustment Proof Brief, p. 8.* This is clearly erroneous when the Board was required to make a decision with written findings of fact. No final decision was ever issued.

Appellee Board wrongly relies upon *City of Johnson v. Christensen*, 718 N.W.2d 290 (Iowa 2006) for their position. In *City of Johnson,* the Board passed a written resolution following the hearing and made five written findings of fact. *City of Johnson* at 294. The written resolution approved a special exception for an area variance and granted a variance for height. In the present case, there was no written resolution or written decision approved and issued by the Board. *City of Johnson* stands for the proposition that the Board must make a written decision separate and distinct from the contested hearing and lends support to Plaintiffs-Appellees' legal position.

Appellees' claim that Plaintiffs did not argue that the Board never made a final decision is without legal merit. Plaintiffs did argue the Board did not make a final decision by the fact that they Board failed to issue a

written decision. *Plaintiffs' Response and Resistance to Defendant Davenport Zoning Board of Adjustment and the City of Davenport, Iowa's Pre-Answer Motion to Dismiss, par. 5 - 8, 17 & 19.*

CONCLUSION

The appellate court should reverse the district court's dismissal of Plaintiffs' Petition for Writ of Certiorari.

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on September 14 2017, I served this document by mailing one copy to all other parties in this matter at their respective addresses as shown below:

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I further certify that on September 14, 2017, I filed this document with the Clerk of the Iowa Supreme Court by use of the Iowa Supreme Court's electronic filing system.

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