IN THE COURT OF APPEALS OF IOWA

No. 2-1005 / 12-0444
Filed March 13, 2013

**GLORI DEI FILIPPONE, A Minor
By and Through her Mother and
Next Friend, MARIA FILIPPONE,**
Petitioner-Appellant,

vs.

**IOWA DEPARTMENT OF NATURAL
RESOURCES,**
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Douglas J. Stovall, Judge.

Glori Dei Filippone appeals the denial of her petition for rulemaking. **AFFIRMED.**

Channing L. Dutton of Lawyer, Lawyer, Dutton & Drake, L.L.P., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, and David R. Sheridan and Jacob J. Larson, Assistant Attorneys General, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

BOWER, J.

Glori Dei Filippone petitioned the Iowa Department of Natural Resources (DNR) to adopt new rules regarding the emission of greenhouse gasses in Iowa. After the DNR denied the petition, she sought judicial review. The district court affirmed the DNR's denial, and now Filippone appeals.

Because Filippone failed to preserve error on her argument regarding the Inalienable Rights Clause, we do not consider it on appeal. We decline to expand the public trust doctrine to include the atmosphere. Finally, we find the DNR's denial of the petition for rulemaking was not unreasonable, arbitrary, capricious, or an abuse of discretion. Accordingly, we affirm.

I. Background Facts and Proceedings.

On May 4, 2011, Kids vs Global Warming filed a petition for rulemaking pursuant to Iowa Code section 17A.7(1) (2011).[1] The petition proposed that the DNR adopt new rules restricting greenhouse gas emissions. On June 1, 2011, Our Children's Trust and Glori Dei Filippone requested to be added as petitioners.

The Environmental Protection Commission considered the petition at a June 21, 2011 public meeting, at which Filippone presented oral and written comments supporting the rulemaking petition. The commission voted unanimously to deny the petition.

On June 22, 2011, the DNR denied the petition, citing its current greenhouse gas emissions requirement. It also noted that it anticipated the

[1] Section 17A.7(1) states: "An interested person may petition an agency requesting the adoption, amendment, or repeal of a rule."

Environmental Protection Agency (EPA) will likely be creating new standards, which might be inconsistent with the proposed rules in violation of Iowa Code section 455B.133(4). Finally, the DNR noted that adopting the proposed rules would require resources and funding to be designated to the program, and that without additional legislatively-appropriated funding, it would be unable to develop and administer the proposed rules.

Filippone filed a petition for judicial review on July 21, 2011. The district court affirmed the DNR's denial of the petition for rulemaking after finding the denial was not unreasonable, arbitrary, capricious, or an abuse of discretion. The court also declined Filippone's invitation to expand the public trust doctrine to include the atmosphere. Filippone filed a timely appeal.

II. Scope and Standard of Review.

Iowa Code section 17A.19(10) governs judicial review of agency decision making. *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 255 (Iowa 2012). We apply the standards of section 17A.19(10) to determine whether we reach the same results as the district court. *Id.* If the agency action has prejudiced the substantial rights of the petitioner and meets one of the criteria enumerated in section 17A.19(10)(a) through (n), the district court may grant relief. *Id.*

Under section 17A.19(1), our standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review. *Id.* at 256. Where the agency has been clearly vested with the authority to make fact findings on an issue, we cannot disturb those findings unless they are not supported by substantial evidence in the record before the court when that court

reviewed the record as a whole. *Id.* If the agency has been clearly vested with the authority to make a factual determination, it follows that application of the law to those facts is likewise vested by a provision of law within the agency's discretion. *Id*. In those cases, we only disturb the agency's application of the law to the facts if that application is irrational, illogical, or wholly unjustifiable. *Id.*

An agency's decision cannot be unreasonable or involve an abuse of discretion. Iowa Code § 17A.19(10)(n); *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994). Unreasonableness is defined as "action in the face of evidence as to which there is no room for difference of opinion among reasonable minds, or not based on substantial evidence." *Stephenson*, 522 N.W.2d at 831. Abuse of discretion is synonymous with unreasonableness, and involves lack of rationality, focusing on whether the agency has made a decision clearly against reason and evidence. *Id.*

Our scope of review is for correction of errors at law. *Soo Line R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994). When a party raises a constitutional issue in an appeal of an agency action, our review is de novo. *Insituform Techs., Inc. v. Employment Appeal Bd.*, 728 N.W.2d 781, 788 (Iowa 2007).

III. Analysis.

1. Inalienable Rights Clause.

Filippone first argues the DNR acted unreasonably in denying the proposed rule because Iowa's Inalienable Rights Clause provides Iowans with a constitutionally-protected right to a life-sustaining atmosphere. However, a

review of the record shows Filippone failed to raise this issue before the district court in her petition for judicial review, and the issue was not addressed by the court in its ruling. Ordinarily, issues must be both raised and decided by the district court before we will decide them on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Filippone has failed to preserve error on this claim.

2. Public Trust Doctrine.

Filippone also argues the DNR must consider new rules regarding greenhouse gas emissions because the public trust doctrine applies to the atmosphere. This doctrine, which limits the State's power to dispose of land encompassed within the public trust, is "based on the notion that the public possesses inviolable rights to certain natural resources." *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996). The doctrine originally applied to navigable-water beds, but has been expanded to embrace the public's use of lakes and rivers for recreational purposes. *Id.*

The public trust doctrine in Iowa has a narrow scope. *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 813 (Iowa 2000). As our supreme court has stated, "We do not necessarily subscribe to broad applications of the doctrine, noted by one authority to include rural parklands, historic battlefields, or archaeological remains. In fact, we are cautioned against an overextension of the doctrine." *State v. Sorensen*, 436 N.W.2d 358, 363 (Iowa 1989) (citations omitted). In *Bushby v. Washington County Conservation Bd.*, 654 N.W.2d 494, 498 (Iowa 2002), our supreme court declined to extend the doctrine to cover

forested areas. It has also declined to extend the doctrine to encompass a public alleyway that did not provide access to a river or lake, finding such an extension "would be inconsistent with the rationale underlying the public trust doctrine." *Fencl*, 620 N.W.2d at 814.

In light of the case law cited, the district court declined to expand the public trust doctrine to include the atmosphere. We concur that there is no precedent for extending the public trust doctrine to include the atmosphere. Because the DNR does not have a duty under the public trust doctrine to restrict greenhouse gases to protect the atmosphere, its denial of the proposed rule was not unreasonable.

3. Fair Consideration.

Finally, Filippone argues the DNR acted unreasonably in denying the proposed rule because it failed to give fair consideration to the petition for rulemaking.

In *Community Action Research Group v. Iowa State Commerce Commission*, 275 N.W.2d 217, 220 (Iowa 1979), our supreme court held that section 17A.7 "requires only that an agency give fair consideration to the propriety of issuing the proposed rule. It does not require the agency to take a stand on the substantive issues that might prompt the proposal of a rule."

The DNR's Environmental Protection Commission held a public hearing on the proposed rulemaking and heard presentations from those both for and against the proposed rulemaking. The commission then voted unanimously to deny the petition for rulemaking. The director of the DNR then issued a written

denial of the petition for rulemaking, which cited the following reasons for its denial: current state law regulating greenhouse emissions, a potential conflict with planned EPA rules governing greenhouse emissions, and a lack of resources and funding to develop and administer the proposed rules.

Filippone cites to two comments made during the Environmental Protection Commission's public hearing to support her argument that the petition for rulemaking was not given fair consideration. At the hearing, one of the commissioners unfortunately stated that Filippone had "lost" him during her presentation when she said she was a vegetarian. The other comment came from a commissioner who stated she would have liked more time to look over the materials related to the petition. However, all seven commission members voted to deny the petition. The written denial by the DNR director then outlines specific reasons why the petition was denied.

We agree with the district court that the DNR gave fair consideration to the proposed rulemaking. Its denial of the petition was not unreasonable, arbitrary, capricious, or an abuse of discretion. Accordingly, we affirm the decision of the DNR to deny the petition for rulemaking.

AFFIRMED.

Mullins, J., concurs; Doyle, P.J., concurs specially.

DOYLE, J. (concurring specially)

I concur specially. I agree there is no Iowa case law for extending the public trust doctrine to include the atmosphere. But, I believe there is a sound public policy basis for doing so.

In 1989, in enacting the Resources Enhancement and Protection (REAP) program, the legislature stated:

> The general assembly finds that:
> 1. The citizens of Iowa have built and sustained their society on Iowa's *air*, soils, waters, and rich diversity of life. The well-being and future of Iowa depend on these natural resources.
> . . . .
> 4. The *air*, waters, soils, and biota of Iowa are interdependent and form a complex ecosystem. Iowans have the right to inherit this ecosystem in a sustainable condition, without severe or irreparable damage caused by human activities.

1989 Iowa Acts ch. 236, § 2 (now codified at Iowa Code § 455A.15 (2013)) (emphasis added). Furthermore,

> It is the policy of the state of Iowa to protect its natural resource heritage of *air*, soils, waters, and wildlife for the benefit of present and future citizens with the establishment of a resource enhancement program.

Id. § 3 (now codified at § 455A.16) (emphasis added). The legislature, the voice of the people, has spoken in terms as clear as a crisp, cloudless, autumn Iowa sky.

Nevertheless, in view of our supreme court's stated reluctance to extend the public trust doctrine beyond rivers, lakes, and the lands adjacent thereto, I do not feel it is appropriate for a three-judge panel of this court to take on the task of expanding the doctrine to include air. *See Bushby v. Washington County Conservation Bd.*, 654 N.W.2d 494, 498 (Iowa 2003) ("[T]he scope of the public-

trust doctrine in Iowa is narrow, and we have cautioned against overextending the doctrine."); *Figley v. W.S. Indus.*, 801 N.W.2d 602, 608 (Iowa Ct. App. 2011) ("[W]e are not at liberty to overturn precedent of our supreme court."). I therefore specially concur.