IN THE COURT OF APPEALS OF IOWA

No. 7-394 / 06-0244
Filed October 12, 2007

SCOTT McCLURE,
Plaintiff-Appellant,

vs.

VERIZON WIRELESS, ST. CHARLES TOWER, INC., T & J LAND, INC., BOONE COUNTY, IOWA, and BOONE COUNTY BOARD OF ADJUSTMENT,
Defendants-Appellees.

Appeal from the Iowa District Court for Boone County, David R. Danilson, Judge.

Appellant Scott McClure appeals the district court's grant of summary judgment in favor of appellees Verizon Wireless, St. Charles Tower, Inc., T & J Land, Inc., Boone County, Iowa, and the Boone County Board of Adjustment. **AFFIRMED.**

Robert W. Goodwin of Goodwin Law Office, Ames, for appellant.

Barry J. Nadler and Hannah M. Rogers of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Ames, for appellee Verizon Wireless, Inc.

Neil Shortlidge of Stinson Morrison Hecker, L.L.P., Overland Park, Kansas, for appellee Verizon Wireless, Inc.

Jim P. Robbins, Boone County Attorney, Boone, for appellees Boone County, Iowa and Boone County Board of Adjustment.

Jim Quilty of Crawford Law Firm, Des Moines, for appellee St. Charles Tower, Inc.

Stephanie Karr of Curtis, Heinz, Garrett & O'Keefe, St. Louis, Missouri, for appellee St. Charles Tower, Inc.

Loren A. Nalean of Nalean & Nalean, Boone, for appellee T & J Land, Inc.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

The Boone County Board of Adjustment issued a conditional use permit authorizing the construction of a cell phone tower opposite Scott McClure's home. McClure sued, claiming he should have been notified of the Board's proceedings by personal service or by mail, rather than by publication. The district court rejected this claim and granted summary judgment in favor of several defendants. We affirm.

I. Background Facts and Proceedings

The undisputed material facts are as follows. McClure learned a cell phone tower might be built on his neighbor's property. He asked the Zoning Administrator about the matter and was advised that several hurdles needed to be overcome. McClure subsequently told his neighbor that he did not want the tower built.

Two to three months after the conversation with his neighbor, T & J Land, Inc. and St. Charles Tower, Inc. applied to the Boone County Zoning Commission for a conditional use permit to build a wireless communication tower on the property of McClure's neighbor. They requested the permit on behalf of Verizon Wireless.

The Zoning Commission had a notice of public hearing published in the local newspaper. The notice stated the purpose of the hearing and the location of the property and provided that "Persons wishing to appear at such hearing may do so in person, or by attorney, or other representative." McClure did not see the notice and, as a result, did not attend the hearing. The Commission recommended approval of the conditional use permit application. The matter proceeded to the Board of Adjustment.

The Board had two notices of public hearing published in the local newspaper, one to apprise the public of the originally scheduled date, and another to provide

notification of a rescheduled hearing date. The second notice was published seven days before the hearing. McClure did not see these notices either, and as a result, did not attend the hearing. Following the rescheduled hearing, the Board approved the permit application.

The cell tower was built between November 2003 and the spring of 2004. In late 2003, McClure asked to attend a Board meeting to discuss the Board's earlier approval of the application for a conditional use permit. He later asked to reopen the hearing. The Board denied the request.

Approximately twenty-six months later, McClure filed a petition for declaratory judgment asking the district court to "declare and construe the Defendants' rights to maintain the cell tower" constructed across the road from his property, and to "enter an Order requiring said tower to be removed." The defendants moved for summary judgment, asserting the action was untimely. The district court granted summary judgment in favor of the defendants, concluding McClure received adequate notice of the Board's hearing, an adequate public hearing was held, and the petition for declaratory judgment was untimely. McClure appealed.

McClure raises several arguments on appeal. We find it necessary to address only one: Whether the district court erred in upholding the published notice of the Board hearing on the conditional use permit application.[1]

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[1] The defendants reiterate that the petition for declaratory judgment was untimely. *See Sutton v. Dubuque City Council*, 729 N.W.2d 796, 800 (Iowa 2006) ("[P]olicy considerations militate in favor of a short period of limitations in challenging rezoning based on some claim of illegality in the enactment of the ordinance."). However, the issue is not as straightforward as the defendants suggest, because if the notice was indeed improper, that fact implicates the concept of subject matter jurisdiction, which may be raised at any time. *See Osage Conservation Club v. Bd. of Supervisors of Mitchell County*, 611 N.W.2d 294, 297 (Iowa 2000); *Build-A-Rama, Inc. v. Peck*, 475 N.W.2d 225, 227 (Iowa Ct. App. 1991). In addition, the court would likely have to

II. Analysis

The Iowa Supreme Court has adopted a reasonableness test for determining the adequacy of a board of adjustment's notice of a pending application for a conditional use permit. *Buchholz v. Bd. of Adjustment of Bremer County*, 199 N.W.2d 73, 77 (Iowa 1972). In *Buchholz*, the court stated, "When notice must be given but no method is prescribed, the notice must be a reasonable one under the circumstances. It must afford a fair opportunity to appear and object."

McClure urges that notice by publication was unreasonable because the Board was acting in a "quasi-judicial function." He states the Board should have provided him with notice of the hearing via United States mail or personal service. The defendants counter that notice by publication was authorized by statute and ordinance and, therefore, the notice given was reasonable.

Beginning with the defendants' argument first, we note that the statutory notice provision and the zoning ordinance on which they rely apply to zoning changes by the Board of Supervisors rather than the consideration of conditional use permits by the Board of Adjustment. The two are different. *See* Iowa Code § 335.6 (2005) ("The board of supervisors shall provide for the manner in which the regulations and restrictions and the boundaries of the districts shall be determined . . . ."); Boone County, Iowa Zoning Ordinance § 30(B)(3) ("[T]he Board of Supervisors shall hold a public hearing [upon a proposed zoning amendment], and notices thereof shall be published in accord with Iowa law."); *Id.* § 22 (Statement of Intent) (explaining that the conditional use permit process "provides for flexibility in identifying the special

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address the adequacy of the notice in any event. *See* Restatement (First) of Judgments § 129 cmt. b (1942) (discussing void judgments and "a technical failure of service").

conditions" that may make permissible a certain land use otherwise inconsistent with a zoning district, without "making the Ordinance unreasonably complicated"); *Boomhower v. Cerro Gordo County Bd. of Adjustment*, 163 N.W.2d 75, 77 (Iowa 1968) ("Amendment of a zoning ordinance is a legislative function placed in the board of supervisors. The board of adjustment which is granted quasi-judicial and administrative function was not given and should not have veto power over the legislative body."). *Compare* Iowa Code § 335.4 (vesting zoning power in the board of supervisors) *with id.* § 335.15 (granting the power to hear special exceptions to the board of adjustment). Therefore, the cited statute and ordinance do not directly bear on the adequacy of the notice issued here. *See Buchholz*, 199 N.W.2d at 77 (not imposing on board of adjustment the statutory notice requirements contained in Iowa Code section 358A.7 (1971) for actions by board of supervisors).

Having said that, we cannot conclude as a matter of law that "reasonable" notice in this context was notice by personal service or by mail. In *Buchholz*, the court declined to prescribe either of these types of notices even after recognizing that the granting of a special use permit was a quasi-judicial function. 199 N.W.2d at 77; *cf. Quality Refrigerated Serv., Inc. v. City of Spencer*, 586 N.W.2d 202, 206 (Iowa 1998) (stating in challenge to proposed comprehensive amendments to zoning ordinance, "[w]e think notice by publication under the circumstances of this case is reasonably certain to inform those affected"). On the undisputed material facts in this summary judgment record,[2] we conclude published notice in the local newspaper seven days

[2] McClure argues certain facts were in dispute, but we are convinced the facts he raises are not material to resolve the notice issue. *See Bill Grunder's Sons Constr., Inc. v. Ganzer*, 686 N.W.2d 193, 196 (Iowa 2004) ("An issue of fact is 'material' only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law.").

before the scheduled hearing was reasonable as a matter of law.[3] *See Perkins ex rel. Perkins v. Dallas Center-Grimes Cmty. Sch. Dist.*, 727 N.W.2d 377, 378 (Iowa 2007) (setting forth standards for review of summary judgment ruling); *Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988) ("If the conflict in the record concerns only the legal consequences flowing from undisputed facts, entry of summary judgment is proper.").

AFFIRMED.

[3] Our conclusion may have been different had McClure asserted bad faith on the part of the Board in failing to notify him by other means, but McClure conceded at oral argument this was not an issue.