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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-319 / 90-1885

GERALD W. HOWE, GARY WATTS, BECKY WATTS, ROBERT SHELLADY, MARY SHELLADY, DWIGHT HUNTER, WILLIAM HUNTER, ANNE MARIE TRIMPE and **R. MICHAEL HOWE,**

Appellants,

311

vs.

JOHNSON COUNTY BOARD OF ADJUSTMENT,

Appellee.

Appeal from the Iowa District Court for Johnson County, William L. Thomas, Judge.

Plaintiffs appeal the district court's annullment of a writ of certiorari. **AFFIRMED.**

Charles A. Barker of Barker, Cruise, Kennedy, Houghton & Foster, Iowa City, for appellants.

Anne Lahey, Assistant Johnson County Attorney, for appellee.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

DONIELSON, P.J.

On April 21, 1988, Clarence Sewell, acting on behalf of Allied Cellular Systems, Inc., filed an application for a special use exception asking the Johnson County Board of Adjustment to allow the construction of a prefabricated building and communications tower. The tower was to be constructed by Allied Cellular in order to provide Johnson County with cellular telephone service. The site for the tower had apparently been chosen as one of the few feasible locations within the county based on the topography and borders of the county.

The application required a list of the names and addresses of all the property owners within 500 feet of the proposed site in order that they could be given notice of the hearing. Sewell listed the plaintiffs' addresses as Rural Route 5, Iowa City, Iowa 52240, and notices were sent to all the listed addresses. However, the plaintiffs' addresses are not Rural Route 5, Iowa City. They all nevertheless own real estate within 500 feet of the proposed site. None of the plaintiffs received notice of the hearing.

In May 1988, the application was presented to the Johnson County Board of Adjustment. At the hearing, on May 11, 1988, Sewell told the Board that all interested parties had been notified, and no one present filed an objection to the proposed plan. Accordingly, the Board

granted the special use exception, and the building permit was approved on August 9, 1988.

Upon learning of the construction, Gerald Howe, one of the plaintiffs, filed a petition in district court for injunctive relief, requesting a temporary halt to the construction. The court denied such relief, but stated that the notice requirements of the Johnson County zoning ordinance had not been met.

On June 21, 1989, Howe appealed the matter to the Board of Adjustment, bringing to their attention Sewell's failure to comply with the applicable notice provisions. A hearing was held on October 25, 1989, and the Board received a number of complaints concerning the communications facility. Nevertheless, the Board denied the appeal on the date of the hearing.

The plaintiffs subsequently applied for a writ of certiorari in the district court. A trial was held, and the court entered its ruling on November 14, 1990. The district court held the issue of lack of notice had not been brought to the attention of the Board until June 21, 1989, over six months after the plaintiffs should reasonably be charged with knowledge of the basis for their appeal. The court reasoned that, at the latest, the plaintiffs had knowledge by November 18, 1988, the date the district court had denied the plaintiffs injunctive relief.

Therefore, at that time, the court reasoned, the plaintiffs were charged with the knowledge of the facts constituting the basis for their appeal. As such, the plaintiffs should have appealed the matter within a reasonable time after acquiring such knowledge. Six months, the court held, was an unreasonably lengthy delay. The court concluded the delay was unreasonable as a matter of law, comparing other statutorily provided limits on the time for filing an appeal. Accordingly, the district court annulled the writ of certiorari.

The plaintiffs have appealed. They contend that when statutory requirements regarding notice are not followed, any orders entered by the Board are void. The plaintiffs also maintain the district court erred in finding the appeal of the Board's denial of relief was untimely filed.

The proceeding below was an action, pursuant to Iowa Rule of Civil Procedure 306, for a Writ of Certiorari. Such an action is a law action. State v. Cullison, 227 N.W.2d 121, 126 (Iowa 1975). Therefore, our standard of review is for correction of errors of law. Id.; Iowa R. App. P. 4. We are bound by the trial court's factual findings if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1).

The plaintiffs first argue that the May 11, 1988, decision by the Board is void because the notice requirements of the zoning ordinance were not satisfied. As such, it appears the plaintiffs contend that a void

order may be attacked at any time, thus circumventing any time restriction for the filing of an appeal.

The trial court did not address this argument. The plaintiffs did not file a motion requesting the court to enlarge or amend its findings pursuant to Iowa Rule of Civil Procedure 179(b). Therefore, this argument has not been properly preserved for our review. Estate of Grossman v. McCreary, 373 N.W.2d 113, 114 (Iowa 1984).

The plaintiffs next argue the trial court erred in upholding the Board's denial of the plaintiffs' appeal on the basis that the plaintiffs' appeal to the Board was untimely as a matter of law.

The issues before the district court in a certiorari proceeding are confined to questions of illegality raised by the petition for the writ of certiorari. Vogelaar v. Polk County Zoning Board of Adjustment, 188 N.W.2d 860, 863 (Iowa 1971). The plaintiffs, in their petition for the writ of certiorari, alleged that the Board's decision on October 25, 1989 was "illegal in whole or in part or is arbitrary and capricious" in several particulars. Essentially, the plaintiffs alleged the Board's refusal to revoke the special use permit and building permit was illegal.

Iowa Code section 358A.13 (1989), and Article XXX, section 3 of the Johnson County Zoning Ordinance provide, in relevant part:

> Appeals to the board of adjustment may be taken by any person aggrieved . . . . Such shall be taken within a reasonable time, as provided by the rules of the board of adjustment, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof.

The Board has never adopted a rule establishing a reasonable time for appeal. However, in Brock v. Dickinson County Board of Adjustment, 287 N.W.2d 566 (Iowa 1980), the supreme court held that, in the absence of a rule denoting a specific time for appeal, a board of adjustment could use a reasonable time standard to determine the timeliness of appeals before it. Id. at 570.

The trial court held the Board's refusal to reverse itself was not illegal because the plaintiffs failed to file their appeal to the Board within a reasonable period of time. We affirm the trial court.

The costs of this appeal are taxed to the plaintiffs-appellants.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.

Habhab, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would affirm the writ.