IN THE COURT OF APPEALS OF IOWA

No.0-630 / 09-1908
Filed October 6, 2010

ERIC PAULSON and KATHRYN PAULSON,
Plaintiffs-Appellees,

vs.

CITY OF VENTURA, IOWA and JBS AUTO PARTS, INC.,
Defendants-Appellants.

Appeal from the Iowa District Court for Cerro Gordo County, Gerald W. Magee, Judge.

Appeal from the order granting a writ of mandamus. **AFFIRMED.**

John Sorensen of Stanton & Sorenson, Clear Lake, for appellant City of Ventura.

Thomas Reavely of Whitfield & Eddy, P.L.C., Des Moines, for appellant JBS Auto Parts.

F. David Eastman of Eastman & Casperson, P.L.C., Clear Lake, for appellees.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

SACKETT, C.J.

Defendants, the City of Ventura and JBS Auto Parts, Inc., appeal from the district court ruling that granted the request of plaintiffs, Eric and Kathryn Paulson, for writ of mandamus and ordered Ventura to enforce its zoning code and to require JBS to bring its nonconforming use of a residential lot into compliance with the zoning code. Ventura contends the court erred in finding that JBS's use of the property violates Ventura's zoning code and in finding enforcement of the zoning code is a ministerial function and mandamus is a proper remedy. JBS contends the court erred in granting the request for writ of mandamus because mandamus is not appropriate (1) when an official body has discretion to act, (2) when alternative remedies exist, and (3) when there are no clearly-defined rights or duties. We affirm.

I. Background Facts and Proceedings.

The Brad Smith subdivision is a three-lot residential subdivision in Ventura, Iowa. Plaintiffs purchased lots two and three in about 2006. Defendant JBS purchased the Dome Bait & Tackle property, which is adjacent to lot one, in 2005. It purchased lot one in 2007. Plaintiffs built a twin home/duplex on lot two and live in the side next to lot one.

In 2007 JBS sought a one-year conditional use variance in order to continue to use lot one to store boat hoists, as had been done for years. At the hearing on the request, JBS requested that a conditional use be granted for eight years. The Ventura board of adjustment granted a two-year limited conditional use permit. The hearing minutes show some limitations on the conditional use:

"The storage of the boat hoists shall be in such a manner, as to minimize the depreciation of the adjoining residential property." Also, JBS "and the owners of the adjoining residential property will each incur half the cost of planting a landscape screen between the two properties."

In 2008 plaintiffs filed a petition for writ of certiorari and application for injunction, challenging the board's actions. The court concluded the board acted illegally in granting the two-year conditional use variance. The court noted the Ventura city code allowed the board to approve conditional uses such as government buildings, churches, schools, public libraries, home occupations, horticultural nurseries, and greenhouses, "when there is clear evidence that such uses will not seriously affect the value and character of the surrounding uses in the district." *See* Ventura Code of Ordinances § 166.06(2) (2008). The court further concluded there was no evidence the limitations imposed would be effective in alleviating the depreciation of plaintiffs' property, thus the board's decision "was not supported by substantial competent" evidence. The court sustained the writ of certiorari and annulled the board's approval of the conditional use of lot one.

Concerning the requested injunction, the court found a long history of storing boat hoists on lot one and that plaintiffs knew of the use when they purchased lots two and three. The owner of JBS had told plaintiffs boat hoists would be stored on lot one for a couple of years before a home would be built there. However, "JBS substantially increased the number of boat hoists stored there in a short amount of time." In addition "a number of mature trees were

removed to accommodate more hoists." The court determined the combination of these factors "resulted in a change in the nature of lot one that was unforeseeable" to plaintiffs when they purchased lots two and three. Because it sustained the writ of certiorari and annulled the board's conditional use grant, the court stated "Ventura is not required to take any action against [the] use of lot one," but plaintiffs had suffered injury and, "in the event Ventura takes no action," would continue to suffer irreparable injury without an adequate legal remedy if the court did not grant an injunction. However, because of the historical use of lot one for hoist storage, the fact plaintiffs knew of the use before building on lot two, and the "logistical difficulty" in ordering how many hoists could be stored on lot one, the court instead ordered JBS to install the natural barrier between lots one and two at its sole expense if it continued to store boat hoists on lot one. Neither party appealed from this ruling.

Plaintiffs then asked Ventura to enforce its zoning ordinance concerning lot one. Ventura considered the matter during one or two city council meetings, but took no action. Plaintiffs again requested action and raised additional concerns about parking and a portable restroom on lot one. The city attorney responded:

> You will recall being present when I addressed the Council on options available to the City in connection with this matter in a meeting in late July or August. So there is no mistake about it, the City of Ventura has and will continue to enforce all of its Ordinances including the Zoning Ordinance in an even-handed and appropriate manner. That, of course, contemplates appropriate consideration of all practical, legal, and factual matters in determining appropriate action where a specific matter is concerned. As you know, the Council, by inaction, directed that no specific action be taken with respect to the purported nonconforming use. As you know, one of

> the considerations on which the City apparently relied consists of the Court's findings of fact in its ruling.

Plaintiffs then filed their petition for writ of mandamus, seeking to compel Ventura to enforce its zoning ordinance and require JBS to remove all boat hoists and stop other commercial activity on lot one. The court framed the issues as (1) whether Ventura had a valid zoning ordinance regulating the properties, (2) if there is a valid zoning ordinance, whether the current use of lot one violates the ordinance, and (3) if the answers to (1) and (2) are affirmative, whether mandamus is the appropriate remedy.

The court found Ventura had a valid zoning ordinance, and JBS had "substantially altered and changed the use of lot one and now uses it exclusively for commercial purposes." It examined the zoning ordinance, noting its intent "was to protect and preserve approved uses of property, to prevent the depreciation of property values, and not allow non-conforming uses to be enlarged or expanded that would adversely impact the neighborhood." The court agreed with the decision in the earlier certiorari proceeding that JBS's use of lot one did not qualify as a permissible conditional use under the zoning ordinance and that its use of lot one caused the value of plaintiffs' adjoining property to depreciate. The court found "as a matter of fact and law" that JBS was in violation of Ventura's zoning code.

Having answered the first two questions in the affirmative, the court then considered whether mandamus was the proper remedy. It noted that Ventura argued mandamus was not proper both because there was disagreement whether JBS was in violation of the zoning code and because the city had

discretion in how to resolve any alleged violation. The court determined that Ventura incorrectly interpreted Iowa Code section 414.20 (2009), which provides:

> In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained; or any building, structure, or land is used in violation of this chapter or of any ordinance or other regulation made under authority conferred thereby, the council, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises.

The court concluded Ventura had a duty to enforce its zoning ordinance and its discretion extended "only to determine what action to take to correct the violation." It also determined plaintiffs have "a right to enjoyment of their property free from adjacent illegal use and also have the right to have Ventura enforce its Zoning Code. They have no other remedy."

The court also cited section 128.02 of Ventura's zoning code, which delineates the duties of the zoning administrator:

> [I]t shall be the duty of said Administrator to enforce this Zoning Code. . . . The duties of the Zoning Administrator include the following:
>
> . . . .
>
> 2. To cause any building, structure, land, place or premises to be inspected and examined and to order in writing the remedy of an[y] condition found to exist therein in violation of any provision of this Zoning Code.

The court concluded the administrator's duty to enforce the zoning code "is a ministerial act and mandamus is the proper remedy to compel such act."

In ordering Ventura to correct the violation, the court recognized the discretion in choice of actions, such as an action to abate, an injunction, or

citations for violation of the code, but found "taking 'no action' is not a proper use of its discretion in the instant case and indeed was arbitrary and capricious." The court granted the writ of mandamus and ordered the city to enforce its zoning code "and require JBS to end its illegal use" of the property "and upon failure [of JBS] to do so, to take appropriate action to enforce compliance." The court left the "means and methods" of enforcement to the city's discretion "reasonably exercised."

II. Scope and Standards of Review.

"Because a writ of mandamus is triable in equity, in general our review is de novo." *Koenigs v. Mitchell County Bd. of Supers*, 659 N.W.2d 589, 592 (Iowa 2003). A district court's decision whether to issue a writ of mandamus involves the exercise of discretion. *Id.*

III. Merits.

A. Ventura contends the court erred in making a determination that the use of lot one by JBS is in violation of the zoning code. The city argues that question was not before the court in the mandamus action because "a writ of mandamus is not to establish a legal right, but to enforce one" already established, and the legal right to performance of the act "must be clear, specific, and complete." *Stith v. Civil Serv. Comm'n*, 159 N.W.2d 806, 808 (Iowa 1968).

The evidence is clear that lot one is zoned residential and that JBS is using the lot for commercial purposes. JBS stipulated it uses lot one to store boat hoists in the off-season and as a parking lot for its customers during the season. Although defendants suggest the commercial use of lot one was in

existence before the city adopted its zoning code in about 1965, we find no clear evidence of such use earlier than the 1980s. The city's own action in considering and granting the conditional use request acknowledged the current use did not fit within the allowed uses in a residential zone. After the district court annulled the conditional use permit, the commercial use of lot one remained, but without any pretense of being a permissible or legal use of the lot under the zoning code.

The city's own zoning code provides that the zoning administrator has a duty to enforce the zoning code. Ventura also stipulated it was responsible to enforce its zoning code. The code further expresses its intent to "conserve the value of property" and only permit such uses as "will not seriously affect the value and character of the surrounding uses in the district." The earlier certiorari ruling, which was judicially noticed in this proceeding, determined JBS's use of lot one did not qualify as conditional use in a residential zone and its use of lot one harmed the value of plaintiffs' adjoining property. The district court in the mandamus action merely rephrased the findings and conclusions from the earlier proceeding. The city zoning code established the plaintiffs' right and the duty of the zoning administrator to enforce the code. The legal right of an injured party to have the city enforce its own code is clear, specific, and complete apart from any finding of the court in this action. We affirm on this issue.

B. The city further contends the court erred in finding the enforcement of the zoning code is ministerial and mandamus is the proper remedy. "Mandamus is generally limited to occasions where an official or entity has a duty to act," but where the duty is discretionary, "mandamus will lie only if it is shown defendant

acted arbitrarily or capriciously in denying the request." *Hicks v. Franklin County Auditor*, 514 N.W.2d 431, 441 (Iowa 1994). Where there is an abuse of discretion or evasion of a positive duty, "as to amount to a virtual refusal to perform the duty enjoined, or to act at all," mandamus will lie. *Gibson v. Winterset Cmty. Sch. Dist.*, 258 Iowa 440, 445, 138 N.W.2d 112, 115 (1965). However, if the action is merely ministerial, mandamus will lie regardless of whether defendant acted reasonably or not. *Charles Gabus Ford, Inc. v. Iowa State Highway Comm'n*, 224 N.W.2d 639, 644 (Iowa 1974).

The city points to section 172.04 of its zoning code that provides the city "*may* institute appropriate action or proceedings to enjoin a violation" and Iowa Code section 414.20, which provides the city, "in addition to other remedies, *may* institute any appropriate action or proceedings" to deal with violations of its zoning code. (Emphasis added.) The city argues it has discretion in whether to take action. Plaintiffs argue the court correctly determined the discretion is in the kind of action to take, not whether to take action at all.

We need not determine whether the court correctly concluded the enforcement of the zoning code is ministerial, because the court also determined the decision to take no action was an abuse of discretion and arbitrary and capricious. Mandamus is proper if the city "acted arbitrarily or capriciously in denying the request" for enforcement of its zoning code. *See Charles Gabus Ford*, 224 N.W.2d at 644. The court carefully and properly exercised its discretion in mandating that the city take action to enforce its zoning code, but refraining from specifying the type of enforcement action taken. *See id.* (allowing

control of discretion if "the official actor is shown to have acted arbitrarily or capriciously"). We affirm on this issue. *See Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 811 (Iowa 2000) (affirming on any ground that formed the basis for the district court's decision).

C. JBS contends the district court erred in granting the writ of mandamus because mandamus is not appropriate to control the discretion of an official body. We agree with the district court's determination that the city acted arbitrarily and capriciously in exercising its discretion and deciding not to enforce its zoning code.

> It is not accurate to say that the writ will not issue to control discretion, for it is well settled that it may issue to correct an abuse of discretion, . . . or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined, or to act at all, in contemplation of law; and in such a case a mandamus would afford a remedy where there was no other adequate remedy provided by law.

Winterset Cmty. Sch. Dist., 258 Iowa at 445, 138 N.W.2d at 115 (citations omitted). We conclude the district court properly exercised its discretion and affirm on this issue.

D. JBS further contends mandamus is not appropriate because alternative remedies existed. Mandamus is not appropriate unless "no other specific and adequate mode of relief is available to the complaining party." *Headid v. Rodman*, 179 N.W.2d 767, 770 (Iowa 1970).

> It is true section 661.7, The Code, provides "(a)n order of mandamus shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of the law, save as herein provided." This is but a repetition of the common-law rule. *But the other remedy must be competent to afford relief on the very subject matter in question, and be equally convenient, beneficial and effectual.*

Virginia Manor, Inc. v. City of Sioux City, 261 N.W.2d 510, 514-15 (Iowa 1978) (emphasis added). JBS argues plaintiffs have a remedy through the political process. It suggests they could seek to have officials sympathetic to their position elected "who would be in a position to afford [them] a complete remedy as to any discretionary enforcement action to abate the nonconforming use." Even if plaintiffs were able to have officials of their choice elected at will, the staggered terms would make replacement of a majority of the officials a multi-year process. JBS also suggests plaintiffs could exercise their "political capital in order to amend the zoning ordinance" to require the city to abate any violations of the zoning code.

While we agree the suggested remedies may be "competent to afford relief" eventually, JBS cannot reasonably contend they would be "equally convenient, beneficial and effectual." *See id.* The commercial use of lot one is harming plaintiffs now. Ventura decided to take no action to enforce its zoning code. Mandamus is proper to compel the city to act. *See* Iowa Code § 661.1. We affirm on this issue.

E. JBS contends the court erred in granting mandamus "as there existed no clearly defined rights or duties." Its claim is based in part on an argument that Ventura's zoning code is invalid. In the earlier certiorari proceeding, the district court expressed some concerns because "the evidence at trial as to zoning was not particularly convincing." In this mandamus action, however, Ventura stipulated it was responsible for enforcing its zoning ordinances. JBS stipulated there was a zoning ordinance that affected the lots in question, that the zoning

code and related maps had been filed and recorded as required, and that JBS uses lot one to store boat hoists in the off-season and as a parking lot for its customers during the season.

JBS argues Ventura's zoning code before 2008 was invalid, primarily based on a claim the city did not maintain or record a zoning map, as required by Iowa Code section 380.11. In interpreting a prior version of this section, our supreme court determined that the requirement for recording any zoning district, building lines, or fire limits, is "directory only and that the validity of the ordinance [does] not depend upon such recordation." *Boardman v. Davis*, 231 Iowa 1227, 1232, 3 N.W.2d 608, 611 (1942). This argument is without merit.

JBS further argues the court's finding it had "substantially altered and changed the use" of lot one is erroneous. This argument is based in part of JBS's contention the commercial use of lot one predated any valid zoning code. As discussed above, there is no clear evidence the lot was used for commercial purposes prior to the enactment of Ventura's zoning code in 1965. Therefore, JBS's reliance on *Central City v. Knowlton*, 265 N.W.2d 749, 752, 754 (Iowa 1978), is misplaced. In *Central City*, the use of the property that was "made" nonconforming by the passage of the zoning regulations, predated the regulations, so the "standard to be used" in determining whether there was an illegal enlargement of a nonconforming use, was "the use made . . . at the time of the effective date of the ordinance." *Id.* In the case before us, it is clear JBS expanded its parking lot use, increased both the number of boat hoists stored and the amount of lot one used for storage of the boat hoists, and at one point

added a portable toilet. The express intent of Ventura's zoning code is "not to encourage [the] survival" of nonconformities and "that nonconformities shall not be enlarged upon or extended." *See* § 171.01, Code of Ordinances, Ventura, Iowa. Even conditionally-allowed nonconforming uses should "not seriously affect the value and character of the surrounding uses in the district." *See id.* § 122.11.

As there are clearly defined rights and duties in the case before us, the district court did not abuse its discretion in requiring the city to take action. We affirm on this issue.

IV. Conclusion.

We agree with the challenged findings of the district court. Because Ventura had a duty to enforce its zoning code and chose instead to take no action, we conclude mandamus was the appropriate remedy to compel the city to act. We need not decide whether the city's action is ministerial or discretionary because we agree its exercise of discretion was arbitrary and capricious. We affirm the decision and order of the district court.

AFFIRMED.