

Decision on Appeal from Zoning Committee Grant of Conditional Use Permit
and Decision to Request for Reconsideration

By Bayfield County Board of Adjustment

Case No. 5 & 6

December 7, 2006

Andrew and Susan Knudsen request an appeal to the Board of Adjustment from a conditional use permit issued to Mathy Construction and its agents, Northwoods paving. The issue for the public hearing is whether the appeal notice is timely within the requirements of Sec. 13-1-102(c)(2). That provision states as follows:

“The appeal notice shall be filed with the Planning and Zoning Director within thirty (30) days after written notice of the order or decision appealed from was sent by first class mail to the aggrieved party, or, if such notice was not sent to the aggrieved party, within thirty (30) days after the party first knew of, had reason to know of, or should have known of, the order of decision.”

The issue for the public hearing was the timeliness of the appeal only. The hearing did not deal with the merits of the request.

Andrew and Susan Knudsen also request a reconsideration and other relief related to a variance issued by the Bayfield County Board of Adjustment on June 15, 2006 to Mathy Construction and its agent, Northwoods Paving. Sec. 59.694(10) Wis. Stats., provides, in pertinent part, as follows:

“(10) Certiorari. A person aggrieved by any decision of the board of adjustment, or a taxpayer, or any officer, department, board or bureau of the municipality, may within 30 days after the filing of the decision in the office of the board, commence an action seeking the remedy available by certiorari.”

The sole issue for purposes of the public hearing was whether or not the request for the Knudsens to reconsider, reverse, and otherwise void the variance, is timely and should be heard.

Findings of Fact:

1. This case involves both an appeal from a Zoning & Planning Committee decision to issue a conditional use permit to operate a gravel pit and a request to have the Board of Adjustment reconsider their prior grant of a variance related to the same gravel pit project. The variance was to operate a hot mix asphalt facility at the same gravel pit.
2. The Zoning & Planning Committee made its decision to grant the conditional use permit on June 15, 2006.
3. The Board of Adjustment met on June 29, 2006 and issued a decision granting the variance on July 7, 2006.
4. The appeal to the Board of Adjustment of the Zoning & Planning Committee decision must be filed with the Zoning & Planning Director within 30 days from the date that the decision was mailed to the aggrieved party, or 30 days from the time the aggrieved party

- had reason to know or should have known of the decision. Section 13-1-102(c)(2).
5. There was no testimony that the decision had been mailed to Mr. and Mrs. Knudsen. Mr. and Mrs. Knudsen testified that they had not received notice.
 6. The following legal notices or public documents providing notice to interested parties were part of Exhibit EF-16.
 - A. Notice of the June 15, 2006 meeting of the zoning committee was published on May 25, 2006 and June 1, 2006 in the County Journal, the Bayfield County newspaper where legal notices are customarily published.
 - B. Minutes of the June 15, 2006 meeting of the Bayfield County Zoning Committee showed that the conditional use permit had been granted. Mrs. Knudsen located those minutes on the Bayfield County website but apparently not until September 4th or 5th, according to her affidavit.
 - C. The public hearing notice of the Bayfield County Board of Adjustment regarding the asphalt plant was published in the County Journal on June 1, 2006 and June 8, 2006.
 - D. Many of the written materials submitted by the Knudsens and their supporters suggest that everyone on the cluster of lakes where the noise from the gravel pit could be heard should have been notified. That would have required hundreds, if not thousands, of additional notices and the board does not see what reasonable written notice standard the zoning department could apply to satisfy the claims that are being made by those objectors.
 7. Mrs. Knudsen indicated that she had been a full time resident of Barnes since June 2006. (Exhibit EF1).
 8. In late July and early August she and her husband were hearing a lot of heavy equipment noise but thought it was coming from the construction of a new home on the adjoining parcel next to their house.
 9. The noise, if any, that Mrs. Knudsen would have heard coming from the gravel pit would have been coming from a distance in excess of one mile.
 10. Mrs. Knudsen testified that she could not distinguish between noises one mile away versus things that were happening next door because it sounded approximately the same. The Board of Adjustment finds this testimony difficult to believe.
 11. Mr. and Mrs. Knudsen both testified that Mrs. Knudsen was spending 18 hours per day attempting to determine what was causing the noise and what their options were but those efforts, even after they found out about the gravel pit, were focused at the town level with the Town of Barnes and not the county level.
 12. Both Mr. and Mrs. Knudsen were aware that Bayfield County had a zoning ordinance. Mrs. Knudsen testified that she was aware that the ordinance applied to the Town of Barnes.
 13. The Knudsens left on vacation and to take their daughter to college on August 16, 2006 and did not return home until August 29th.
 14. Mrs. Knudsen testified that upon their return on August 29th they were painfully aware of very loud noises coming from the gravel pit, including jarring dynamite blasting, screeching, all clear signals and loud and constant heavy equipment noises. (Mrs. Knudsen's affidavit, part of Exhibit EF-1).

15. The Board considered whether the Knudsens or someone similarly situated knew or should have known that there had been a decision to grant the conditional use permit and the variance for the hot mix plant in the location of the gravel pit.
16. In determining whether a person knew or should have known about the permitting of the gravel pit the Board considered the information included in Exhibit EF-16, the timeline that was put together by Mr. Forsythe of Northwoods Paving.
17. The Board felt that this information in Exhibit EF-16 was credible, reliable and based upon the records of Northwoods Paving.
18. That evidence showed, among other things, that:
 - A. Drilling for later blasting starting July 6, 2006 and went through the middle of July. Then there was a gap without drilling until August 1st and then the drilling started again and continued to late August.
 - B. The stripping of the topsoil at the quarry site by the bulldozer started on July 29th.
 - C. The first day of blasting rock started on August 8th and continued, six or more times, once every two or three weeks.
 - D. A sign was placed identifying Northwoods Paving at the pit entrance on Highway 27 on July 7th.
 - E. The rock crushing started on August 9th.
 - F. The driveway was graded and widened to a 30 ft., width on August 11th.
 - G. On August 12th trucks started to haul gravel out of the pit regularly.
 - H. From August 12th through the middle of September there was an average of nine to fifteen trucks making eight to nine runs per day.
 - I. A logical inference from all of the above testimony was that from August 9th to 12th the noise from crushing and blasting would have been more or less steady.
19. There was testimony that the truck traffic increased after July 6th.
20. Truck traffic on Highway 27 alone during this period of time would have given notice to anyone other than a hermit that something significant was going on in this gravel pit for which a permit of some kind would be required.
21. The Knudsens' main access road to their property was Highway 27 (Mrs. Knudsen's affidavit, Exhibit EF-1).
22. Based on the above the Board finds that any reasonable person would have certainly known by August 15th, at the very latest, that a permit for one or more things related to operation of the gravel pit had been granted.
23. The Board finds that when there is this much noise and activity a reasonable person would know or should have known to investigate further and that some type of a county permit would reasonably have been required.
24. The Board has considered the claim that the notice of appeal in this case was filed by FAX without the proper Bayfield County form on September 27th. There is no provision in the Bayfield County Ordinance that allows filing of a notice of appeal by FAX, and what was used on September 27th was not a standard appeal form approved by the zoning department. Even if a FAX filing of a notice of appeal were permissible (and the Board is not deciding that it was) the Board feels that this appeal was not filed until October 4th because that was the date on which the filing fee was paid.

25. The Board has considered the request for a reconsideration of its decision on the variance. Section 59.694(10) of the Wisconsin Statutes requires that an appeal from a board of adjustment decision to the circuit court by certiorari must be completed in thirty days.
26. The Board feels that a reconsideration of their decision in certain circumstances could be appropriate. However, the Board does not feel that a reconsideration can justifiably occur after the deadline for certiorari review has occurred. The Board allows for the possibility that in some circumstances the time for reconsideration should be extended because someone seeking reconsideration did not know or have reason to know that a variance had been granted. However, in this case, for the same reasons that the Knudsens should have known by August 15th that some permit of some type had been granted for the gravel pit they should have had reason to question or ask for reconsideration of the variance, particularly since they knew that zoning in Bayfield County occurs at the county level.
27. In reaching this decision the board has considered the brief of counsel for Mr. and Mrs. Knudsen, and particularly the cases cited by Mr. Cincotta, *State ex rel Brookside Poultry Farms v. Jefferson County Board of Adjustment*, 131 Wis.2d 101, 388 N.W.2d 593 (1986) and *State of Wisconsin Department of Natural Resources v. Walworth County Board of Adjustment*, 170 Wis.2d 406, 414, 489 N.W.2d 681 (Ct. App. 1992). We also agree with Mr. Cincotta's brief that the Bayfield County Ordinance essentially adopts the reasoning of the Supreme Court in *Brookside* and that the ordinance provides that the 30 day period runs from the time when an aggrieved party knew, had reason to know or should have known of the order or decision. Sec. 13-1-102(c)(2).
28. Both the ordinance and the above cases are intended to expand access to judicial review and not limit it but the board feels that the expansion of access to judicial review has to have some reasonable cutoff point. At some point if it is claimed that there is intolerable and disturbing noise from constant heavy equipment, truck traffic, drilling, dynamite blasting, and screeching all clear signals, then people, including the Knudsens, must have reason to know or should have known that a zoning permit of some kind for such activity has been granted. The board further finds that any reasonable person should have known by August 15th that such a permit or permits had been granted.

Decision:

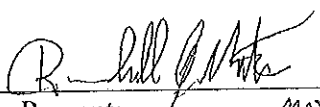
For all the above reasons the Board of Adjustment determines as follows:

1. The appeal of the Zoning & Planning Committee's grant of a conditional use permit to Northwoods Paving is denied as untimely.
2. The request for reconsideration of the variance granted on July 7, 2006 to Northwoods Paving is denied as untimely.

Motion made by Matis seconded by Lupa

VOTE: 4-0

Dated: 1/25/07


Members Present: MATIS, LUPA, TETZNER, COMPTON

Also Present: Michael Fauerbach, Attorney for BOA