

IN THE COURT OF APPEALS OF IOWA

FILED

APR 27 1982

CLERK SUPREME COURT

DONNA WINTER, et al,)

Plaintiffs-Appellants,)

Filed April 27, 1982

vs.)

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ROBERT W. JOHNSON, LINN COUNTY)
BOARD OF ADJUSTMENT a/k/a LINN)
COUNTY ZONING BOARD OF ADJUST-)
MENT, and AGGREGATES, INC.,)

2-103
2-66851

Defendants-Appellees.)

Appeal from Linn District Court - L. Vern Robinson, Judge.

Plaintiffs challenge board of adjustment's grant of a conditional use permit for a sand and gravel pit. ANNULMENT OF WRIT AFFIRMED.

Peter C. Riley and Tom Riley, Cedar Rapids, Iowa, for plaintiffs-appellants.

Craig Kelson, Assistant Linn County Attorney, for defendants-appellees Johnson and Linn County Board of Adjustment.

Phillip D. Klinger and Thomas G. McCuskey, Cedar Rapids, Iowa, for defendant-appellee Aggregates, Inc.

F. James Bradley, Cedar Rapids, Iowa, for defendant-appellees Aggregates, Inc.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

The plaintiffs brought a certiorari action challenging the Linn County Board of Adjustment's grant of a conditional use permit to Aggregate, Inc. to allow its use of property for the extraction of gravel and sand. The plaintiffs claim that the notice of the public hearing on the matter before the Board of Adjustment was unreasonable and that the Linn County Rural Zoning Ordinance contained no procedures for the granting of a conditional use permit. The trial court rejected these conditions and annulled the writ of certiorari. On this appeal the plaintiffs urge the action of the Board of Adjustment was invalid because (1) the notice of the public hearing was unreasonable and a violation of due process, and (2) there were no procedures for the granting of a conditional use permit in the county zoning ordinance or the rules of the board of adjustment.

The plaintiffs owned residences near the site of Aggregate, Inc.'s proposed sand and gravel pit. In the spring of 1978 there was a previous proceeding before the Board of Adjustment in connection with an application for a conditional use permit to operate a sand and gravel pit in the same general location as that which was before the Board in the present controversy. Certain property owners involved in the present case were also involved in this previous proceeding and requested at that time that they be given notice of any hearings held with respect to the 1978 application. Ultimately, the 1978 application was denied by the Board of Adjustment following the public hearing which was held at that time.

The application for conditional use permits involved in the present action was made in 1980. It was made in the name of Aggregate, Inc., a corporation to which the property had been transferred by the 1978 applicant. A notice of a public hearing to be held on September 22, 1980, for consideration of the application was published on September 8, 1980, in a local newspaper of general circulation in Linn County. Written notice was sent to the four property owners

who owned property within 500 feet of the site of the proposed conditional use permit. Some of the plaintiffs in the present action were property owners who participated in the 1978 proceeding and were not given written notification of the hearing on the 1980 application because they did not reside within 500 feet of the site. Some, but not all, of the plaintiffs in the present action, learned of the September 22, 1980, public hearing before it was held and made both written and oral objections to the granting of the conditional use permit involved in the present action. In addition to the written objections prepared and filed by the plaintiff, Donna Winter, to the 1980 application, some 45 persons filed written objections to the 1980 application which had attached thereto and incorporated by reference therein, the written objection which had been submitted in opposition to the 1978 application. The items objected to (with the possible exception of the potential for reducing property values) were inquired into at the public hearing held on September 22, 1980, and a representative of Aggregate, Inc. indicated the measures which had been taken since the denial of the 1978 application to alleviate the objections which had been lodged at that time. Following the public hearing on September 22, 1980, the Board of Adjustment approved the issuance of a conditional use permit to Aggregate, Inc., for extraction of sand and gravel from the premises.

I. Sufficiency of Notice. The first issue on this appeal concerns whether the fact that the only notice afforded plaintiffs with respect to the public hearing on the granting of the conditional use permit was published notice renders the action of the Board a nullity as violative of due process. The county zoning ordinance in question requires that a public hearing be held prior to the granting of a conditional use permit, but the ordinance is silent with respect to the method of notice which is required. In Buchholz v. Board of Adjustment, 199 N.W.2d 73, 77 (Iowa 1972), the court, when faced with a similar problem, stated: "Although requiring a public hearing the ordinance is silent as to notice. When notice must

be given but no method is prescribed, the notice must be a reasonable one under the circumstances."

Plaintiffs rely upon Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), for the proposition that personal notice to the interested property owners was required in the present proceeding. We believe that Mullane may be easily distinguished from the present case on the basis of the interests of the parties claiming a right to notice. The parties claiming a right to notice in Mullane were concerned with a proceeding directly determining their own proprietary interests in a common trust fund. The proprietary interests of the plaintiffs in the present case are not directly affected by the subject of the public hearing. The manner in which the proprietary interests of the plaintiffs might be indirectly affected differs only in degree from the rights of the public generally. Under such circumstances the courts have generally sustained the sufficiency of published notice. See, e.g., Tuite v. Zoning Board of Review, 95 R.I. 12, 182 A.2d 311 (1962); Seattle Shoreline Coalition v. Justen, 93 Wash. 2d 390, 609 P.2d 1371 (1980); Annot. 38 A.L.R. 2d 167, 222-28 (1971). We conclude that notice by publication was sufficient in the present proceeding. This conclusion is fortified by the fact that this is the type of notice required by the legislature for other proceedings under chapter 358A, The Code. See and compare, § 358A.6, The Code. Nor do we believe that the generally recognized sufficiency of published notice for proceedings of this type is in any way altered by the fact that some of the plaintiffs were on record as having objected to the 1978 application. The 1980 application was a fresh proceeding and the board was not required to search its records so as to identify and give special notice to those persons interested in the prior proceeding.

We note that the notice which was afforded in the present case was sufficient to produce at least 45 objecting parties who resubmitted the objections which had been made at the 1978 hearing plus some additional grounds. On the

present record we cannot conclude that plaintiffs' interests were not adequately represented by those who did receive notice and actively objected to the granting of the permit. We therefore decline to invalidate the action of the Board of Review on the ground the notice of the public hearing was inadequate.

II. Lack of Procedural Rules for Conducting a Public Hearing. Next, we consider plaintiffs' contention that the action of the Board of Review is invalid because the Board did not have procedural rules for conducting a public hearing on an application for a conditional use permit. As support for this contention, plaintiffs rely upon Citizens Against Lewis and Clark Landfill v. Pottawattamie Board of Adjustment, 277 N.W.2d 921, 923-25 (Iowa 1979). Our review of the record convinces us that, unlike the situation involved in Lewis and Clark, the Linn County Board of Review does have adequate procedural rules. While there is nothing in the rules which specifically identifies the subject of "conditional use permits," we believe the rules intended to cover such permits under the generic designation of "modifications of the application of any of the regulations or provisions of the zoning ordinance." As so interpreted, the rules make adequate provision for the presentation at the public hearing of objections by "interested property owners." We have considered all issues urged and affirm the trial court.

AFFIRMED.