IN THE COURT OF APPEALS OF IOWA

No. 0-745 / 10-0356
Filed January 20, 2011

GALINSKY FAMILY REAL ESTATE, LLC,
Plaintiff-Appellee,

vs.

CITY OF DES MOINES ZONING BOARD OF ADJUSTMENT,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

The City of Des Moines Zoning Board of Adjustment appeals from the district court's decision that Galinsky Family Real Estate, LLC's tenant did not violate the zoning code because it enjoys non-conforming use status as a used car lot. **REVERSED.**

Michael F. Kelley, Assistant City Attorney, Des Moines, for appellant.

Louis R. Hockenberg, Elizabeth N. Overton, West Des Moines, for appellee.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

This case involves a zoning enforcement action against a used car lot on Southeast Fourteenth Street in Des Moines. The Board of Adjustment appeals from the district court's decision that Big Guy Auto Sales—the tenant of Galinsky Family Real Estate, LLC—did not violate the zoning code because it enjoys non-conforming use status as a used car lot. Because a non-conforming use must have been legal before the enactment of the current ordinance, and because Galinsky has not demonstrated the Des Moines municipal code previously permitted off-street parking for more than five cars on an unpaved lot, we reverse the district court's finding of a legal non-conforming use.

I. Background Facts and Procedures

In April 2008, the Des Moines City Council launched a "concentrated code enforcement" effort to improve the appearance of the city's major corridor streets, including Southeast Fourteenth Street. Zoning enforcement officer SuAnn Donovan testified: "We went and visited every used car lot . . . in the City of Des Moines to find out the extent of their operations and whether they were in compliance or not."

One of the used car dealers inspected by the city as part of this zoning enforcement effort was Big Guy Auto Sales, which is operated by Daniel James. James rents the property from Gary Galinksy, the owner of Galinsky Family Real Estate, LLC. Galinsky purchased the property at 1717 Southeast Fourteenth Street in February 2005 and first leased it to Dan Wright of River Edge Auto Sales.

On May 6, 2005, the city issued an Auto Dealership Zoning Confirmation to Galinsky in regard to the property at 1717 Southeast Fourteenth Street. The confirmation stated that the property was "zoned properly" and met the standards to be used as a "vehicle display lot"—allowing the owner to obtain a dealership license from the Iowa Department of Transportation. The confirmation also included the following information: "Conditions associated with grandfather rights for auto sales lot: All vehicles for sale as well as customer and employee parking must be conducted from areas of the property that have been improved with hard-surfaced paving."

About one year later, James started leasing the property at 1717 Southeast Fourteenth Street from Galinsky. On July 19, 2006, the city zoning department asked James to sketch a "site plan" indicating where the inventory of used cars would be parked. James provided the city with a simple hand-drawing showing a "front display area" of the car lot abutting Southeast Fourteenth Street with a "holding lot" behind it. The drawing does not show definitively whether the holding lot extended all the way back to Southeast Fourteenth Court, an unpaved street that runs parallel to Southeast Fourteenth. On the same date, the city issued a Vehicle Dealership License Zoning Confirmation to James, noting that the property was "zoned properly" and met the standards to be used as a vehicle display lot.

On April 19, 2008, a city inspector visited Big Guy Auto Sales and discovered inoperable vehicles, boats, and other junk and debris stored on the

unpaved back portion of the lot. The city's neighborhood inspection division issued a notice of violation and James responded by cleaning up the property.

On June 4, 2008, the city sent a letter to Galinsky assigning a new address—1716 Southeast Fourteenth Court—to the rear portion of the lot at 1717 Southeast Fourteenth Street. Ms. Donovan testified that she issued the address letter so the city could use its computerized database to track future enforcement activity on that parcel.

A city inspector again visited Big Guy Auto Sales on August 5, 2008. The next day, the city's development zoning division issued Galinsky a notice that the condition of his property at 1716 Southeast Fourteenth Court violated a municipal code provision prohibiting storage of vehicles on an unpaved lot.[1] Galinsky appealed the notice of violation to the City of Des Moines Zoning Board of Adjustment (the Board) under Iowa Code section 414.10 (2007), asserting: "I believe I have grandfather rights to use this property as it has been used in the past."

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[1] The notice cited Des Moines Municipal Code section 134-1087(4)(a), (b), (c), which states, in pertinent part:

> Only the following uses of structures or land shall be permitted in the M-1 light industrial district:
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> . . . .
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> (4) Contractor's equipment storage yard or plant; truck terminal or storage yard; rental of equipment commonly used by contractors; and storage yards for vehicles of a delivery or hauling service, subject to the following requirements: (a) All areas used for outside storage . . . shall be maintained with both a dustless surface and a drainage system approved by the city engineer;
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> . . . .
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> (c) All driveways, parking lots and areas used for temporary storage of vehicles shall be surfaced with an asphaltic or Portland cement binder pavement . . . .

The Des Moines city council enacted this provision on May 23, 2005.

The Board was set to hear the appeal on September 24, 2008, but delayed consideration of the matter until its October 22, 2008 meeting so a second public notice could be issued with reference to the 1717 Southeast Fourteenth address. The Board heard from James, Galinsky, Galinsky's attorney, and zoning enforcement officer Donovan. Galinsky asked the Board to overturn the city's zoning enforcement decision that cars could not be stored on the unpaved back portion of the lot because that use was "grandfathered" in as a result of letters from the city in 2005 and 2006 confirming that the property was properly zoned for a vehicle display lot. Galinsky acknowledged that his tenant "stocks up" on inventory in the spring, parking as many as twenty used cars in the back unpaved lot to have for sale "when people get their tax money."

The Board rejected Galinsky's appeal on a vote of six to zero with one abstention. The Board's October 22, 2008 written decision found Galinsky failed to provide "any compelling evidence that demonstrates the existence of any legal nonconforming rights to use the unpaved portions of the property for equipment and vehicle storage." The Board concluded that the earlier letters from the city stated that the property had "grandfather rights" to be used for auto sales, but did not "grant grandfather rights to park vehicles on unpaved surfaces." The Board noted that an earlier version of the city code (City of Des Moines Municipal Code section 2A-40(D)(2) (1953)[2]) required any off-street parking areas for more than

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[2] Section 2A-40(D)(2) (1953) provides as follows:

> D. Every parcel of land hereafter used as a public or private parking area, including a commercial parking lot, shall be developed and maintained in accordance with the following requirements:
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> . . . .

five vehicles to be paved and the same requirement was adopted in the current municipal code at Section 134-1377(f)(5).[3]

The Board also determined that James's "site sketch" approved by the city on July 19, 2006, "does not extend to the property line adjoining SE 14th Court and does not include the unpaved area." The Board upheld the city enforcement officer's determination under "City Code Section 134-1087" that the lot must be developed in accordance with requirements for outdoor storage of cars and equipment.

Galinsky filed a petition for writ of certiorari and application for a restraining order against the city in Polk County district court. On May 28, 2009, the district court held a hearing on the matter. Counsel for the Board urged the district court to find that substantial evidence supported the Board's decision and argued that the court was restricted from taking additional evidence under the holding of *Bontrager Auto Service, Inc. v. Iowa City Board of Adjustment*, 748 N.W.2d 483 (Iowa 2008). Galinsky countered that because the certiorari

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> (2) Any off-street parking area, including any commercial parking lot, for more than five (5) vehicles shall be surfaced with an asphaltic or portland cement binder pavement or such other surfaces as shall be approved by the Director of Public Works and the Building Inspector, so as to provide a durable and dustless surface, shall be so graded and drained as to dispose of all surface water accumulation within the area, and shall be so arranged and marked as to provide for orderly and safe loading or unloading and parking and storage of self-propelled vehicles.

[3] Section 134-1377(f)(5) states:

> (f) *District parking lot requirements.* Every parcel of land used as a public or private parking area, including a commercial parking lot, shall be developed and maintained in accordance with the following:
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> . . . .
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> (5) *Paving*. Any off-street parking area, including any commercial parking lot, for more than four vehicles shall be surfaced with an asphaltic or Portland cement binder pavement or such other surfaces as shall be approved by the city engineer . . . .

proceedings were de novo, the court could take additional evidence on his claim that the Board acted illegally, arbitrarily, and capriciously. The district court allowed testimony subject to its later determination whether new factual findings were permitted. In a decision issued September 24, 2009, the district court granted Galinsky's request for certiorari, concluding:

> [T]he properties at 1717 SE 14th Street and 1716 SE 14th Court have and continue to enjoy non-conforming use status as a used car lot. They have and continue to be used to store vehicles being prepared for sale on the back lot, and offer cars for sales on the front lot. This status has not been changed by the City's efforts to extinguish this use by assigning a new address to the back lot.

The Board filed a motion under Iowa Rule of Civil Procedure 1.904(2) and Galinsky resisted. The district court denied the motion. The Board now appeals.

II. Scope of Review/Preservation of Error

Our scope of review in this certiorari action is for correction of legal error. *U.S. Cellular Corp. v. Bd. of Adjustment*, 589 N.W.2d 712, 716 (Iowa 1999). The question is whether the Board's decision was supported by substantial evidence. *See Bontrager Auto Service, Inc.*, 748 N.W.2d at 495. The substantial evidence rule used in certiorari actions is akin to that used to review decisions of administrative agencies. *Bush v. Bd. of Trs.*, 522 N.W.2d 864, 866 (Iowa Ct. App. 1994). "Evidence is substantial if a reasonable person would find it adequate to reach the given conclusion, even if a reviewing court might draw a contrary inference." *Id.* "The possibility that two persons might reach differing conclusions upon review of the evidence does not prevent a finding from being supported by substantial evidence." *Id.*

The decision reached by a board of adjustment enjoys a strong presumption of validity. *Ackman v. Bd. of Adjustment*, 596 N.W.2d 96, 106 (Iowa 1999). "If the reasonableness of the board's action is 'open to a fair difference of opinion, the court may not substitute its decision for that of the board.'" *Id.* (citation omitted).

An objection to the zoning enforcement decision not raised before the board of adjustment will not be entertained on appeal from the district court's ruling, unless the issue involves the subject matter jurisdiction of the board to reach its decision. *Johnson v. Bd. of Adjustment*, 239 N.W.2d 873, 878 (Iowa 1976); *see Osage Conservation Club v. Bd. of Sup'rs*, 611 N.W.2d 294, 298 (Iowa 2000).

III. Analysis

A. Did the district court err by taking additional evidence?

As a threshold matter, the Board contends that the district court should not have heard new evidence in the certiorari action. The Board relies on *Bontrager Auto Service, Inc*. for the proposition that the district court should not substitute its own fact-finding for that of the board. *Bontrager* clarified the circumstances when a district court may make new factual findings on issues that were before the board for decision. *Bontrager Auto Service, Inc.*, 748 N.W.2d at 495. Our supreme court decided that a district court may take additional evidence in a certiorari action challenging the board's decision only when the alleged illegality does not appear in the record made before the board. *Id*. "Ordinarily, testimony

would not be necessary when the claimed illegality is insufficient evidence, at least when a record was made before the board." *Id*.

On appeal, Galinsky asserts that the district court's decision to take additional testimony was appropriate where there were allegations of illegal conduct by the city. In the alternative, Galinsky argues that the district court's decision to accept testimony was irrelevant to its conclusions of law.

Under our reading of *Bontrager*, the district court should not have taken additional evidence or decided factual questions not presented to the Board of Adjustment. Because the alleged illegality—insufficiency of the evidence to support the Board's decision that Galinsky could not rely on nonconforming use status to avoid the zoning violation—could be determined from evidence before the Board, the district court erred in hearing witnesses and engaging in another layer of fact finding. Having decided the district court's evidentiary hearing was not necessary, we turn our review to the Board's findings of fact.

B. Did substantial evidence support the Board's decision?

In the law of zoning, the term "nonconforming use" refers to the following:

> A use which not only does not conform to the general regulation or restriction governing a zoned area but which lawfully existed at the time that the regulation or restriction went into effect and has continued to exist without legal abandonment since that time.

Bd. of Sup'rs v. Miller, 170 N.W.2d 358, 361 (Iowa 1969). The initial burden is upon the city to prove the violation of a zoning ordinance. *City of Jewell Junction v. Cunningham*, 439 N.W.2d 183, 186 (Iowa 1989). Once the violation is proved, the burden shifts to the party asserting a nonconforming use to establish the lawful and continued existence of the property use. *Id*.

The city's inspector alleged that the storage of used cars on an unpaved portion of Galinsky's property at 1717 Southeast Fourteenth Street violated Des Moines zoning codes. The city presented an aerial photograph from 2005 as evidence at the Board of Adjustment meeting to show that when Galinsky purchased the property, no vehicles were parked on the grassy portion of the lot.

At the Board meeting, Galinsky did not contest the city's assertion that parking cars on the unpaved portion of the property violated the current zoning code. His argument before the Board was that he had "grandfather rights" to have his tenants use the property for the sale of used cars.[4]

The Board acknowledged Galinsky's property had "grandfather rights" to be used for auto sales, but not "grandfather rights to park vehicles on unpaved surfaces." The Board highlighted the city's May 6, 2005 letter to Galinsky which specifically stated: "All vehicles for sale as well as customer and employee parking must be conducted from areas of the property that have been improved with hard-surfaces paving." The Board was not convinced that nonconforming use status excused Galinsky from complying with zoning regulations which required off-street parking for more than five vehicles to be paved. The Board found that as far back as 1953, the zoning code prohibited used car dealers from parking cars on an unpaved lot. Accordingly, the Board determined Galinsky's property did not qualify for a nonconforming use exemption for an activity that was not lawful, even if it was occurring, when the current zoning code went into effect.

[4] Galinsky also raised concerns before the Board that the city was engaging in selective enforcement of its zoning ordinances, but that position was not articulated as a separate claim for relief and is not advanced in this appeal.

We agree with the Board's finding that Galinsky does not enjoy nonconforming use status. Galinsky did not meet his burden before the Board to show that his tenant's practice of parking cars being prepared for sale on the unpaved rear portion of the lot at 1717 Southeast Fourteenth was ever allowed under the city zoning codes. To qualify as nonconforming, the use of the property must be lawful at the time the owner or tenant commenced the activity. *See, e.g.*, *Mendes v. Bd. of Appeals*, 552 N.E.2d 604, 605 (Mass. App. Ct. 1990); *Pschesang v. Vill. of Terrace Park*, 448 N.E.2d 1164, 1166 (Ohio 1983); *Lantos v. Zoning Hearing Bd.*, 621 A.2d 1208, 1210–11 (Pa. Commw. Ct. 1993). The record before the Board does not reflect that City of Des Moines zoning ordinances allowed used car lots to park their inventory on grass surfaces at the time that Galinsky purchased the property at issue. Substantial evidence supports the board's decision that Galinsky's property must be developed in accordance with zoning requirements if used cars are to be stored on the back lot.

C. Did Galinsky preserve his claims that the city cited an inapplicable zoning provision in its notice of violation and the Board relied on an inapplicable provision in its ruling?

We have not overlooked Galinsky's appellate argument that the city relied on the wrong zoning ordinance in its notice of violation. His point is well taken that the City of Des Moines municipal code section 134-1087(4) does not mention vehicle display lots among the light industrial uses required to have paved lots. In fact, the zoning enforcement officer acknowledged in the district

court that the city "probably could have used a better ordinance cite" when preparing its notice of violation. We are troubled that the notice of violation may not have alerted Galinsky to the proper code section.

But the problem with Galinsky's argument is that he did not raise any question about the applicability of section 134-1087(4) at the Board of Adjustment hearing. His only argument before the Board involved nonconforming use. Accordingly, the Board did not have an opportunity to consider the claim nor did the city have a chance to amend the ordinance citation in the notice to conform to proof at the hearing. It is too late to raise an issue for the first time in appeal from the Board's determination. *See Johnson*, *2*39 N.W.2d at 878. Because of Galinsky's failure to preserve error, we do not consider whether section 134-1087(4) applied to the rear portion of the property at 1717 Southeast Fourteenth.

In the same vein, Galinsky disputes the applicability of section 2A-40(D)(2) (1953) (now incorporated into section 134-1377(f)(5)) which prohibits off-street parking of more than five vehicles on an unpaved surface. Galinsky asserts neither his tenant's display lot nor its holding lot constitutes a "parking lot" under this zoning provision. We are inclined to disagree with Galinsky's interpretation that his tenant's holding lot does not fall within the broad definition of parking lot used in section 2A-40(D)(2) and section 134-1377(f)(5).[5] Legislative drafters are presumed to use words in their ordinary and usual sense, and "in its broad

[5] We are cognizant that another panel of our court has determined that the front display lot at Big Guy Auto Sales does not fall within the ambit of "parking areas" as described in the previously numbered section 2A-25(F) of the Des Moines Municipal Code. *Galinsky Family Real Estate, L.L.C. v. City of Des Moines Zoning Bd.*, No. 10-0692, filed this date.

application the ordinary and usual public concept of 'parking lot' is simply an outdoor lot for the parking of vehicles." *Sorg v. Iowa Dep't of Revenue*, 269 N.W.2d 129, 132 (Iowa 1978). But we need not reach this question of statutory interpretation because it was not raised before the Board. The city included a copy of the 1953 ordinance in a packet of information provided Galinsky before the Board of Adjustment hearing. Galinsky did not argue to the Board that the off-street parking provision did not apply by its terms.

As in other contexts, the rules of error preservation in board of adjustment cases serve the goals of affording the trier of fact an opportunity to avoid or correct error, and providing the appellate court an adequate record to review. *See DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). Galinsky limited his argument before the Board to the single claim of nonconforming use. In his certiorari challenge and on appeal he broadened his objections to encompass complaints about the applicability of the zoning provisions cited by the city. Galinsky did not give the Board a chance to address or correct the errors now complained of, and our court does not have an adequate record in this appeal to review those assignments of error. Accordingly, we do not consider Galinsky's arguments which were not raised before the Board.

Because we conclude that substantial evidence supports the Board's rejection of Galinsky's legal nonconforming use argument, we reverse the district court's grant of the petition for writ of certiorari.

REVERSED.

Mansfield, P.J., concurs; Danilson, J., dissents.

DANILSON, J. (dissenting)\

I respectively dissent. The vehicles on the unpaved rear portion of Galinsky's lot constitute an automobile dealer's business inventory to be prepared for sale. The City alleged that Galinsky's property was in violation of Des Moines Municipal Code section 134-1087(4)(c), which provides that with respect to "[c]ontractor's equipment storage yard or plant; truck terminal or storage yard; rental of equipment commonly used by contractors; and storage yards for vehicles of a delivery or hauling service," "[a]ll driveways, parking lots and areas used for temporary storage of vehicles shall be surfaced . . . ." To rebut Galinsky's claim of a nonconforming use, the City attempts to rely upon an earlier version of the city code that applies to public or private parking areas and commercial parking lots (Des Moines Municipal Code section 2A-40(D)(2) (1953)) currently existing as section 134-1377(f)(5). In light of the City's prior acknowledgment in writing of Galinsky's nonconforming use, the lack of any change in the operations upon the property to alter this status, and the inapplicability of the zoning ordinances upon which the City relies, I would affirm the district court's ruling reversing the Board's decision.