IN THE COURT OF APPEALS OF IOWA

No. 0-503 / 09-1689
Filed August 11, 2010

CITY OF CLEAR LAKE,
Plaintiff-Appellee,

vs.

SCOTT KRAMER,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Colleen D. Weiland, Judge.

On discretionary review, the defendant challenges a conviction for violating a municipal ordinance prohibiting the keeping of livestock. **REVERSED.**

Brian D. Miller of Miller & Miller P.C., Hampton, for appellant.

Charles H. Biebesheimer of Stillman Law Firm, Clear Lake, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

This case involves land that has been used for livestock pasture for over half a century. In 2007, the City of Clear Lake directed Scott Kramer to stop keeping livestock on the property. Kramer did not do so, and the City took him to court. The lower courts found Kramer in violation of a city ordinance, rejecting his defense of a prior nonconforming use. Because we conclude that Kramer's defense was well-grounded, we now reverse.

I. Background Facts and Proceedings.

Scott Kramer is the owner of three parcels of property totaling 7.3 acres located at 2605 South Shore Drive in the City of Clear Lake (City). Kramer inherited the property from his aunt, Edna Klaassen, when she passed away in June 2007.

The relevant history of this property dates back to the mid-twentieth century. In 1936, Edna acquired the "home parcel,"[1] which includes two houses, a garage, a barn, a machine shed, and out-sheds, as well as a pasture used to keep livestock. The east side of this parcel fronts on South Shore Drive. In 1950, Edna and her husband, George Klaassen, acquired the adjoining "pasture parcel," which has no structures on it and has been solely used as a pasture to keep livestock. The "pasture parcel" is located west of the "home parcel." At the time the Klaassens acquired these two parcels, no zoning ordinance was applicable to the property. The first zoning ordinance was enacted by the City in 1955, and the parcels were zoned agricultural.

[1] During the trial, according to a zoning map, the home parcel was identified as parcel "K," the pasture parcel was identified as parcel "N," and the smaller single lot was identified as "1-003" or "Lot 1 Brookhaven."

In 1957, the Klaassens acquired a smaller single lot that adjoined the pasture parcel to the west. This lot fronts on Lake View Drive. Although it was zoned for residential use under the 1955 Zoning Ordinance, the Klaassens permitted livestock to roam onto this land as well.

In 1983, the City enacted a new zoning ordinance. Under this ordinance, the entire property was zoned for residential use. In 1994, the City enacted its current zoning ordinance, under which the property remained zoned for residential use.

There is no dispute that from the date of its acquisition by the Klaassens, each parcel has been continuously utilized to raise livestock, including cattle, horses, mules, and sheep. The property has never been used for row crops or for any other purpose. Over the years, though, the number of animals kept on the property has decreased. In the early 1980s, Kramer himself started raising livestock on his uncle and aunt's property. He had cattle and horses until the early 1990s, and at the present time, has three horses and a mule. The City never objected to the use of the property for livestock pasture.

George passed away in 1993, and Edna passed away on June 22, 2007. Approximately six weeks after Edna's death, the City wrote Kramer, directing him to remove all horses and mules from the property within sixty days. The City's letter explained, "The previous owners of the property had the permission of the Council to keep horses and mules on the property. As the previous owners have passed away, the Council's permission has now lapsed."[2]

[2] The City zoning official who wrote the letter admitted that he himself had kept horses on the property in the year 2000 or thereabout.

Kramer declined to remove his animals. On May 16, 2008, the City cited him for "keep[ing] livestock unlawfully" in violation of sections 1.15, 55.01(4), 55.05, and 165.10 of the city ordinances. A trial was held before a district associate judge, sitting as magistrate court, on October 31, 2008. The testimony at trial indicated that generally the property is bordered by South Shore Drive to the east, residential areas (built in the 1970s or after) to the north and west, and the Clear Lake State Park (owned by the County) to the south. The City established the entire property is currently zoned for residential use, a zoning classification that does not permit a property owner to keep horses or livestock. Kramer asserted the affirmative defense of prior nonconforming use. He testified that since each parcel was purchased by the Klaassens in 1936, 1950, and 1957 respectively, it has been continuously used to pasture farm animals.

On November 10, 2008, the district associate judge found that Kramer did not establish a lawful prior nonconforming use because "at least since 1955 the zoning ordinances have limited the property use to single family residences and have prohibited the keeping of livestock on the property." Accordingly, Kramer was found guilty of the ordinance violation. Kramer appealed to the district court, which issued a ruling affirming his misdemeanor conviction on October 14, 2009.

Kramer applied for discretionary review.[3] The supreme court granted the application and transferred the case to our court.

[3] Iowa Code § 814.6(2)(d) ("Discretionary review may be available . . . [for] [s]imple misdemeanor and ordinance violation convictions.").

II. Analysis.

Our review is for correction of errors at law. Iowa R. App. P. 6.907. The facts of this case are essentially undisputed. Kramer acknowledges his keeping of livestock on the property does not conform with existing Clear Lake ordinances. The main issue is whether he established a prior nonconforming use.

"A nonconforming 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) (citations and internal quotations omitted).

> The city has the burden of proving a violation of the ordinance. A party who asserts a nonconforming use has the burden to establish the lawful and continued existence of the use, and once the preexisting use has been established by a preponderance of the evidence, the burden is on the city to prove a violation of the ordinance by exceeding the established nonconforming use.

City of Jewell Junction v. Cunningham, 439 N.W.2d 183, 186 (Iowa 1989). Also, contrary to the implication of the City's letter to Kramer, "[a]n established nonconforming use runs with the land, and hence a change in ownership will not destroy the right to continue the use." 8A Eugene McQuillin, *The Law of Mun. Corp.* § 25.183.50, at 33 (3d ed. 2003) [hereinafter McQuillin]; *see also* 83 Am. Jur. 2d *Zoning & Planning* § 587, at 503 (2003) ("A nonconforming use is not personal to the current owner or tenant, but attaches to the land itself, and is not affected by the user's title, or possessory rights in relation to the owner of the land.").

Kramer argues that because the property was used to pasture animals since it was purchased and there were no zoning ordinances in effect at that time, he has established a prior nonconforming use. We agree with Kramer as to the "home" and "pasture" parcels. Prior to 1955, these parcels were not subject to zoning and were used as pasture for livestock. Under the City's initial zoning ordinance in 1955, both parcels became zoned for agricultural use. This zoning classification permitted use for "[f]arms, including the usual farm buildings and structures," as well as golf courses and cemeteries. Clear Lake Zoning Ordinance § 5 (1955). A section titled "General Regulation" applied to all zoning classifications and provided, "The keeping or raising or poultry, livestock, or rodents is prohibited except on premises containing two acres or more and except within an enclosure distant at least one hundred (100) feet from any residence now existing or hereafter erected." *Id*. § 4(4)(M). However, another section allowed nonconforming uses, which were defined as the "[l]awful use of a building or land at the time of the enactment of the Ordinance or amendment thereto, which use does not conform with the provisions of this Ordinance for the District in which it is located." *Id*. § 3(25). Accordingly, there is no question Kramer has proved a prior lawful nonconforming use. *See Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 430 (Iowa 1996); *Frank Hardie Adver., Inc. v. City of Dubuque Zoning Bd.*, 501 N.W.2d 521, 522 (Iowa 1993).

Thus, we find the keeping of livestock on the "home" and "pasture" parcels was a lawful prior nonconforming use under the 1955 Zoning Ordinance. Further, new zoning ordinances were subsequently enacted in 1983 and 1994 that provided for continuation of nonconforming uses. *See* Clear Lake Zoning

Ordinance § 18.08.010(43) (1983) (defining nonconforming use as "any building or land lawfully occupied by a use at the time of passage of this zoning ordinance or amendment thereto which does not conform after the passage of this zoning ordinance or amendment thereto with the use regulation of the district in which it is situated"); Clear Lake Zoning Ordinance § 165.44 (1994) (stating that "[t]he lawful use of any building or land existing on the effective date of this chapter may continue, although such use of land does not conform with the provisions of this chapter."). [4]

As a fallback argument, the City contends that even if Kramer and his predecessors had a valid nonconforming use, the City was entitled to regulate that use. The City cites to 8A McQuillin section 25.182, which explains, "Nonconforming uses are subject to reasonable regulation under the police power to protect the public health, safety, welfare or morals." The City tries to characterize the 1955 ordinance that prohibited pasturing of livestock within 100 feet of a residence and the more restrictive 1983 ordinance that prohibited it within 200 feet as these kinds of regulations. We disagree. These livestock restrictions do not directly address the public health, safety, welfare, or morals, such as ventilation, fire protection, or sanitary requirements might. *See City of Chicago v. Miller*, 188 N.E.2d 694, 698-99 (Ill. 1963) (holding that existing buildings may be subjected to these kinds of requirements). They are essentially

[4] The zoning ordinance enacted in 1983 specified that agriculturally zoned property could be used for "[f]arms; farm buildings, other than those used for livestock; truck gardens; orchards and nurseries." City of Clear Lake Zoning Ordinance § 18.28.020 (1983). Conditional uses, which required the approval of the Board of Adjustment, included "[l]ivestock raising facilities and the raising of livestock." City of Clear Lake Zoning Ordinance § 18.28.030 (1983).

land use restrictions. In effect, the City wants to use a "public health, safety, welfare or morals" exception to swallow the nonconforming use rule. We decline to follow the City's approach.

Kramer, however, has failed to demonstrate the smallest, westernmost lot that fronts on Lake View Drive was a prior nonconforming use. This lot was acquired by the Klaassens in 1957. At that time, the original zoning ordinance was already in effect and the lot in question had been zoned residential. Kramer admitted at trial that there are trees on this lot and "[t]he horses go and stand underneath the trees for shade."

Yet this lot represents only a very small portion of Kramer's property. The City's original demand letter and original citation did not mention this lot. In fact, both the August 2007 letter and the May 2008 citation referenced "2605 South Shore Drive." *See* Iowa R. Crim. P. 2.55 (stating a "complaint shall contain . . . [a] concise statement of the acts or acts constituting the offense, including the time and place of its commission . . . "). This is actually the street address of the "home parcel," which fronts on South Shore Drive, and which was clearly a valid nonconforming use. Kramer was never asked to remove animals from "the lot on Lake View Drive." At trial, the city's witness characterized the small lot on Lake View Drive as a vacant wooded lot that "joins" the pasture. Furthermore, the case was tried as an up or down proposition as to Kramer's property as a whole, on the vast majority of which livestock were roaming lawfully before the 1955 ordinance came into effect. In these circumstances, we believe that Kramer's conviction for violation of the livestock ordinance must simply be reversed.

REVERSED.