IN THE COURT OF APPEALS OF IOWA

No. 2-582 / 12-0097
Filed October 31, 2012

DARWIN FISH,
Plaintiff-Appellant,

vs.

WAPELLO COUNTY, IOWA, STEVEN SIEGEL, JERRY L. PARKER, GREG M. KENNING, and BRIAN P. MOORE,
Defendants-Appellees.

Appeal from the Iowa District Court for Wapello County, Joel Yates, Judge.

Darwin Fish appeals from the district court's ruling granting the defendants' motion for summary judgment and dismissing Fish's petition for a writ of mandamus. **AFFIRMED.**

Richard C. Bauerle, Fountain Hills, Arizona, for appellant.

Robert W. Goodwin of Goodwin Law Office, P.C., Ames, for appellees.

Heard by Potterfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Darwin Fish appeals from the district court's ruling granting the defendants' motion for summary judgment and dismissing Fish's petition for a writ of mandamus seeking to require maintenance of two roads as part of the Wapello County secondary road system. Because the board of supervisors and the county engineer did not approve the road plan, the roads did not become part of the secondary road system subject to the county's maintenance.

I. Background Facts and Proceedings.

Darwin Fish is the owner of lot 13 in a subdivision in Wapello County, Iowa, known as Ackley's Birchwood First Subdivision. Fish filed a petition seeking a writ of mandamus to require the Wapello County Board of Supervisors and the Wapello County Engineer to maintain two roads (Birchwood Lake Knoll and Greenbriar Lane) in the subdivision as a part of the county's secondary road system. The west portion of the subdivision lies within the city limits of Ottumwa and the east portion lies outside the city limits in Wapello County. The roads in the subdivision connect to a city street named Birchwood Drive. They do not connect to any county road.

Fish moved for class action certification. He asserted the class consisted of "law enforcement officers, fire department person[nel], utility company person[nel], mail delivery person[nel], ambulance drivers and patients, medical doctors as well as the general public, all of whom use" the two roads in the subdivision. The district court denied the motion, finding the class, if any, consisted of individual property owners of the parcels of property in the

subdivision, whom were not so numerous as to make joinder impracticable or unmanageable.

On November 5, 2011, the district court held a hearing on the parties' cross motions for summary judgment. The following facts were not in dispute.

Wapello County is a municipal corporation organized and existing under the laws of the State of Iowa. The administrative powers of Wapello County are vested in the board of supervisors. The board of supervisors is comprised of the defendants, Steven Siegel, Jerry L. Parker, and Greg M. Kenning.

Pursuant to Iowa law, the board of supervisors has jurisdiction and control of the secondary roads in Wapello County and is charged with the duty to keep the secondary roads of Wapello County maintained in good condition, safe for vehicular traffic, and free of all ice, snow, and other accumulations and obstructions; and the county engineer has supervision of the secondary roads.

Ackley's Birchwood First Subdivision is located in Wapello County within one mile of the corporate limits of the city of Ottumwa. The subdivision was platted in 1978. Richard M. Ackley and Mary R. Ackley signed the statement of dedication of the subdivision on August 8, 1978, which provides: "[T]he streets set forth therein are hereby dedicated to the Public for public street purposes, and shall be known as designated in the plat as 'Birchwood Lake Knoll' and 'Greenbriar Lane.'" The dedication included attached restrictions that were made a part of the subdivision plat. Restriction number eight stated:

> The expense of the maintenance of the roadways described hereinabove and as a part of this survey and plat, if not borne by the City of Ottumwa or the County of Wapello, shall be prorated among all parties owning residential lots in the above-described

> subdivision and plat, based on the front footage of each residential lot fronting on the street in question, or roadways, as each frontage bears to the total feet in length of each street or roadway in question. This shall apply whether or not an owners [sic] has constructed a residence.

On August 7, 1978, the Ottumwa Plan and Zoning Commission signed a certificate to the city council and the board of supervisors approving the final plat and also approving the following variances:

> 1. No sidewalks are required.
> 2. The paved portion of said roadway shall be six inches in depth asphaltic concrete pavement on full base and being 22 feet in width.
> . . . .
> 4. No curbs and gutters are required.
> 5. No sanitary or storm water sewers required. Septic tanks to be provided pursuant to the restrictions to said plat.

On August 21, 1978, the city council for Ottumwa adopted Resolution No. 216 titled, "Resolution Approving Final Plat of Ackley's Birchwood First Subdivision," which reads:

> [T]he subdividers of said Subdivision have agreed to construct a roadway to be dedicated to the public, pursuant to plans and specifications presented to said Plan and Zoning Commission, and approved by said Commission and have agreed to provide a performance bond for the construction of said improvements, said roadways to be known as "Birchwood Lake Knoll" and "Greenbriar Lane."

Resolution No. 216 also provided for a variance: "The paved portion of said roadway shall be of six inch depth asphaltic and concrete pavement, upon full base and shall be 22 feet in width."[1] On August 29, 1978, the mayor, the city

[1] Fish ordered drilling tests, which were conducted on January 26, 2010. These tests found that the asphalt was six inches deep.

engineer, and the chairperson of the plan and zoning commission signed their approval of the final plat.

On August 18, 1978, the board of supervisors of Wapello County adopted a resolution approving the plat of Ackley's Birchwood First Subdivision and authorized the chairperson to sign the final plat evidencing the approval.

Richard and Mary Ackley posted a subdivision bond of $42,600 in favor of the city of Ottumwa and Wapello County to "install asphalt paving."

An affidavit of Brian P. Moore dated March 7, 2011, was submitted along with defendants' resistance to plaintiff's motion for summary judgment. Moore has been the county engineer for the past nine years. His affidavit states that he "recognize[s] that on August 18, 1978, the Wapello County Board of Supervisors passed a Resolution approving the Plat of Ackley's Birchwood First Subdivision." He also recognizes that "[t]he then County Engineer, William J. Byrne, approved said Plat." Moore notes that "road plans are different and distinct from the Plat[,] [and] [the] [r]oad plans show elevation and design details, where the Plat only shows an aerial view of the location of the roadway." Moore also notes that

> [i]t is important that a county engineer . . . approve[s] the road plans in a subdivision before such a roadway becomes part of the county's secondary road system to make sure that the roadway meets proper design standards, and that the county's secondary road budget is able to handle such subdivision roadways.

Moore concludes that "[f]rom a thorough review of the records of the office of the Wapello County Engineer and from my own knowledge, I hereby state that there has been no approval of [the] road plans [for] Birchwood Lake Knoll or Greenbriar Lane by the Wapello County Engineer."

Steven Siegel submitted an affidavit dated March 7, 2011. Siegel is a current member of the board of supervisors. Siegel too draws a distinction between approval of the road plans and approval of the plat. Siegel concludes that "[f]rom a thorough search of records of the office of the Wapello County Board of Supervisors and from [his] own knowledge, [he] hereby state[s] that there has been no approval . . . by the Wapello County Board of Supervisors . . . of Birchwood Lake Knoll or Greenbriar Lane."

Kelly Spurgeon is the county auditor. An auditor's certificate subscribed and sworn by Spurgeon on July 18, 2011, states that she reviewed all records in the Wapello County Auditor's office regarding Ackley's Birchwood First Subdivision. Only one document was found, and it was captioned "Ackley's Birchwood First Subdivision." The document has a certificate by Lewis E. Graham, Jr. R.L.S. Iowa No. 2955 dated July 30, 1978, that states in part, "I hereby certify that this is a Plat of Ackley's Birchwood First Subdivision . . . made by me at the owners' request." The document was unsigned and was filed on January 18, 1979. There is no document designated "road plans" regarding the subdivision on file in the Wapello County Auditor's office.

Amanda Valent is the city clerk for the city of Ottumwa. In a sworn statement made October 11, 2011, Valent states that she has "located the record of the Census figures for Ottumwa, Iowa, for the year 1970 to be 29,610."

Before the district court, Fish first contended that the city of Ottumwa followed the platting procedure pursuant to Iowa Code chapter 409,[2] and the city's approval is all that is necessary to incorporate the roadways into the Wapello County secondary road system. The defendants argued that chapter 409 was not applicable; rather, section 306.21 governed. Second, Fish asserted the subdivision roads had been dedicated to the public use and the plat had been approved by the city of Ottumwa, which was sufficient to implicitly constitute approval and acceptance of the two roads into the county road system. Third, Fish asserted the defendants were unable to defend their case because the plat had been approved in 1978, and Iowa Code section 354.21 required that any action to object to the plat could not be maintained after June 30, 2000 (ten years from date the provision became effective). The defendants argued they were not challenging a plat and the section was inapplicable. Their defense to the petition was that approval of the plat and approval of road plans were distinct, and the city's approval of the plat did not constitute acceptance of the streets by the county board of supervisors and county engineer into the county road system. The district court ruled in the defendants' favor, dismissing Fish's petition. Fish now appeals.

II. Scope and Standard of Review.

We review the entry of summary judgment for the correction of errors at law. Iowa R. App. P. 6.907. Summary judgment should be granted when the

---

[2] Ackley's Birchwood First Subdivision was dedicated on August 8, 1978; the subdivision plat is dated July 30, 1978. The 1977 Code of Iowa therefore governs. We note that chapter 409 has since been repealed. *See* 1990 Iowa Acts, ch. 1236, § 54.

entire record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). "If the conflict in the record concerns only the legal consequences flowing from undisputed facts, entry of summary judgment is proper." *Farm Bureau Mut. Ins. Co. v. Milne,* 424 N.W.2d 422, 423 (Iowa 1988).

III. Discussion.

A writ of mandamus is "brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station." Iowa Code § 661.1 (2011). Fish argues a writ should issue here because (1) the city of Ottumwa followed the platting procedure pursuant to Iowa Code chapter 409, and the city's approval is all that is necessary to incorporate the roadways into the Wapello County secondary road system; (2) the streets at issue were dedicated to the public use and they were accepted by both the city of Ottumwa and the public; and (3) the defendants are barred by an Iowa Code section 354.21 statute of limitations from maintaining any action against Fish based on an omission, error, or inconsistency in any document required in platting Ackley's Birchwood First Subdivision.

A. City's approval is all that is necessary. In its December 21, 2011 ruling, the court rejected Fish's argument that chapter 409 (pertaining to the subdivision and platting of parcels of land "located within a city or within two

miles of a city with a population in excess of 25,000") was applicable.[3] The court accepted the defendants' contention that section 306.21 was applicable, which provided at that time:

> All road plans,[4] plats and field notes and true and accurate diagrams of water, sewage and electric power lines for rural subdivisions shall be filed with and approved by the board of supervisors and the county engineer before the subdivision is laid out or recorded. Such plans shall be clearly designated as "completed", "partially completed" or "proposed" with a statement of the portion completed and the expected date of full completion. *If such road plans are not approved as provided in this section such roads shall not become the part of any road system as defined in this chapter.*

(Emphasis added.)

The court ruled, in effect, that section 306.21 trumped chapter 409's provisions concerning a city's approval of a subdivision. The district court noted that in *Spencer's Mountain, Inc. v. Pottawattamie County*, 285 N.W.2d 166, 168 (Iowa 1979), our supreme court held that "section 306.21 requires approval of

---

[3] Fish cites to Iowa Code section 409.1, which stated in relevant part that the chapter applies to "every original proprietor of any tract or parcel of land of any size located within a city or within two miles of a city subject to the provisions of section 409.14 [a city with a population more than twenty-five thousand]. . . ." The uncontested facts show Ackley's Birchwood First Subdivision is a parcel of land which exists both within and outside the city limits, and Ottumwa was a city with a population over twenty-five thousand people as of the 1970 Census. Consequently, Fish concludes that chapter 409 applies to govern the city of Ottumwa's treatment of Ackley's Birchwood First Subdivision.

Under section 409.13 when a city approves a subdivision plat, the platted roads within the city become a part of the city's road system. Fish then states there is no evidence that the developers or Ottumwa failed to follow the requirements of chapter 409. He contends that when the city of Ottumwa approved the plat of Ackley's First Subdivision the roads within the city limits became a part of the county road system.

[4] The affidavit of Brian Moore states, "[R]oad plans are different and distinct from the Plat. Road plans show elevations and design details, where the Plat only shows an aerial view of the location of the roadway." Attached to his affidavit were copies of the road plans for Birchwood Lake Knoll and Greenbriar Lane, which had been approved by the city of Ottumwa, but not the county engineer or board of supervisors.

both the board of supervisors and county engineer before a subdivision road can become part of the secondary road system." We find no error.[5]

"'City' means a municipal corporation, *but not including a county*, township, school district, or any special-purpose district or authority. When used in relation to land area, 'city' includes only the area within the city limits." Iowa Code § 362.2 (emphasis added). "Municipal corporations can exercise such powers only as are expressly granted, and such implied ones as are necessary to make available the powers expressly conferred, and essential to effectuate the purposes of the corporation, and these powers are strictly construed." *City of Keokuk v. Scroggs*, 39 Iowa 447, 450 (1874). "Powers conferred upon a municipality cannot be enlarged by liberal construction." *Van Eaton v. Town of Sidney*, 231 N.W. 475, 477 (Iowa 1930).

Chapter 409 authorized a city to approve a subdivision, including city streets. *See Oakes Constr. Co. v. City of Iowa City*, 304 N.W.2d 797, 808 (Iowa 1981) ("Cities now have the power to establish streets and condemn right-of-ways under the Home Rule Amendment, the Twenty-fifth Amendment to the Iowa Constitution, *see Bechtel v. City of Des Moines*, 225 N.W.2d 326 (Iowa 1975), augmented by section 471.4(6) of the present Code giving them the power of eminent domain."). Section 409.14 provided:

> [T]he approval of the city council shall be deemed an acceptance of the proposed dedication for public use, and owners and purchasers shall be deemed to have notice of the public plans, maps and reports of the council and city plan commission, if any, having

---

[5] We also note that the road plan must be "filed with and approved by" the county engineer and board of supervisors "*before* the subdivision is laid out or recorded." Iowa Code § 306.21 (emphasis added).

> charge of the design construction and maintenance of the city streets affecting such property within the jurisdiction of such cities.

But section 409.1 specifically stated: "The recording of a plat pursuant to this paragraph is in addition to any other requirement of this chapter and the recording for assessment and taxation purposes *shall not constitute a dedication or impose any liability upon the state or any of its political subdivisions*." (Emphasis added.). Chapter 409 did not authorize a city to approve a road for inclusion in the county road system.[6]

Counties are political subdivisions of the state created to assist in carrying out state governmental functions. *Mandicino v. Kelly*, 158 N.W.2d 754, 758 (Iowa 1968). A county board of supervisors is given authority by statute to perform certain duties, one of which is to approve road plans for inclusion into the secondary road system. Iowa Code § 306.21; *see Spencer's Mountain*, 285 N.W.2d at 167. However, that approval is not sufficient in itself—the county engineer must also approve. *Spencer's Mountain*, 285 N.W.2d at 167 (noting "the board of supervisors lacks statutory authority to bind the county engineer by its judgment on road engineering standards" and noting its zoning powers are enumerated in Iowa Code section 358A.3). Iowa Code section 306.21 governs how a road becomes part of a road system and requires the approval of the county board of supervisors and the county engineer—"and if any proposed rural subdivision is within one mile of the corporate limits of any city such road plans

---

[6] Fish points out that Iowa Code section 4.8 states, "If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the generally assembly prevails." He argues that because chapter 409 was enacted after chapter 306, chapter 409 prevails. But, we do not find the statutes irreconcilable. Consequently, section 4.8 does not come into play.

shall also be approved by the city engineer and council of the adjoining municipality." Section 306.21 recognizes the existence of the different governmental entities and requires the approval of all relevant entities.

B. Common law dedication. We agree with the district court's conclusion that even if the streets were dedicated to the public by the subdivision plat, the county is not obligated to maintain the roads. As emphasized by the district court, the Iowa Supreme Court has stated:

> The duties resting upon municipal and other governmental authorities with respect to the establishment of streets or other highways are, unless imposed by positive law, of a political rather than a legal nature, the performance of which cannot be compelled by the courts, and for the nonperformance of which they cannot be held responsible. To warrant the establishment of a highway which is to be opened, constructed, or maintained at the public expense, or to warrant the exercise of the power of eminent domain for such purpose, such highway must be required by public convenience and necessity. Whether such necessity exists, however, is generally regarded as a legislative question which must be left to the discretion of the proper governmental authorities.

Oakes Constr., 304 N.W.2d at 808. Here, there has been no acceptance or approval by the county or county engineer pursuant to section 306.21, nor a determination by the county that public convenience or necessity requires the performance sought by Fish. "Whether a given road will subserve the public need or convenience is a question for the government alone to determine." *Id*.

We also believe section 409.1 negates Fish's contention asserting common law dedication. Whatever implications may otherwise arise, dedication of lands in platting of a subdivision under chapter 409 "shall not constitute a dedication or impose any liability upon the state or any of its political subdivisions." Iowa Code § 409.1.

C. Section 354.21 statute of limitations. We reject Fish's strained reading of section 354.21[7] and find no merit in his claim that this section somehow limits the defendants' ability to defend against this petition for writ of mandamus. Fish relies upon the following language of Iowa Code section 354.21:

> An action shall not be maintained at law or in equity, against a proprietor, based upon an omission of data shown on an official plat or upon an omission, error, or inconsistency in any of the documents required by this chapter unless the action is commenced within ten years after the date of recording of the official plat.

This action was not initiated "against a proprietor" to challenge the validity of the plat on the basis of an omission, error, or inconsistency in the plat. Section 354.21 has no application to the case before us.

The court did not err in dismissing the petition for writ of mandamus. We therefore affirm.

AFFIRMED.

---

[7] Fish notes that pursuant to section 354.21, "[a]n action shall not be maintained . . . based upon an omission of data shown on an official plat or upon an omission or error, or inconsistency in any of the documents required by this chapter. . . ." He asserts that the term "maintained" has a dictionary definition of "defend in argument . . . assert to be true." He argues therefore that the defendants improperly "maintained" this action by claiming there was an omission of data shown on the official plat. He concludes, "Had they not made this claim Appellant would have been awarded a writ of mandamus against Appellees."