IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

No. 9-396 / 98-484
Filed November 10, 1999

THE OSAGE CONSERVATION CLUB, An Iowa Not-For-Profit Corporation,

Appellant,

vs.

BOARD OF SUPERVISORS OF THE COUNTY OF MITCHELL, IOWA,

Appellee.

Appeal from the Iowa District Court for Mitchell County, John S. Mackey, Judge.

The appellant appeals from a district court decision dismissing its petition for writ of certiorari from a board of supervisors' decision approving rezoning of land for a residential subdivision adjacent to the appellant's open air shooting range **REVERSED AND REMANDED.**

Patrick J. Rourick, St. Ansgar, for appellant.

Aaron R. Murphy, Assistant County Attorney, for appellee.

Considered by Streit, P J., and Mahan, and Vaitheswaran, J.

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VAITHESWARAN, J.

Osage Conservation Club (OCC) owns land in Mitchell County adjacent to property owned by James and Rebecca Hovig. OCC challenges a decision of the Mitchell County Board of Supervisors to rezone the Hovigs' land from agricultural to residential. Because we find the Board lacked jurisdiction to render a decision, we reverse.

I. Background Facts and Proceedings

The Hovigs filed a rezoning application with the Mitchell County Planning and Zoning Commission (Commission). The Commission issued, mailed and published a notice of public hearing. At the hearing, the Commission considered objections and testimony from OCC. The Commission then unanimously approved the zoning change and voted to forward the final plat to the Mitchell County Board of Supervisors (Board) with a recommendation that the Board also approve the change.

OCC filed written objections and met with the Board. The Board, however, did not issue a notice of public hearing or hold a public hearing. On December 17, 1997, the Board amended its ordinance to reflect the zoning change recommended by the Commission.

OCC petitioned the district court for a writ of certiorari, challenging the merits of the Board's decision and the absence of fact findings. The court received a certified record of administrative proceedings, together with an affidavit from a board member delineating reasons in support of its decision. The district court upheld the Board's decision on the merits and dismissed the petition. We do not reach the merits

because we conclude the Board lacked jurisdiction to amend the zoning ordinance.

II. Jurisdiction/Error Preservation

Iowa Code chapter 335 (1997) governs county zoning. Section 335.6 provides that zoning regulations "shall not become effective until after a public hearing, at which parties in interest and citizens shall have an opportunity to be heard." The section further requires publication of notice of the time and place of hearing. Section 335.7 extends that notice and hearing requirement to zoning changes, stating in pertinent part, "[t]he provisions of section 335.6 relative to public hearings and official notice shall apply equally to all changes or amendments."

In *Bowen v. Story County Board of Supervisors*, 209 N.W.2d 569, 571 (Iowa 1973), the Iowa Supreme Court held that section 358A.7 (the predecessor statute to section 335.7), "prescribes public notice and hearing before the board of supervisors" prior to a zoning change, and this statutory requirement is "mandatory and jurisdictional." The court stated, "failure of the board of supervisors to provide public notice and hearing as required by Code section 358A.7 deprived it of jurisdiction to rezone the Carlson land." *Id.* at 572.

The certified record reflects that the Board did not comply with the notice and hearing requirements of Iowa Code section 335.7. The parties, however, did not raise this issue before the Board or the district court. The first question we address, therefore, is whether they were required to do so in order to preserve the issue for appeal. The court in *Bowen* found the board's power to rezone without notice and a public hearing could "be attacked at any stage in order to avoid unwarranted exercise

of judicial authority" and "unwarranted exercise of such tribunal's authority." *Id.* at 569. We conclude *Bowen* is dispositive because *Bowen* addresses the same statutory scheme and the precise jurisdictional issue facing us here.[1] Accordingly, we independently raise and consider the jurisdictional issue.

The Board's failure to publish notice of and hold a public hearing was contrary to Iowa Code section 335.7 and its own ordinance, which provides, "a public hearing shall be held by the Board of Supervisors, public notice of which shall be given in the local newspapers of Mitchell County at least fifteen (15) days prior to such hearing." Although OCC stipulated it met with the Board prior to approval of the zoning change, "[w]here a statute requires public notice, actual appearance by a few citizens cannot waive the right of all citizens to the statutory notice and opportunity for hearing." *Bowen*, 209 N.W.2d at 572; *see also Buchholz v. Bd. of Adjustment of Bremer County*, 199 N.W.2d 73, 77 (Iowa 1972) (finding meeting did not satisfy the requirement of a "public hearing"). Accordingly, we conclude the Board lacked jurisdiction to rezone the Hovig property. Therefore, the Board's rezoning decision

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[1]Subsequent opinions in different contexts have held that non-compliance with procedures similar to those implicated in *Bowen* does not deprive courts of subject matter jurisdiction but only of authority to hear the particular case. *See Christie v. Rolscreen Co.*, 448 N.W.2d 447, 450 (Iowa 1989) (finding failure to invoke statutory procedures set forth in civil rights act implicated jurisdiction of the case, as opposed to subject matter jurisdiction); *City of Des Moines v. Des Moines Police Bargaining Unit Ass'n*, 360 N.W.2d 729, 730 (Iowa 1985) (holding failure to exhaust administrative remedies implicated jurisdiction of the case, as opposed to subject matter jurisdiction). Further, in *State v. Mandicino*, 509 N.W.2d 481, 483 (Iowa 1993), the court held jurisdiction over the case could be waived if not raised. None of these cases, however, expressly overruled *Bowen*.

was void and OCC's writ of certiorari is sustained. *Bowen*, 209 N.W.2d at 572. The matter should be returned to the Board for new proceedings in conformity with the notice and public hearing requirements of Iowa Code section 335.7.[2]

REVERSED AND REMANDED.

[2]Although we do not reach the merits, we note that the Board's decision was not accompanied by minutes or a transcript of proceedings. Additionally, the Board did not specify any grounds for its decision until after its court petition was filed. In *Montgomery v. Bremer County Board of Supervisors*, 299 N.W.2d 687, 694 (Iowa 1980), the court held board zoning proceedings are not evidentiary hearings requiring specific fact findings, but comment-argument type hearings. We believe, however, the Board must maintain some record of who attended and what was generally said. The Board should at the time that it renders the decision also specify the general supporting grounds. *See* Iowa Code § 335.20 (in a court review action, board is required to file a return setting forth "such *other* facts as may be pertinent and material to show the grounds of the decision) (emphasis added). We find the Board cannot rely entirely on post hoc rationalizations.