IN THE COURT OF APPEALS OF IOWA

No. 0-222 / 09-1522
Filed May 26, 2010

KATHY J. BRADSHAW-HULSING,
Petitioner-Appellant,

vs.

BOARD OF ADJUSTMENT OF THE CITY OF CLIVE, IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, Gregory A. Hulse, Judge.

The petitioner appeals from the district court's ruling granting the respondent's motion for summary judgment. **AFFIRMED.**

James E. Nervig of Brick Gentry P.C., West Des Moines, for appellant.

Jason C. Palmer and Timothy N. Lillwitz of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, and James Wine, Des Moines, for appellee.

Heard by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

Kathy Bradshaw-Hulsing appeals from the district court's order granting summary judgment in favor of the Board of Adjustment of the City of Clive (Board). The central question on appeal is whether Bradshaw-Hulsing's challenge to certain actions of the City of Clive (City) is barred by section 175.43(4) of the Clive Zoning Ordinance, which requires appeals to be taken from any decision of the Clive Community Development Department (CCDD) to the Board within ten days. Because we agree that Bradshaw-Hulsing's challenge is barred by that ordinance, we affirm the district court.

I. Background Facts and Proceedings.

Bradshaw-Hulsing owns a home in Clive near Hickman Road. Her property is zoned residential. Across the street from her home, Bunn Properties, L.L.C. (Bunn) owns a lot that is zoned for commercial use. In January 2006, Bunn planned on building a veterinary clinic on its lot and submitted an application for site plan approval to the CCDD. On February 28, 2006, during a public meeting, the Clive Planning and Zoning Commission recommended approval of the Bunn site plan. On March 16, 2006, during a regularly-scheduled public meeting, the Clive City Council approved the Bunn site plan. On June 14, 2006, the CCDD issued a building permit to Bunn, and shortly thereafter Bunn began construction.

On August 23, 2006, Bradshaw-Hulsing filed her first petition in district court seeking a declaratory judgment, a permanent injunction, and monetary damages against Bunn and the City. According to Bradshaw-Hulsing, Bunn was violating the City zoning ordinances. She asked the court to halt construction

and to prevent the City from issuing any certificates of occupancy for the veterinary clinic until the zoning violations were abated. On October 30, 2006, while the district court case was pending, the CCDD issued a certificate of occupancy and zoning compliance to Bunn.

On February 7, 2007, the district court found that Bradshaw-Hulsing had failed to exhaust her administrative remedies and granted summary judgment in favor of Bunn and the City. Bradshaw-Hulsing appealed. On appeal, this court affirmed the district court and stated:

> We agree with the district court that Bradshaw simply filed her petition seeking redress with the district court too early. She failed to undertake her duty to adequately exhaust administrative remedies for her zoning violation concerns with the appropriate City entities. In fact, it appears the City was possibly still in the process of conducting its approval of the Bunn Properties site plans and construction until October 2006 when the certificate of occupancy was finally issued. Therefore, the district court lacked authority to entertain this matter at the time it was presented with Bradshaw's petition, and the defendants are entitled to judgment as a matter of law.

Bradshaw v. Bunn Props., L.L.C., No. 07-0426 (Iowa Ct. App. June 25, 2008). The supreme court denied further review on August 19, 2008.

On February 9, 2007, two days after the district court decision had been entered, and shortly before she appealed that decision to the appellate courts, Bradshaw-Hulsing filed a separate appeal of Clive's actions with the Board. This was styled an "Appeal by Aggrieved Person Pursuant to Section 175.43(4) of the Clive Zoning Ordinance." This appeal came before the Board on May 15, 2007. However, the Board voted to defer proceedings until Bradshaw-Hulsing's judicial appeal of the February 7, 2009 district court decision had been decided.

On October 21, 2008, the Board held a hearing on Bradshaw-Hulsing's section 175.43(4) appeal. The sole issue addressed at that time was whether Bradshaw-Hulsing had timely filed her appeal with the Board. In a written decision filed on November 13, 2008, the Board determined that according to the zoning ordinances, Bradshaw-Hulsing was required to file an appeal within ten days of a decision of city staff. As she had not done so, her appeal was untimely. Thus, the Board denied Bradshaw-Hulsing's appeal without reaching its merits.

On December 2, 2008, Bradshaw-Hulsing filed a petition for writ of certiorari in the district court challenging the Board's decision. Subsequently, both Bradshaw-Hulsing and the Board filed motions for summary judgment. On August 12, 2009, the district court found that under the Clive Zoning Ordinance, Bradshaw-Hulsing's appeal was required to be filed with the Board within ten days of a decision of the CCDD and Bradshaw-Hulsing had not complied with the ten-day limitation. Thus, the district court granted the Board's motion for summary judgment, denied Bradshaw-Hulsing's motion for summary judgment, and dismissed Bradshaw-Hulsing's petition for writ of certiorari. Bradshaw-Hulsing appeals.

II. Standard of Review.

We review a district court's ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 6.907; *City of Johnston v. Christenson*, 718 N.W.2d 290, 296 (Iowa 2006). Summary judgment should be granted when the entire record demonstrates there is 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. 1.981(3).

> Thus, on review, we examine the record before the district court to decide whether any material fact is in dispute, and if not, whether the district court correctly applied the law. In considering the record, we view the facts in the light most favorable to the party opposing the motion for summary judgment.

Shriver v. City of Okoboji, 567 N.W.2d 397, 400 (Iowa 1997) (internal citations and quotation omitted).

III. Analysis.

Iowa Code chapter 414 (2009) empowers cities to regulate land use within their boundaries and directs how that is to occur. Pursuant to that chapter, the City has enacted a zoning ordinance, which in part regulates new development. According to the ordinance, a property owner must submit an application for site plan approval to the CCDD; the Planning and Zoning Commission and the City Council must approve the site plan; and then the CCDD issues a building permit. Clive Zoning Regulations § 175.42. Once construction is completed, the CCDD issues a certificate of occupancy. *Id*. § 175.42.

Any person aggrieved by a decision of the CCDD may appeal to the Board. *Id*. § 175.43. The specific authority for section 175.43 comes from Iowa Code section 414.10. That section provides that appeals to a board of adjustment "shall be taken within a reasonable time as provided by the rules of the board." Section 175.43(4) of the Clive Zoning Ordinance specifies that this appeal "shall be taken within ten (10) days by filing application request on forms provided by the Community Development Department."

In *Shors v. Johnson*, which involved a similar ten-day deadline to appeal, the supreme court held that

> the time for appeal should run from the earliest (a) the appealing party had actual knowledge of the decision appealed from, (b) the appealing party was chargeable with knowledge of that decision, or (c) notice of the decision is given in a reasonable, specified manner.

Shors v. Johnson, 581 N.W.2d 648, 652 (Iowa 1998) (quoting *Arkae Dev., Inc. v. Bd. of Adjustment*, 312 N.W.2d 574, 577 (Iowa 1981)).

In the present case, the planning and zoning commission approved the site plan on February 26, 2006, the CCDD issued a building permit on June 14, 2006, and the CCDD issued a certificate of occupancy on October 30, 2006. Although Bradshaw-Hulsing was aware that construction had begun and believed no later than June 2006 that zoning violations had occurred, she failed to challenge any of the CCDD's actions with the Board until she filed her appeal on February 9, 2007, more than ninety days after Bunn had received its certificate of occupancy for the premises.

On appeal, Bradshaw-Hulsing does not contend that the ten-day time limit in section 175.43 is facially invalid or that ten days is not, as a general matter, a "reasonable" time limit. Bradshaw-Hulsing also does not deny that she had actual and constructive knowledge of adverse decisions having been made by the City long before she appealed to the Board. Indeed, nearly six months earlier, on August 23, 2006, Bradshaw-Hulsing had filed her first lawsuit against the City.

Instead of making any of these claims, Bradshaw-Hulsing raises two other arguments, to which we now turn.

A. "Clear and Unambiguous Violations."

First, Bradshaw-Hulsing asserts that because the zoning violations here are "clear and unambiguous," the permits issued were void and she should be able to appeal to the Board at any time. In support of her argument Bradshaw-Hulsing cites to *Chamberlain, L.L.C. v. City of Ames*, 757 N.W.2d 644 (Iowa 2008). In *Chamberlain*, the issue was whether a city could deny a certificate of occupancy even though a building official had previously indicated before construction began that there would not be a code violation. *Chamberlain*, 757 N.W.2d at 650. The supreme court stated that the doctrine of "vested rights" might estop the city from denying a certificate of occupancy in some cases, such as where "the building official's interpretation resolves some kind of ambiguity or interprets an indefinite provision of the building code." *Id*. However, the "vested rights" doctrine did not apply in that case where there was a "plain" violation of the code. *Id*. Bradshaw-Hulsing argues that because the violations of the City's zoning ordinance in this case were likewise "clear and unambiguous," she is not bound by the ten-day time limit in section 175.43.

Bradshaw-Hulsing is making an apples-to-oranges comparison. A city and a private citizen do not necessarily have the same rights to redress zoning or building code violations. The "vested rights" doctrine prevents the government, in some circumstances, from exercising legal authority that it would otherwise have vis-à-vis a private party—e.g., the authority to deny a certificate of occupancy based on a building code violation. However, the absence of "vested rights," as alleged by Bradshaw-Hulsing here, does not mean that a private party

acquires greater legal authority than the statutes and ordinances provide to challenge another private party's alleged zoning violation.

Moreover, Bradshaw-Hulsing's proposed "clear and unambiguous" exception to the appeal deadline would unnecessarily complicate appeals. "The time requirement for appeal has traditionally been considered mandatory." *Grandview Baptist Church v. Bd. of Adjustment*, 301 N.W.2d 704, 707 (Iowa 1981). Bradshaw-Hulsing wants to engraft on this "mandatory" deadline an exception for situations where the underlying violation was "clear." Undoubtedly, this would lead to additional litigation over whether the private party is bound by the appeal deadline because he or she is challenging a "clear" violation.

Furthermore, the ten-day deadline serves a salutary purpose. Like other appeal deadlines, it provides finality. In Bradshaw-Hulsing's words, "This case raises the important question of whether a property owner has the right to appeal, *at any time*, to the board of adjustment from what the owner alleges are clear and unambiguous zoning violations by her neighbor." (Emphasis added.) However, landowners need to know at some point that the approval of their plans is final and not subject to future legal challenge "at any time."

Accordingly, for these reasons, we reject Bradshaw-Hulsing's first argument. There is nothing in the statute or the ordinance that limits the applicability of the appeal deadline to cases where zoning violations are relatively unclear. If anything, because the alleged zoning violations were clear according to Bradshaw-Hulsing, this confirms that she had constructive notice of them and should have appealed to the Board within the time allowed. She failed to do so.

B. No Concurrent Jurisdiction.

Next, Bradshaw-Hulsing argues that because her initial district court case was already pending when the CCDD issued the occupancy permit to Bunn on October 30, 2006, the district court had exclusive jurisdiction over the subject matter and she could not file an appeal with the Board until the district court rendered its decision on February 7, 2007. Bradshaw-Hulsing argues that "the district court and the board of adjustment could not exercise concurrent jurisdiction." Thus, she essentially maintains that the ten-day deadline did not begin running until the district court dismissed her initial lawsuit, and that she met that deadline by filing an appeal with the Board two days later on February 9, 2007. We disagree.

In the first place, we note an internal inconsistency in Bradshaw-Hulsing's position. On February 9, 2007, when she appealed to the Board, the courts still had jurisdiction over her first lawsuit. Bradshaw-Hulsing subsequently appealed the district court's February 7, 2007 dismissal of her lawsuit before it became final; our court filed a decision on June 25, 2008, and the supreme court denied further review on August 19, 2008. Bradshaw-Hulsing cannot credibly argue that an appeal to the Board was barred during the first part of this timeframe because the district court had jurisdiction but not during the latter part of this timeframe when the supreme court or the court of appeals had jurisdiction. If Bradshaw-Hulsing's position is carried to its logical conclusion, this means she had until late 2008 (i.e., when the supreme court denied further review) to appeal to the Board, even though the City had authorized Bunn to construct the veterinary clinic and it had proceeded to build the clinic back in 2006. That cannot be right.

Furthermore, Bradshaw-Hulsing does not explain why the principle that two tribunals should not be simultaneously *hearing* a case, *see, e.g.*, *Riley v. Boxa*, 542 N.W.2d 519, 524 (Iowa 1996), excuses her from properly *commencing* one. Even assuming that the Board and the courts should not have both been hearing Bradshaw-Hulsing's claims of zoning violations at the same time, a ready solution would be for one of the entities to stay proceedings, which in fact is what the Board did. Bradshaw-Hulsing cannot use her own improperly filed lawsuit as an excuse for not complying with a deadline for commencing proceedings before the Board.[1]

IV. Conclusion.

For the foregoing reasons, we affirm the judgment of the district court dismissing Bradshaw-Hulsing's petition for writ of certiorari.

AFFIRMED.

[1] As a subsidiary argument, Bradshaw-Hulsing also claims the district court was "unfairly predisposed to rule against Bradshaw-Hulsing" because it incorrectly believed the Board of Adjustment had disputed the existence of any zoning violations. We disagree. In its pleadings, the Board did dispute whether any zoning violations had occurred. Hence, the district court did not mischaracterize the Board's position.