IN THE COURT OF APPEALS OF IOWA

No. 0-317 / 09-1424
Filed June 30, 2010

LAUREL J. ELY JR., and
MILDRED E. ELY,
Plaintiffs-Appellants,

vs.

CITY COUNCIL OF THE CITY
OF AMES, IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Story County, Dale E. Ruigh, Judge.

Plaintiffs appeal the district court ruling rejecting plaintiffs' constitutional challenges to the Ames municipal code and its determination that the city council did not engage in illegal spot zoning. **JUDGMENT AFFIRMED, WRIT ANNULLED.**

Robert W. Goodwin of Goodwin Law Office, P.C., Ames, for appellants.

Kristine Stone, Assistant City Attorney, Ames, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

SACKETT, C.J.

Plaintiffs, Laurel and Mildred Ely, filed a petition for certiorari alleging the Ames city council violated their rights to due process and equal protection by designating property adjacent to the Elys' property as a historic landmark. Following a bench trial, the district court concluded that the designation did not violate the due process or equal protection clauses and was not illegal spot zoning. The Elys appeal this ruling. We affirm the dismissal of the Elys' action and annul the writ.

I. BACKGROUND AND PROCEEDINGS. In 1920, the Martin family built a house at 218 Lincoln Way in Ames, Iowa. From approximately 1920 to the late forties, the Martins provided room and board to African-American students attending Iowa State University when the students were denied housing elsewhere. The Martins became well known in the community for their efforts to make the Iowa State dormitories integrated and housing more available to African Americans in the Ames community. Distinguished botanist and the first African American to graduate from Iowa State University, George Washington Carver, often visited the Martins' home when he returned to Ames. The house is an example of the Craftsman architectural style and is one of the few remaining houses on Lincoln Way. Over time, Lincoln Way became a major artery within Ames and was designated as a "Highway-Oriented Commercial" zoning district. The home is currently residential rental property and is permitted as a nonconforming use because it was used as a household living space prior to enactment of the commercial zoning designation.

The Archie A. and Nancy C. Martin Foundation was created to honor the Martins' contribution to the community. It submitted an application requesting that Ames designate the Martin house as a historic landmark. Plaintiffs, the Elys, own commercial property located immediately east of the Martin house. Their property is used as a tire and automotive service center. The Elys claim the Martin house is not well-maintained by its current owner, a grandson of Archie and Nancy Martin, and has deteriorated over time. They objected to the Martin property being designated as a historical landmark. They contended the designation would make it impossible to remove the house or change its residential use. They also argued that the designation would not insure that the property would be properly maintained. The end result without a requirement to improve the property, they asserted, is that it would decrease the commercial value of nearby properties, including their lot. Despite these objections, the planning and zoning commission and city council, following a public hearing, approved the designation and rezoned the individual Martin property as a "Historic Preservation Overlay District."

On January 10, 2008, the Elys filed a petition for certiorari claiming the relevant city ordinances denied the Elys due process and equal protection and the city council's actions were illegal spot zoning. A trial to the bench was held on December 3, 2008. In a ruling filed August 28, 2009, the trial court entered its findings of fact and conclusions of law. It concluded the ordinances were not in violation of the due process clause facially or as applied. It found there were no unreasonable classifications in the ordinance scheme to support the Elys' equal

protection claim. It also determined the rezoning of the Martin property was not spot zoning, and even if it were, the spot zoning was valid. The Elys appeal each of these conclusions.

II. SCOPE OF REVIEW. "An appeal from an order . . . of the district court in a certiorari proceeding is governed by the rules of appellate procedure applicable to appeals in ordinary civil actions." Iowa R. Civ. P. 1.1412. Review of a certiorari action is ordinarily for corrections of errors at law, not de novo. *Fisher v. Chickasaw County*, 553 N.W.2d 331, 333 (Iowa 1996). However, even in a certiorari action, we must review de novo the evidence bearing on a constitutional issue. *Perkins v. Bd. of Supervisors of Madison County*, 636 N.W.2d 58, 64 (Iowa 2001); *Lewis v. Iowa Dist. Ct.*, 555 N.W.2d 216, 218 (Iowa 1996); *Montgomery v. Bremer County Bd. of Supervisors*, 299 N.W.2d 687, 692 (Iowa 1980).[1] We therefore make our own evaluation, based on the totality of the circumstances, to determine whether the city ordinances are unconstitutional. *Webster County Bd. of Supervisors v. Flattery*, 268 N.W.2d 869, 872 (Iowa 1978).

III. DUE PROCESS. On appeal, the Elys claim the trial court erred in finding no denial of their right to due process. They also contend Ames City Code section 31.8, which sets forth the procedure for designating a property as a

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[1] In *Meyer v. Jones*, 696 N.W.2d 611, 614 (Iowa 2005), the Iowa Supreme Court stated that the scope of review of a certiorari action was for the correction of errors at law. *Meyer*, 696 N.W.2d at 613-14. The court then went on to evaluate whether a city's procedure for abating a nuisance in its city code violated a property owner's right to procedural due process. *Id.* at 614. It concluded the city did violate the owner's right to procedural due process and remanded for the court to sustain the writ. *Id.* at 616-17. It did not address whether the standard of review is different in a certiorari action on constitutional issues.

historical landmark, violates their right to procedural due process as guaranteed by the Fourteenth Amendment of the United States Constitution and by article I, section nine of the Iowa Constitution.

The district court did not address the procedural due process claim. Finding the Elys' claim vague, it addressed whether the overall procedure for designating a historical landmark was a substantive violation of due process. It evaluated whether Ames city code chapter 31, which addresses historic preservation districts, was unreasonable, arbitrary, capricious, or discriminatory, on its face or as applied to the Elys. It concluded it did not. It found several other chapters of the city code outlined routine maintenance requirements that applied to all properties, not just historic landmarks.[2] It concluded that in light of

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[2] It stated,

> Chapter 13 of the Ames Municipal Code contains other general requirements for the maintenance of rental structures, such as the Martin house. Except as those requirements would be inconsistent with the design criteria established under Chapter 31 for historic landmarks, they apply to all rental structures, including historic landmarks. Nothing in Chapter 31 discourages maintenance of historic landmarks or requires that a badly-maintained historic landmark be left untouched. Chapter 31 only limits the ways in which the exterior of an historic landmark can be altered. In addition to the provisions relating to rental properties, the municipal code contains many other provisions for the maintenance of all properties in the City of Ames, including historic landmarks. Chapter 5 of the code contains a detailed building, electrical, mechanical and plumbing code for structures in the city. Chapter 10 concerns the handling of garbage and refuse. Chapter 11 contains a provision prohibiting the outdoor storage of household appliances and fixtures. Chapter 18 contains restrictions on the parking of vehicles. Chapter 22 requires the timely removal of snow from public sidewalks. Chapter 27 contains provisions relating to the trimming of trees and shrubs. Chapter 30 regulates the handling of junked vehicles. Suffice it to say, the Ames Municipal Code contains numerous detailed provisions relating to the maintenance of properties in the city. Those requirements apply to all property in the city, including property designated as an historic landmark.

these other provisions, chapter 31 was not unreasonable or capricious for not including a routine maintenance requirement. We agree with this determination.

Given that the *procedural* due process claim was not specifically addressed by the district court, and the Elys did not file a motion to amend or enlarge under Iowa Rule of Civil Procedure 1.904(2), we are inclined to conclude that error was not preserved on this claim. *See Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (stating that to preserve error a party must make a request for a ruling through a motion to amend or enlarge or through some other means "when the district court *fails to resolve* an issue, claim, or other legal theory properly submitted for adjudication."). Nonetheless we will address Elys' claim since the district court did address the substantive due process issue.

The central meaning of procedural due process has been clear for over a century: "'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Kistler v. City of Perry*, 719 N.W.2d 804, 807 (Iowa 2006) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556, 569-70 (1972)). A person is only entitled to procedural due process when a state action threatens to deprive a person of a protected property or liberty interest. *Meyer v. Jones*, 696 N.W.2d 611, 614 (Iowa 2005). In analyzing a procedural due process claim, we first must determine whether there is a protected liberty or property interest at stake. *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 691 (Iowa 2002). If a protected interest is involved, we must determine what procedure is needed to protect that interest. *Id.* In doing so, we balance three considerations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976); *see also Sorci v. Iowa Dist. Ct.*, 671 N.W.2d 482, 491 (Iowa 2003)).

The Elys argue they have a protected interest in maintaining the property value of their land, in maintaining the aesthetics of their neighborhood, and in promoting the economic welfare of the community. "Protected property interests . . . 'are created and their dimensions are defined' not by the Constitution but by an independent source such as state law." *Bowers*, 638 N.W.2d at 691 (citing *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 718 (8th Cir. 1995)). A property interest is only protected if there is a legitimate claim to entitlement. *Greenwood Manor v. Iowa Dep't of Pub. Health, State Health Facilities Council*, 641 N.W.2d 823, 837 (Iowa 2002). An abstract desire or expectation of a benefit is not sufficient. *Id.* The Elys claim that *Neuzil v. City of Iowa City*, 451 N.W.2d 159, 164 (Iowa 1990), establishes that one has a protected property interest in maintaining property values. They contend *Stoner McCray System v. City of Des Moines*, 247 Iowa 1313, 1319, 78 N.W.2d 843, 848 (Iowa 1956), establishes that one has a protected property interest in the aesthetics of surrounding properties. They also argue that section 31.1 of the

Ames city code creates a protected property interest in improving property values and enhancing aesthetics.

We disagree that *Neuzil* and *Stoner McCray* hold that maintaining property values or neighborhood aesthetics are protected property interests. Those cases discussed property values and aesthetics as purposes of zoning ordinances that would or would not render them unreasonable, capricious, or discriminatory. *See Neuzil*, 451 N.W.2d 163-64; *Stoner McCray Sys.*, 247 Iowa at 1319, 78 N.W.2d at 848. These topics were not addressed in terms of protected property interests for procedural due process analysis.

The record does not show that the Elys have a protected property interest in the historic landmark status of adjoining properties. Although they have concerns about property values and the appearance of their neighborhood, these interests are better categorized as hopes and abstract expectations and do not raise to the level of entitlement. This case is comparable to *Greenwood Manor*, 641 N.W.2d 837-38. In *Greenwood Manor*, a nursing care company sought to obtain the required certificate from the department of public health to build a facility in Coralville, Iowa. *Greenwood Manor*, 641 N.W.2d at 828. Nursing care facilities already existing in and near Coralville argued at the public hearing on the request that another facility should not be allowed to operate in the area. *Id.* at 829-30. After the certificate was issued, Greenwood Manor filed suit, alleging that it had a protected property interest in whether certificates were issued in the surrounding area and that interest deserved an evidentiary hearing on the issue rather than only an opportunity to be heard at a public hearing. *Id.* at 830. The

court found there was not a protected property interest at stake. *Id.* at 838. It acknowledged that although the existing care facilities had protected property interests in running their own facilities, those interests were not involved in determining whether a new certificate should be issued to another facility. *Id.* at 837-38. Similarly, the Elys have protected property interests but they are not immediately implicated in the designation of a neighboring property as a historical landmark.

Even if a protected property interest was involved, we do not believe more procedure is due the Elys. The current procedure requires a public hearing where property owners can voice concerns about whether properties should be designated historic landmarks.[3] This is adequate to protect the Elys' interest in maintaining property values and neighborhood aesthetics. *See Greenwood Manor*, 641 N.W.2d at 838; *see Sindlinger v. Iowa Bd. of Regents*, 503 N.W.2d 387, 390 (Iowa 1993); *Lunde v. Iowa Bd. of Regents*, 487 N.W.2d 357, 361 (Iowa Ct. App. 1992); *see also Cathedral Rock of Granite City, Inc. v. Illinois Health Facilities Planning Bd.*, 720 N.E.2d 1113, 1122 (Ill. Ct. App. 1999) (finding that affected persons provided notice of the certificate of need application, the right to

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[3] Ames municipal code section 31.9 provides in pertinent part,

> (1) Oral and written testimony concerning the significance of the nominated historic district or landmark shall be taken at a public hearing before the Ames Historic Preservation Commission. The Planning and Housing Department shall notify, by certified mail, all property owners of a proposed landmark or within a proposed district a minimum of twenty days prior to the public hearing to be held by the said Preservation Commission. The Preservation Commission upon hearing the proposal will review and make recommendations to the City Council.

present testimony at a public hearing, and the right to seek judicial review satisfied procedural due process).

IV. EQUAL PROTECTION. The Elys next contend the district court erred in finding they were not denied equal protection when the city council designated the Martin property a historic landmark. They argue the historic landmark ordinances are designed to protect the economic welfare and attractiveness of historic districts,[4] yet this particular designation fails to protect their economic welfare because there is no requirement for the Martin property to be adequately maintained. They claim the differing treatment between historic landmarks and surrounding properties violates their right to equal protection of the law.

Equal protection of the laws, guaranteed by the Fourteenth Amendment of the United States Constitution and article one, section six of the Iowa Constitution, mandates that those similarly situated are treated alike. *Kuta v. Newberg*, 600 N.W.2d 280, 288 (Iowa 1999). The analysis begins with identifying the classification made by the law or ordinance at issue. *In re A.W.*, 741 N.W.2d 793, 807 (Iowa 2007); *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa 2007). Differing treatment of persons does not violate

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[4] They cite Ames municipal code section 31.1 which provides,

> The purpose of this Chapter is to promote the educational, cultural, and economic welfare of the public of the City by preserving and protecting historic structures, sites, and neighborhoods which serve as visible reminders of the history and cultural heritage of the city, state, or nation. Furthermore, it is the purpose of this chapter to strengthen the economy of the City by stabilizing and improving property values in historic areas, and to encourage new developments that will be harmonious with the existing historic buildings and squares. Lastly, it is the purpose of the chapter to foster civic pride and to enhance the attractiveness of the community to residents, potential residents, and visitors.

equal protection if they are not similarly situated. *Bowers*, 638 N.W.2d at 689; *In re Morrow*, 616 N.W.2d 544, 548 (Iowa 2000).

> If a plaintiff fails to articulate, and the court is unable to identify, a class of similarly situated individuals who are allegedly treated differently under the challenged statute, the plaintiff "has not satisfied the first step of an equal protection analysis," and the court need not address whether the "statute has a rational relationship to a legitimate government interest."

Timberland Partners XXI, L.L.P. v. Iowa Dep't of Rev., 757 N.W.2d 172, 175 (Iowa 2008) (quoting *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 204 (Iowa 2002)). If a suspect class or a fundamental right is not involved, the government body only needs a rational basis to withstand the challenge. *Blumenthal Inv. Trusts v. City of West Des Moines*, 636 N.W.2d 255, 268 (Iowa 2001). Furthermore, even if parties are in similar situations, "[m]ere differentiation is not enough to constitute denial of equal protection—there must be invidious discrimination." *Johnson v. Louis*, 654 N.W.2d 886, 890 (Iowa 2002).

> A classification is reasonable if it is "based upon some apparent difference in situation or circumstances of the subjects placed within one class or the other which establishes the necessity or propriety of distinction between them." A classification "does not deny equal protection simply because in practice it results in some inequality; practical problems of government permit rough accommodations . . . ."

Id. (quoting *State v. Mann*, 602 N.W.2d 785, 792 (Iowa 1999)).

The district court concluded that the Elys failed to establish that any unreasonable classification was made in declaring the Martin property a historic landmark. We agree. Promoting preservation of historical and cultural lands has been found to be a legitimate government interest to support the differing treatment of properties. *See Brady v. City of Dubuque*, 495 N.W.2d 701, 703-05

(Iowa 1993) (rejecting an equal protection challenge to a statute that prohibited "century farms" from being designated as "economic development" areas because protecting the cultural achievement of multigenerational family farms is a legitimate government interest). We, like the district court, also do not find the Elys are dissimilarly treated under any of the ordinances cited. The Martin property is not required to meet a level of maintenance satisfactory to the Elys whether it is designated as a historic landmark or not. In fact, in comparing the parcels, the Martin house is held to a higher standard of maintenance than the Elys' property because it is a rental structure under the city code. As the district court pointed out, and we quoted above, other ordinances require certain upkeep of properties and prohibit certain uses of property that are dangerous or a nuisance. Those ordinances apply equally to the Ely and Martin properties. The maintenance standards are not changed by the historic landmark designation. Accordingly, the district court correctly determined there was no equal protection violation.

V. SPOT ZONING. The Elys lastly contend the historic landmark designation of the Martin property is illegal spot zoning. The district court concluded rezoning the Martin property within the historical landmark overlay was not spot zoning and even if it were, the rezoning was valid.

"Spot zoning is the creation of a small island of property with restrictions on its use different from those imposed on surrounding property." *Perkins*, 636 N.W.2d 58, 67 (Iowa 2001). When spot zoning results in the "reclassification of one or more *like tracts* or *similar lots* for a use prohibited by the original zoning

ordinance and out of harmony therewith [it] is illegal." *Keller v. City of Council Bluffs*, 246 Iowa 202, 213, 66 N.W.2d 113, 120 (1954) (emphasis in original). However, if the rezoning is in line with proper police power objectives and there are reasonable grounds to treat the subject property differently, the spot zoning is valid. *Kane v. City Council of the City of Cedar Rapids*, 537 N.W.2d 718, 723 (Iowa 1995). We determine whether a reasonable basis exists for the spot zoning by considering factors such as the size of the spot zoned, the use of surrounding properties, the changing conditions of the area, the current use of the subject property, and its suitability for alternative uses. *Id.*; *Montgomery v. Bremer County Bd. of Supervisors*, 299 N.W.2d 687, 696 (Iowa 1980). "The factor of primary importance is whether the rezoned tract has a peculiar adaptability to the new classification as compared to the surrounding property." *Little v. Winborn*, 518 N.W.2d 384, 388 (Iowa 1994). This type of determination is primarily for the planning and zoning board or city council to decide and if a reasonable body could determine the subject property is distinguishable from the surrounding area, we will uphold its decision. *Montgomery*, 299 N.W.2d at 696.

We agree with the district court's conclusion that rather than illegal spot zoning, the Martin property is the continuation of a permissible nonconforming use. "A non-conforming use is one 'that existed and was lawful when the [zoning] restriction became effective and which has continued to exist since that time.'" *Perkins v. Madison County Livestock & Fair Ass'*n, 613 N.W.2d 264, 270 (Iowa 2000) (quoting *Bd. of Supervisors v. Miller*, 170 N.W.2d 358, 360 (Iowa 1969)). The prior use generally establishes a vested right in continuing the use

after the new ordinance goes into effect and the right is only lost if the use is legally abandoned. *City of Okoboji v. Okoboji Barz, Inc.*, 746 N.W.2d 56, 60 (Iowa 2008). The owner of the Martin property has a vested right to continue using the property as a rental unit whether it is given historic landmark status or not. There is no support for the claim that continuing this nonconforming use is illegal spot zoning.

We also agree there is a reasonable basis for distinguishing the use of the Martin house from the surrounding area. The property has historical and cultural significance to Ames. The council rezoned the property in an effort to preserve this heritage. Ames may make a zoning classification to achieve this objective. *See* Iowa Code § 414.1 (2009) (permitting cities to regulate the use of buildings and land for the purpose of preserving historically significant areas of the community). We therefore affirm on this issue.

VI. CONCLUSION. The Elys failed to prove they were denied due process when the board designated the Martin property as a historical landmark. There is no equal protection violation by the designation. The Ely and Martin properties are not treated differently as a result of the designation. The city's rezoning of the Martin property did not constitute illegal spot zoning. The property is a permissible nonconforming use and the objective sought by the rezoning, historic preservation, is well within the city's police power. We affirm the district court and annul the writ.

JUDGMENT AFFIRMED, WRIT ANNULLED.