ELECTRONICALLY FILED FEB 13, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
No. 19-0759

JOHN C. MAREK JR., JOELLE C. MAREK, JASON MOATS, AMBER F. MOTES, LEMAR D. FENTON, KIMBERLY R. FENTON, BEN B. JOHNSON, MARY P. JOHNSON, SCOTT M. PFEIEFER, DONNA J. PRESTON, ANDREW GRIESSER, JESSE J. MULLEN, AMANDA M. MULLEN, SCOTT E. CHRISTOFFERSON, CANDY S. CRISTOFFERSON, CLIFFORD A. MATHER, WENDY L. MATHER, PHILLIP C. BUFFINGTON, ROBYN B. BUFFINGTON, COREY S. STROTHMAN, SAMANTHA STROTHMAN, PRAIRIE AG REAL ESTATE HOLDINGS, LLC,

Plaintiffs-Appellees / Cross-appellants,

vs.

DAN JOHNSON and LINDA JOHNSON,

Defendants-Appellants,

and

THE CITY DEVELOPMENT BOARD OF THE STATE OF IOWA,

Defendant / Cross-appellee,

and

HENRY COUNTY, IOWA

Defendant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR HENRY COUNTY
THE HONORABLE JOHN M. WRIGHT

DEFENDANT / CROSS-APPELLEE'S FINAL BRIEF

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Authorities

Iowa. R. App. P. 6.903(2)(g)(3)

ROUTING STATEMENT

Defendant / Cross-appellee the City Development Board of the State of Iowa ("Board") is involved in this appeal solely as a cross-appellee. The issues raised in this cross-appeal are appropriate for transfer to the Court of Appeals because they can be resolved by the routine application of existing legal principles. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF FACTS[1] AND PROCEDURAL BACKGROUND

A. The Board's Structural and Legal Framework.

The City Development Board is a state board established by Iowa Code § 368.9. The Board's responsibilities include supervision of the procedures necessary to carry out a city discontinuance. Iowa Code § 368.21; *see also* Iowa Code § 368.1 (defining discontinuance as the termination of a city). "In the case of a discontinuance, the board shall publish two notices as provided in section 368.15 that it will receive and adjudicate claims against the discontinued city for a period of six months from the date of last notice, and

[1] These facts are taken from allegations in Plaintiffs' petition. Though the Board may contest some of these allegations, the Board acknowledges that when considering the merits of a motion to dismiss, the Court must accept the allegations contained in a plaintiff's complaint as true. *Hedlund v. State*, 875 N.W.2d 720, 724 (Iowa 2016).

shall cause necessary taxes to be levied against the property within the discontinued city to pay claims allowed." *Id*.

B. Factual Background

On February 17, 2017, the City of Mt. Union ("City") filed a notice of discontinuance with the Board. (Plaintiffs' Petition for Declaratory Judgment, ¶ 11, App. 14). On March 8, 2017, the Board directed staff to carry out procedures to complete the City's discontinuance. (Petition, ¶ 17, App. 15). On March 10, 2017, the Board announced it would address claims raised against the City over the next six months pursuant to Iowa Code section 368.3 and 368.20.

On September 11, 2017, the Johnsons filed a monetary claim against the City with the Board based on their petition in Henry County No. LALA011869 ("Johnson Litigation"). (Petition, ¶ 22, App. 16). On December 7, 2017, the district court in the Johnson Litigation issued judgment against the City in favor of Johnsons. (Petition, ¶ 25, App. 17). The Johnsons submitted the district court judgment to the Board for payment. *See* (Petition, ¶ 27, App. 17).

On January 10, 2018, the Board held a public hearing on whether to grant the Johnsons' claims against the former City based on the December 7, 2017 decision of the district court. (Petition, ¶ 28, App. 17). On February 15,

2018, the Board issued a determination that it was bound by the judgment in the Johnson Litigation and allowed Johnsons' claim of $105,000 against the former City in discontinuance proceedings. (Petition, ¶¶ 28-29, App. 17-18).

C. Procedural Background

Plaintiffs filed their petition in the underlying action that is the subject of this appeal on March 26, 2018, thirty-nine days after the Board issued its determination to allow the Johnsons' claim against the former City. In their Petition, Plaintiffs sought declaration of the following:

> (1) that the judgment in the Johnson Litigation is void for lack of jurisdiction (Petition, 9, App. 19);
>
> (2) that the Board is not bound by judgments entered after it opened the six-month claims period against the discontinued City (Petition, 11, App. 21);
>
> (3) that the Board has authority to determine the validity of the judgment in the Johnson Litigation (Petition, 11, App. 21);
>
> (4) that the Board must adjudicate the underlying factual and legal issues featured in the Johnson Litigation (Petition, 11, App. 21);
>
> (5) that the Board unconstitutionally applied certain provisions of Iowa Code chapter 368 (Petition, 12, App. 22).
>
> (6) that the petition should be consolidated with an existing petition for judicial review brought against the Board. (Petition, 13, App. 23)

Plaintiffs acknowledged that they filed a petition for judicial review in a separate action. (Petition, ¶¶ 29, 33, App. 18, 19). Similarly, they

acknowledged that judicial review of agency action is the exclusive way to challenge error by the Board. (Petition, 11, App. 21).

Plaintiffs served notice of their petition for declaratory judgment on the Board by personal service on April 12, 2018, seventeen days after it was filed. (Return of Service of Original Notice to Board, 1, App. 25).

The Board moved to dismiss all counts of the petition for failure to state a claim upon which relief may be granted on May 2, 2018. (Board Motion to Dismiss, 2-6, App. 27-31). The Board sought dismissal of the bulk of Plaintiffs' claims because judicial review is the exclusive remedy to challenge the Board's decision to allow the Johnsons' claims against the City. (Mot. Dismiss, 2-4, App. 27-29). The Board also sought dismissal of Plaintiffs' collateral attack against the district court's ruling in the Johnson Litigation because that issue states no claim against the Board. (Mot. Dismiss, 5-6, App. 30-31).

On July 10, 2018, the district court dismissed Plaintiffs' case against the Board. (Order on Motion to Dismiss, 6, App. 31). The district court reasoned that judicial review is the exclusive means to review Board action and that the Board is not involved in and has no interest in the Johnson Litigation. (Order on Mot. Dismiss, 5-6, App. 30-31).

After the Johnsons brought an unrelated appeal in this matter, Plaintiffs filed their cross-appeal of the district court's July 10, 2018 order granting the Board's motion to dismiss. (Notice of Cross-Appeal, 1, App. 70).

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR WHEN IT GRANTED THE BOARD'S MOTION TO DISMISS ON THE BASIS THAT JUDICIAL REVIEW IS THE EXCLUSIVE WAY TO CHALLENGE THE BOARD'S ACTION.

Error preservation: The Board does not dispute that Plaintiffs have preserved error concerning the dismissal of their petition in the underlying action.

Standard of review: Iowa's appellate courts review a district court's order granting a motion to dismiss for correction of errors at law. *Hedlund v. State*, 875 N.W.2d 720, 724 (Iowa 2016). Courts accept all well-pleaded facts in the petition as true, but not the conclusions of law. *Id.* Courts affirm an order granting a motion to dismiss if the petition fails to state a claim upon which relief may be granted. *Id.*

Argument summary: Judicial review is the exclusive way to challenge agency action unless a statute referencing Iowa Code chapter 17A expressly states otherwise. Iowa Code Chapter 368 is explicit that judicial review is the sole way to challenge Board action. Under these statutes, Courts have consistently reaffirmed that judicial review is the exclusive way to challenge

Board action. Thus, the district court correctly dismissed Plaintiffs' petition for declaratory judgment as an improper way to challenge Board action.

Even if the Court looks beyond the caption of Plaintiffs' petition for declaratory judgment, that petition still fails as a petition for judicial review because it does not meet filing and other procedural steps for judicial review.

Plaintiffs' remaining arguments that they should be allowed to challenge Board action by declaratory judgment because Chapter 368 limits the scope of judicial review of Board action are incorrect.

A. Judicial review is the exclusive way for Plaintiffs to challenge the Board action contested in their petition.

Judicial review is the exclusive way to challenge agency action unless a statute referencing Iowa Code chapter 17A expressly states otherwise. Iowa Code § 17A.19; *Iowa Farm Bureau Federation v. Environmental Protection Comm'n*, 850 N.W.2d 403 (Iowa 2014) ("The IAPA establishes the exclusive means for a person or party adversely affected by agency action to seek judicial review."). Agency action includes any part of an agency's proceeding, decision, order, grant or denial of relief, or any other exercise or nonexercise of an agency's duty. Iowa Code § 17A.2(2). Unless a statute expressly states otherwise, there is no exception to the exclusivity of judicial review for certiorari, declaratory judgment, or injunction. *Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 835 (Iowa 1979).

The Iowa legislature has expressly stated that judicial review is the exclusive means by which a party may challenge a decision of the Board:

> The judicial review provisions of this section and chapter 17A shall be the exclusive means by which a person or party who is aggrieved or adversely affected by [Board] action may seek judicial review of that [Board] action.

Iowa Code § 368.22(2). The legislature has taken the additional, unusual step of limiting the scope of review for Board decisions. Iowa Code § 368.22(3) (defining limits to scope of appeal from Board action); *see also City of Des Moines v. City Dev. Bd. of State*, 633 N.W.2d 305, 312 (Iowa 2001) (concluding if Section 368.22 and Chapter 17A conflict, then Section 368.22 controls under the doctrine of general and special statutes).

Based on these statutory authorities, Courts have consistently reaffirmed that judicial review is the exclusive way to challenge Board action. *Dunn v. City Dev. Bd. of Iowa*, 623 N.W.2d 820, 824 (Iowa 2001) ("To determine whether the appeal to the district court was proper, we look to the provisions of Iowa Code sections 368.22 and 17A.19"); *City of Hiawatha v. City Dev. Bd.*, 609 N.W.2d 496, 498 (Iowa 2000) (confirming Section 368.22 and Chapter 17A provide the exclusive means to seek review of Board action); *Anderson v. City Development Bd. of Iowa*, 767 N.W.2d 420, 2009 WL 775431 at *5 (Iowa Ct. App. March 26, 2009) (concluding review of Board

action is "limited generally under Iowa Code section 17A.19 and specifically under section 368.22").

Board action includes the Board's decision whether to allow claims against a discontinued city. When a discontinuance occurs, the Board has a duty to supervise procedures necessary to implement the discontinuance. Iowa Code § 368.21. The Board is charged with deciding which claims made against a discontinued city are allowed. *Id.* Based on these decisions, the Board "shall cause necessary taxes to be levied against the property within the discontinued city to pay claims allowed." *Id.*

Plaintiffs' petition challenges the Board's decision to allow the Johnsons' claims against the former City and the procedures by which the Board reached that decision. Plaintiffs claim that the Board should not have considered the Johnsons' claim because it was untimely, (Petition, 11, App. 21), that the Board should have decided it could determine the validity of the district court ruling in the Johnson Litigation, *id.*, that the Board should have re-adjudicated the underlying facts and law in the Johnson Litigation, *id.*, and that the procedures that the Board applied to allow the Johnsons' claims against the former City were unconstitutional. (Petition § 3, App. 22). These counts of the Plaintiffs' petition are all challenges to either or both the Board's January 10, 2018 public hearing to discuss whether to allow Johnsons' claims

against the former City and its February 15, 2018 determination to allow the Johnsons' claim against the former City. (Petition, ¶¶ 28-29, App. 17-18).

The Board's decision to allow the Johnsons' claims against the former City and the procedures by which the Board reached that decision are agency action. The Board's January 10, 2018 public hearing on Johnsons' claim against the discontinued City and February 15, 2018 determination whether to allow the Johnsons' claim were both statutory duties imposed on the Board. Iowa Code § 368.21. The Board's exercise of these duties was Board action. Iowa Code § 17A.2(2) (defining agency action to include an agency's proceeding, decision, order, grant of relief, or other exercise agency duty).

Because the Plaintiffs seek to challenge Board action in their petition, their exclusive means to do so is by a petition for judicial review. But Plaintiffs have instead challenged these Board actions by a petition for declaratory judgment. However, there are no exceptions to exclusivity for Plaintiffs' declaratory judgment action. *Salsbury Labs.*, 276 N.W.2d at 835. Plaintiffs have even tacitly admitted this by acknowledging that they are seeking judicial review against the Board in a separate action. (Petition, ¶¶ 29, 33, App. 18-19).

Thus, Plaintiffs' attempt to seek review of Board action in a petition captioned for declaratory judgment alone should be enough for the Court to

conclude that the district court did not err in dismissing all claims concerning Board action in the underlying case, even when all well-pleaded facts in the Plaintiffs' petition are taken as true.

B. Plaintiffs' petition captioned for declaratory judgment is not a petition for judicial review.

In some cases, Iowa courts have considered whether a petition captioned for declaratory judgment should nonetheless be treated as a petition for judicial review by examining whether "the [petition], its filing and other procedural steps, met section 17A.19 requirements."[2] *Neumeister v. City Development Bd.*, 291 N.W.2d 11, 13 (Iowa 1980); *but see Anderson v. Iowa City Dev. Bd.*, 660 N.W.2d 321, 2003 WL 465560 at *1 (Iowa February 26, 2003) (*per curiam*) (concluding declaratory judgment action barred by res judicata without reaching whether barred by exclusivity of judicial review). So it was in *Neumeister* where the Court considered whether a petition captioned for declaratory judgment was timely filed and served as required to qualify as a petition for judicial review. 291 N.W.2d at 13 (citing Iowa Code § 17A.19(3) (timely filing) and Iowa Code § 17A.19(2) (timely service)); *but see also City of Des Moines*, 633 N.W.2d at 312 (concluding post-*Neumeister*

[2] In the 40 years since *Neumeister*, appellate courts have rarely cited the case to consider whether to construe a declaratory judgment action as a petition for judicial review, and never in a published opinion.

that Section 368.22(1)(b) now controls timely filing involving Board decisions). Another essential judicial review requirement is that a petition does not invoke a district court's original jurisdiction, and cannot be combined with an original action. *Black v. Univ. of Iowa,* 362 N.W.2d 459, 462 (Iowa 1985). Ultimately, the *Neumeister* Court found that the petition captioned for declaratory judgment in that case did not qualify as a petition for judicial review because it failed to meet the timely service of original notice requirement in Section 17A.19(2). 291 N.W.2d at 14. Thus, *Neumeister* too took its place in the long line of cases affirming judicial review as the exclusive way to challenge Board action and agency action more broadly.

Plaintiffs' petition captioned for declaratory judgment fails to meet procedural steps of a petition judicial review. Plaintiffs' petition was filed untimely for a petition for judicial review. A party must seek judicial review of any Board decision within thirty days after it was filed. Iowa Code § 368.22(1)(b); *City of Des Moines,* 633 N.W.2d 312 (concluding Section 368.22 controls appeal filing deadline for Board decision under the doctrine of general and special statutes). However, Plaintiffs did not file their petition until March 26, 2018—thirty-nine days after the Board filed its February 15, 2018 decision allowing the Johnsons' claim against the discontinued City. (Petition, ¶ 29, App. 18). Thus, even if the declaratory judgment caption was

not fatal to treating Plaintiffs' petition as one for judicial review, the Plaintiffs' failure to meet "filing and other procedural steps" required for judicial review is fatal. *Neumeister*, 291 N.W.2d at 14 (concluding petition captioned for declaratory judgment could not be treated as petition for judicial review because it failed to meet procedural steps).

Plaintiffs' petition fails to meet other procedural steps for judicial review requirements as well. Service of original notice was not made within ten days after Plaintiffs' petition was filed as would be required for judicial review. Iowa Code § 17A.19(2). Instead, Plaintiffs did not complete service on the petition filed on March 26, 2018 until seventeen days later on April 12, 2018. (Return of Service of Original Notice to Board, 1, App. 25). Similarly, the petition seeks to invoke the district court's original jurisdiction, which is not permitted in judicial review. *Black*, 362 N.W.2d at 462. Thus, even if the Court elects for closer review, Plaintiffs' petition is not a petition for judicial review. Finally, many of the same plaintiffs, represented by the same counsel, *have* initiated a judicial review of the Board's decisions regarding the Johnson Litigation in a separate action in Henry County. (Petition, ¶¶ 29, 33, App. 18-19).

In sum, because judicial review is the exclusive way to challenge Board action and Plaintiffs' petition is not a petition for judicial review, the Court

should affirm the district court's dismissal of Plaintiffs' claims against the Board, even when all well-pleaded facts in the Plaintiffs' petition are taken as true.

C. Plaintiffs' remaining arguments that the Court should allow their declaratory judgment action against the Board are incorrect.

Courts can review the constitutionality of Board action despite other statutory limitations to the scope of review. For most agencies, Section 17A.19(10) "governs judicial review of administrative agency decisions." *Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*, 919 N.W.2d 6, 11 (Iowa 2018). Section 17A.19(10)(a) allows judicial review of the constitutionality of agency action. Iowa Code § 17A.19(10)(a). However, Section 17A.19(10) is not applicable to review of Board action. Iowa Code § 368.22(3)(e). Instead, Courts review Board action for "questions relating to jurisdiction, regularity of proceedings, and whether the decision appealed from is arbitrary, unreasonable, or without substantial supporting evidence." Iowa Code § 368.22(2); *see also Frank v. Iowa Dep't of Transp., Motor Vehicle Div.*, 386 N.W.2d 86, 87 (Iowa 1986) (explaining in analogous 17A context that agency decisions are unreasonable when there is no room for a difference of opinion among reasonable minds). Though constitutionality is not listed explicitly in Section 368.22, the Board's proceedings and decisions,

if unconstitutional, would be subject to review by the courts as irregular or unreasonable. *Cf. Davis v. State*, 443 N.W.2d 707, 709 (Iowa 1989) (stating legislative imposition of reasonable regulations is proper so long as no constitutional right is materially impaired).

Plaintiffs should not be allowed to challenge Board action as unconstitutional in a declaratory judgment action merely because constitutionality is not explicitly listed as a ground for judicial review. Plaintiffs can challenge the constitutionality of Board decisions and proceedings pursuant to Section 368.22(2) despite other limits to the scope of the Court's review. Specifically, the Court can review the constitutionality of Board decisions under reasonableness and irregularity review of Board action pursuant to Section 368.22(2). *Cf. Davis*, 443 N.W.2d at 709 (stating legislative imposition of reasonable regulations is proper so long as no constitutional right is materially impaired); *see also Frank*, 386 N.W.2d at 87 (explaining in analogous 17A context that agency decisions are unreasonable when there is no room for a difference of opinion among reasonable minds). Because the constitutionality of Board action is subject to judicial review, Plaintiffs' argument that they may challenge Board action by declaratory judgment should fail. *See Salsbury Labs.*, 276 N.W.2d at 835 (concluding

there is no exception to the exclusivity of judicial review for declaratory judgment actions).

Plaintiffs should not be allowed to challenge Board action in a declaratory judgment action merely because Section 368.22(3) otherwise narrows the scope of judicial review. Section 368.22(2) explicitly affirms that, despite narrowing the scope of judicial review, judicial review remains the exclusive means to challenge Board action. *See Dunn v. City Dev. Bd. of Iowa*, 623 N.W.2d 820, 824 (Iowa 2001) ("To determine whether the appeal to the district court was proper, we look to the provisions of Iowa Code sections 368.22 and 17A.19"). Thus, Plaintiffs' assertion that Section 368.22's limitations to the scope of review allow them to challenge Board action by declaratory judgment is incorrect on the face of that statute. *Salsbury Labs.*, 276 N.W.2d at 835 (concluding there is no exception to the exclusivity of judicial review for declaratory judgment actions).

II. THE DISTRICT COURT DID NOT ERR WHEN IT GRANTED THE BOARD'S MOTION TO DISMISS A COUNT OF THE PETITION BECAUSE PLAINTIFFS FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AGAINST THE BOARD.

Plaintiffs cross-appealed the district court's entire order dismissing the Board from its declaratory judgment action. (Notice of Cross-Appeal, 1, App. 71). However, the Board has only addressed Counts II and III of the petition

above because Count I of the petition is unrelated to Board action. Instead, Count I collaterally attacks the district court's decision in the Johnson Litigation granting the Johnsons' claim as void. (Petition, 9, App. 19).

Plaintiffs do not claim in their briefing that the Court erred in dismissing their collateral attack as to the Board. If Plaintiffs do not brief this issue, the Court should find it is waived. *See* Iowa. R. App. P. 6.903(2)(g)(3).

In any case, the Court properly dismissed Plaintiffs' collateral attack as to the Board because Plaintiffs failed to state a claim upon which relief may be granted. Plaintiffs' petition does not allege that the Board was a party to the Johnson Litigation. So, even if the district court declared that decision void, there would be no relief against the Board. The Board acknowledges that Plaintiffs might come to the Board if their collateral attack is successful and request that the Board reconsider its decision to allow the Johnsons' claim. However, this possibility is not at issue in Count I of the petition. Despite what the Plaintiffs (and perhaps even the Johnsons) may argue, the Board has no stake in whether the decision in the Johnson Litigation is declared void. Thus, the district court did not err when it dismissed Count I of Plaintiffs' petition for failure to state a claim against the Board upon which relief may be granted.

CONCLUSION

For the forgoing reasons, the City Development Board respectfully requests that the Court affirm the district court's decision granting the Board's motion to dismiss.

CONDITONAL REQUEST FOR ORAL ARGUMENT

The Board does not seek oral argument. However, if oral argument is granted to the Plaintiffs regarding their cross-appeal, the Board asks to be heard as well.

Respectfully submitted,

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ATTORNEYS FOR THE CITY
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1) or (2) because:

• This brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains 3643 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: February 13, 2020

/s/ Alan Nagel
ALAN NAGEL
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Alan Nagel, hereby certify that on the 13th day of February, 2020, I, or a person acting on my behalf, did serve Cross-Appellee's Final Brief and Conditional Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

/s/ Alan Nagel
ALAN NAGEL
Assistant Attorney General

CERTIFICATE OF FILING

I, Alan Nagel, hereby certify that on the 13th day of February, 2020, I, or a person acting on my behalf, filed Cross-Appellee's Final Brief and

Conditional Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

/s/ Alan Nagel
ALAN NAGEL
Assistant Attorney General