**IN THE COURT OF APPEALS OF IOWA**

No. 9-060 / 08-1265
Filed May 29, 2009

**RONALD RUDE,**
Plaintiff-Appellant,

**vs.**

**BOARD OF ADJUSTMENT OF THE CITY OF MAPLETON, IOWA, and LAWRENCE NELSON, Individually, JOHN JACOBS, Individually, ROBERT JACOBSON, Individually, DONALD THEOBALD, Individually, and J.P. COOK, Individually,**
Defendants-Appellees.

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Appeal from the Iowa District Court for Monona County, Edward A. Jacobson, Judge.

Appellant appeals the board of adjustment's allowance of a special use permit. **AFFIRMED.**

Allen Nepper and Jessica A. Zupp of Nepper Law Firm, Denison, for appellant.

Marci Iseminger, Sioux City, for appellee.

Joel Vos, Sioux City, for intervenor, appellee Long Lines Wireless.

Heard by Sackett, P.J., and Vogel, J. and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**VOGEL, J.**

Ronald Rude appeals the City of Mapleton Board of Adjustment's (the Board) granting of a special use permit to Long Lines Wireless, L.L.C., a cellular phone company (Long Lines). Rude asserts the Board's action was illegal because (1) the decision to approve a special use permit was pursuant to zoning amendments enacted without consideration of Mapleton's comprehensive plan; and (2) even if the zoning amendments were properly enacted, the Board's decision was nonetheless illegal because the special use permit violated the setback and frontage provisions of Mapleton Zoning Ordinance section 17.06.040, as amended.

## I. Background Facts and Proceedings

In 2006, Long Lines applied first for a building permit, and later a special use permit, in order to construct a cellular phone tower on land it intended to purchase in Mapleton. A public hearing was held by the City in December 2006. Rude was present at the hearing and voiced objections, stating that the city ordinance did not authorize the erection of cell phone towers. As a result, Long Lines withdrew its initial application for the special use permit, and the Mapleton City Council proposed changes to its ordinances to allow a cellular tower to be built. The Mapleton Planning and Zoning Commission recommended the changes be adopted, and in June 2007, following a public hearing, the Mapleton City Council adopted a special use application form and amended the Mapleton zoning ordinances. Thereafter, Long Lines resubmitted its application, and on November 26, 2007, following a public hearing, the Board granted the special use permit for erection of a cellular phone tower. Rude attended each meeting

concerning the zoning amendments, but during none of the meetings did he express concern with the alleged illegality of the zoning ordinance. Following the grant of the special use permit, Long Lines completed construction of the cellular phone tower in December 2007.

Rude filed a petition for a writ of certiorari on December 6, 2007, asking the court to find that the Board's actions in granting the special use permit illegal under the Mapleton zoning ordinances. Trial was held on May 6, 2008, and the district court dismissed the claim in its entirety. Rude appeals.

## II. Standard of Review

Our review of the district court decision concerning certiorari proceedings rendered by a county board of adjustment is limited to the correction of errors at law. *Ackman v. Bd. of Adjustment*, 596 N.W.2d 96, 100 (Iowa 1999). We are bound by the district court's factual findings if supported by substantial evidence in the record. *Id*.

## III. Ordinance Amendments and the Comprehensive Plan

On appeal, Rude argues that the Board's grant of the special use permit to Long Lines was illegal because the zoning amendments were enacted without consideration of Mapleton's comprehensive plan. The district court questioned whether this issue was properly before it, stating that "[t]he alleged illegality was never raised at any of the prior meetings or in any of the pleadings or discovery in this matter until immediately before trial." A reviewing court will not decide an issue which was not raised in the forum from which the appeal was taken. *Bontrager Auto Service, Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483, 487 (Iowa 2008). Further, a reviewing court will not entertain a new theory or a

different claim not asserted on the board level. *Id*. An issue must first be presented to the agency in order to be preserved for appellate review. *Id*.

Rude first raised this as an entirely new issue in his trial brief, only one day before trial. *Id*. Next, the lawsuit was brought against the Board, not the Mapleton City Council, which was the legislative body that amended the ordinances; and the City is not a party to this action. Had Rude sought to attack the legality of the amended ordinances, he would have been required to file his writ of certiorari within thirty days of the Mapleton City Council adopting the zoning amendments. *See* Iowa R. Civ. P. 1.1402(3) (stating a "petition must be filed within 30 days from the time the tribunal, board or officer exceeded its jurisdiction or otherwise acted illegally"). The City approved the zoning amendment in June 2007, and Rude did not file his writ of certiorari until December 6, 2007, clearly more than thirty days after the City's action.[1]

**IV. Mapleton Zoning Ordinance § 17.06.040**

Rude next contends that even if the zoning ordinances were properly amended, the Board's decision to grant the special use permit was nonetheless illegal because the intended use violated the setback and frontage provisions of

[1] Even if the claim would have been properly preserved, we agree with the district court that "[a]lthough . . . procedurally [the claim] must fail, the court also finds that it would fail on the merits," as the land in question was not within the city limits when the comprehensive plan was adopted in 1969, nor has it been amended to include this land. Further, cellular phone towers did not exist in 1969. But even if this land was a part of the comprehensive plan, the 1969 plan addressed communication towers, and the Mapleton City Council adapted the amendments in accordance with the changing conditions and needs of the community; fulfilling the general scheme of the comprehensive plan. *See Montgomery v. Bremer County Bd. of Supervisors*, 299 N.W.2d 687, 695 (Iowa 1980) ("If a board gave full consideration to the problem presented, including the needs of the public [and] changing conditions, . . . then it has zoned in accordance with a comprehensive plan.").

Mapleton Zoning Ordinance section 17.06.040, as amended. Zoning decisions are "an exercise of the police powers delegated by the State to municipalities." *Shriver v. City of Okoboji*, 567 N.W.2d 397, 400 (Iowa 1997). As part of its zoning power, a city may regulate for the purpose of "promoting the health, safety, morals, or the general welfare of the community." *Id.* (quoting Iowa Code § 414.1 (1995)). City zoning ordinances and amendments enjoy a strong presumption of validity. *Id.* at 401. The burden is on the person challenging the ordinance to rebut the presumption and demonstrate the ordinance's invalidity. *Id.*

Prior to the amendment, section 17.06.040 included two categories of principal use; "dwellings" and "non-dwellings" with lot area, frontage, depth, side, width, and rear yard depth requirements for each. The amendment states:

> [the ordinance] SHALL BE AMENDED BY ADDING:
>
> Lot without a building as defined herein the following minimums shall be observed unless modified by the Board of Adjustment in granting a special use permit: Lot Area 10,000 SQFT, Lot Width 100 feet, Depth 100 feet . . . ."

Rude specifically argues that the amended words "by adding" do not supplant the frontage and setback provisions prior to amendment, as the City Council did not intend to fully replace the old version of section 17.06.040. He believes therefore that some of the previous frontage and setback requirements still apply when dealing with lots containing "buildings" and "dwellings." We disagree. The amended section 17.06.040 created a separate category specifically enacted for the purpose of allowing for the erection of a cellular phone tower. As the Board

points out, the April 24, 2007 report of the Planning and Zoning Commission to the City Council stated:

> 3. The Code is proposed to be modified to provide for a specific minimum lot size when the lot is not to have a building erected upon it which would make applicable the City's current Lot size restrictions which refer to Front, Back, and Side yards with reference to a building erected thereon.

It is clear from the Planning and Zoning Commission's report that frontage and setback requirements that had been included prior to amendment were not applicable to lots without buildings in the current amendment. The land in question includes no buildings other than a utility cabinet for the cellular tower. The district court stated that "[t]he amended ordinance which was passed for the specific purpose of granting the permit to build this tower, does not contain those setback lines or restrictions." We agree that the legislative intent is clear in its purpose to accommodate Long Lines' special use permit to erect a cellular tower. We presume the validity of amendment as it was written and find substantial evidence the permit was issued in accordance with the amended ordinance. As the district court found, the cellular phone tower was built in compliance with the restrictions of the amended ordinance, and we find that fully supported in the record.

**AFFIRMED.**