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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2444**

Cyril Miller,
Appellant,

vs.

Le Sueur County, et al.,
Respondents,

and

Kocina Rutt Properties, Inc., Intervenor,
Respondent.

**Filed January 29, 2008
Affirmed
Stoneburner, Judge**

Le Sueur County District Court
File No. 40CV050982

Steven J. Vatndal, 600 South Second Street, Box 3047, Mankato, MN 56002; and

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Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and Crippen, Judge.*

UNPUBLISHED OPINION

STONEBURNER, Judge

The district court concluded that it lacked subject-matter jurisdiction over appellant's challenge to respondent county's approval of a plat and grant of a conditional use permit and that appellant's only remedy was by writ of certiorari to this court. On appeal, appellant argues that the district court erred because he is not challenging a quasi-judicial action. We affirm.

FACTS

Appellant Cyril Miller owns a feedlot in Le Sueur County. He asserts that, at all times relevant, his feedlot had and continues to have a capacity and actual use in excess of 100 animal units. Beginning in December 2004, respondent Kocina Rutt Properties sought county approval for a subdivision on land adjacent to Miller's feedlot (Kocina's project). Kocina's project proposal provided for a 500-foot setback from Miller's feedlot.

A Le Sueur County ordinance requires that all new dwellings be separated by 500 feet from existing animal feedlots of up to 100 animal units, and by 1,000 feet from existing animal feedlots of more than 100 animal units. Le Sueur County, Minn., Zoning Ordinance § 13, subd. 6.52(C)(12) (1996). Miller opposed Kocina's project at every step of the county approval process, arguing that because his feedlot consists of more than 100

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

animal units, the ordinance requires a 1,000-foot setback. Miller also asserted that the 500-foot setback was being measured from the wrong place on his property.

Despite Miller's objections, the Le Sueur County Board of Commissioners (the county board) found that the 500-foot setback provision applied, approved the plat and granted a conditional use permit (CUP) for Kocina's project, conditioned in part on a provision that if the lot nearest Miller's feedlot cannot meet the 500-foot setback requirement, it will be considered unbuildable.

Miller appealed to the County Board of Adjustment (the board of adjustment), which ultimately dismissed the appeal based on the conclusion that it lacked authority to review the county board's decision. Miller filed a "complaint and appeal" in district court against the county, the county board, the board of adjustment, and the planning and zoning commission. In this action, Miller appealed the board of adjustment decision and made claims against the county, asserting that (1) the county's acts were arbitrary and capricious; (2) the county recklessly or intentionally applied County Ordinance § 13, subd. 6.52 (C)(12), in a discriminatory manner; and (3) because the board of adjustment failed to act on his appeal within 60 days, the appeal should be deemed successful under Minn. Stat. § 15.99 (2006). Miller amended his pleading to add a demand for a writ of mandamus prohibiting the county from issuing any zoning or building permits that would allow construction of a dwelling within 1,000 feet of his feedlot.

Kocina intervened and, with the county, moved for summary judgment, arguing that the district court lacked subject-matter jurisdiction to hear Miller's claims. The district court agreed, concluding that Miller's appeal is from a quasi-judicial action of the

county, making his only remedy a writ of certiorari to the court of appeals. The district court held that because the board of adjustment had no authority to review the county board's decision, Minn. Stat. § 15.99 was not applicable to Miller's appeal. This appeal followed.

D E C I S I O N

“On appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). “A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). On appeal from dismissal of an action for lack of subject-matter jurisdiction, this court conducts an independent review of the legal issues presented to the district court. *Ferrell v. Cross*, 543 N.W.2d 111, 114 (Minn. App. 1996), *aff'd*, 557 N.W.2d 560 (Minn. 1997). In this case, there are no factual disputes, therefore we review to determine whether the district court erred in its application of the law.

I. The decision appealed by Miller was a quasi-judicial decision of the county board.

If no statute or appellate rule provides for judicial review of the quasi-judicial decisions of an administrative agency, judicial review is limited to the common-law right to petition for a writ of certiorari. *Neitzel v. County of Redwood*, 521 N.W.2d 73, 75

(Minn. App. 1994), *review denied* (Minn. Oct 27, 1994). In *Neitzel*, we held that “[a] county board’s decision to grant or deny a [CUP] is a quasi-judicial decision because it requires a county board to determine facts about the nature and effects of the proposed use and then exercise its discretion in determining whether to allow the use.” *Id.*

Miller argues that he is challenging the county board’s interpretation of the applicable ordinance, not a quasi-judicial decision. Miller relies on *J.B. Press v. City of Minneapolis*, 553 N.W.2d 80, 83-84 (Minn. App. 1996), in which this court held that the district court had jurisdiction to consider a property owner’s challenge to work orders issued by a city involving interpretation of the city’s building code ordinances.¹ In reaching this holding, we noted that “[c]ertiorari is not available to review legislative or purely ministerial acts of administrative agencies or officers.” *J.B. Press*, 553 N.W.2d at 83-84.

Miller challenges the county board’s application of the 500-foot rather than the 1,000-foot setback requirement. Miller presented his objections orally and in writing, and the county board rejected those arguments. This decision did not involve an interpretation of the ordinance, but rather the application of the ordinance to the facts found by the county board, which, even if erroneous, is plainly a quasi-judicial decision. *See In re Signal Delivery Serv., Inc.*, 288 N.W.2d 707, 710 (Minn. 1980) (stating that an agency acts in a quasi-judicial manner “when the commission hears the view of opposing

¹ *J.B. Press* involved a property owner’s challenge to the fire department’s interpretation of a city ordinance to require replacement, rather than modification, of hollow-core doors to comply with an ordinance requiring fire resistant doors in certain areas of apartment buildings. 553 N.W.2d at 82.

sides presented in the form of written and oral testimony, examines the record and makes findings of fact.”).

Miller’s reliance on *Toby’s of Alexandria, Inc. v. County of Douglas*, 545 N.W.2d 54 (Minn. App. 1996), *review denied* (Minn. May 21, 1996) to support his argument that the district court had jurisdiction over his appeal is misplaced. Miller relies on language in *Toby’s* that implies that a county board of adjustment has authority to review a board of commissioners’ CUP decisions. *See Toby’s*, 545 N.W.2d at 56. But we specifically rejected this implication in *Molnar v. County of Carver Bd. of Comm’rs*, 568 N.W.2d 177, 180 (Minn. App. 1997).

The jurisdictional question in *Molnar* highlighted “a difference between Minn. Stat. Ch. 394 (1996) (governing *county* authority for planning, development, and zoning) and Minn. Stat. Ch. 462 (1996) (governing *city* and *town* authority for planning, development and zoning).” 568 N.W.2d at 180. The statute governing city and town authority specifically provides for review of a CUP decision in district court, but the legislature did not provide a similar procedure for appeal from a county board’s CUP decision, resulting in our holding that “review of a county board’s decision on a CUP is obtainable only through writ of certiorari to this court.” *Id.* (citation omitted). We noted that dicta in *Toby’s* suggesting that a county board’s CUP decision “appears to be an appealable ‘decision’ within the jurisdiction of the board of adjustment” was not intended as a judicial construction of section 394 requiring such appeals to be brought to the board of adjustment. *Id.* In this case, we conclude that *Molnar* is controlling, and because no ordinance expressly provides for appeal of the county board’s CUP decisions to the

district court, review of such decisions is exclusively by writ of certiorari to this court.

Id.

II. The district court did not err in dismissing Miller’s mandamus and discriminatory enforcement claims.

a. Mandamus

Miller argues that even if the district court correctly determined that it did not have jurisdiction over his challenge to the county board’s application of the 500-foot setback requirement, his action for mandamus did not involve a quasi-judicial decision and sought only to compel the county to comply with the plain language of the applicable setback. He argues that his mandamus action was within the district court’s jurisdiction because it is entirely separate from any challenge to the county’s approval of Kocina’s project. We disagree.

Mandamus may be an appropriate remedy if the remedy sought is from an action based on invalid grounds or not warranted by law. *Minneapolis-Honeywell Regulator Co. v. Nadasdy*, 247 Minn. 159, 161, 76 N.W.2d 670, 673 (1956). “To be entitled to mandamus relief, [a party] must show that: 1) the [county] failed to perform an official duty clearly imposed by law; 2) he suffered a public wrong and was specifically injured by the [county’s] failure; and 3) he has no other adequate legal remedy.” *Breza v. City of Minnetrista*, 725 N.W.2d 106, 109-10 (Minn. 2006) (quotation omitted). Miller argues that his mandamus action seeks to compel the county to enforce its own ordinances by preventing the unlawful issuance of permits for Kocina’s project and is an issue squarely within the jurisdiction of the board of adjustment, properly appealed to the district court.

Le Sueur County Ordinance provides that:

The Board of Adjustment shall have the authority to . . . hear and decide appeals from and review any order, requirement, decision or determination made by any administrative official charged with enforcing any ordinances adopted pursuant to the provision of sections 394.21-394.37, . . . and perform such other duties as required by the official controls.

Le Sueur County, Minn., Zoning Ordinance § 22, subd. 2(1) (1996). And:

All decisions by the Board of Adjustment in granting the variances or in hearing appeals from any administrative order, requirements, decision or determination shall be final except that any aggrieved person . . . shall have the right to appeal [within 30 days, after receipt of notice of the decision, to the district court . . . on questions of law and fact].

Le Sueur County, Minn., Zoning Ordinance § 22, subd. 3(1) (1996) (incorporating language from Minn. Stat. § 394.27, subd. 9 (2006)).

In this case, however, Miller is not challenging the decision of any administrative officer and his mandamus action is simply another way of stating his challenge to the county's approval of Kocina's project and grant of the CUP.² The supreme court has declined to hold that the district court has jurisdiction to challenge quasi-judicial decisions merely because the challenge has been presented in a cause of action over which the district court generally has jurisdiction. *See, e.g., Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 179 (Minn. 2006) (reiterating the statement in *Zion Evangelical Lutheran Church v. City of Detroit Lakes*, 221 Minn. 55, 58, 21 N.W.2d 203,

² There is also no evidence in the record demonstrating that Miller has suffered or will suffer a public wrong or that he has been or will be specifically injured by the grant of building permits he seeks to prohibit.

205 (1945), that “mandamus does not lie for mere error in the exercise of discretion” of a quasi-judicial body); *Dietz v. Dodge County*, 487 N.W.2d 237, 239-40 (Minn. 1992) (concluding that the district court lacked jurisdiction over an asserted breach of contract claim where the issue was the propriety of a county’s quasi-judicial decision to terminate Dietz’s employment).

We conclude that Miller’s mandamus claim is not separate from his challenge to the county board’s quasi-judicial decision, and the district court did not err in concluding that certiorari review is his exclusive remedy for such a challenge.

b. Discriminatory enforcement

Miller argues that his assertion that the county unlawfully enforced its ordinances in a discriminatory manner should not have been dismissed for lack of subject-matter jurisdiction. Although the district court did not specifically address this claim in the memorandum attached to its order for summary judgment, the district court makes clear that it was dismissing all of Miller’s claims on summary judgment.

Miller concedes, citing *Northwestern College v. City of Arden Hills*, 281 N.W.2d 865, 869 (Minn. 1979), for the proposition that “[a] zoning ordinance must operate uniformly on those similarly situated,” that his discriminatory enforcement claim necessarily requires a comparison of the county’s treatment of Miller with its treatment of other similarly situated property owners. Miller further concedes that “there is obviously nothing relating to the county’s treatment of other property owners in the record.”

Miller argues that, despite this lack of evidence, the claim is properly within the district court’s jurisdiction and should not have been dismissed on summary judgment.

But the district court found that respondents moved for summary judgment on all of Miller's causes of action, and Miller failed to present the district court with any evidence to create an issue of material fact on the claim of discriminatory enforcement. Therefore, summary judgment on this claim was appropriate even if the district court failed to designate the appropriate ground for such relief. *See Myers through Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990) (stating that this court will affirm grant of summary judgment if it can be sustained on any ground), *review denied* (Minn. Feb. 4, 1991).

III. Minn. Stat. § 15.99 (2006) does not compel the relief Miller seeks.

Miller's precise claim under Minn. Stat. § 15.99 is unclear. He argues that because the board of adjustment accepted, considered, and decided his appeal, it misled him and caused him to miss the applicable deadline for obtaining certiorari review, and the delay of five months in denying his appeal was unlawful under Minn. Stat. § 15.99. Miller argues that this court "should not allow the County to benefit . . . from its unlawful failure to act." Miller asserts that the board of adjustment had, at a minimum, apparent authority to act. But Miller fails to provide support for his argument that the procedural history of this case conferred subject-matter jurisdiction on the district court, and we find no merit to his argument. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that assignment of error based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

The argument Miller presented to the district court under section 15.99 was that the board of adjustment's failure to act within 60 days required a decision in his favor.

The district court correctly rejected this claim, relying on *Breza*, 706 N.W.2d at 518, for the proposition that “if [a local government unit] does not have the underlying authority to approve an application . . . the application cannot be approved by the [local government unit’s] inaction.” In this case, the board of adjustment did not have authority to review the decision of the county board, so its failure to do so within the 60 days provided in section 15.99 is without consequence. The district court did not err in granting summary judgment on Miller’s claims under section 15.99.

Affirmed.