2011 IL App (4th) 110280-U

Filed 12/28/11

NO. 4-11-0280

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THOMAS NORRIS and JUDY NORRIS, Plaintiffs-Appellants, v. THE CITY OF WAVERLY, an Illinois Municipal Corporation; THE CITY OF WAVERLY PLANNING AND ZONING COMMISSION; and THE BOARD OF ADJUSTMENT OF THE CITY OF WAVERLY, an Appointed Board, Defendants-Appellees. | ) | Appeal from Circuit Court of Morgan County No. 07MR61 |
| | ) | Honorable Richard T. Mitchell, Judge Presiding. |

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed, rejecting plaintiffs' contention that the Board of Adjustment denied their challenge to the City of Waverly's stop-use order, requiring plaintiffs to cease and desist from storing hay on their property in violation of the city's zoning laws.

¶ 2 In December 2006, defendant, the City of Waverly (City), served plaintiffs Thomas and Judy Norris with a "Stop Use Order," ordering them to "cease and desist" from storing hay on their property because it was a violation of the City's zoning laws. Plaintiffs responded by appealing to the Board of Adjustment (Board). Following an August 2007 hearing on plaintiffs' appeal, the Board voted to affirm the City's stop-use order.

¶ 3 In September 2007, plaintiffs filed a complaint for administrative review, seeking review of the Board's decision. In July 2008, the circuit court affirmed the Board's decision.

Shortly thereafter, plaintiffs filed a motion to reconsider, which the court later denied.

¶ 4 Plaintiffs appeal, arguing that the Board erred by denying their appeal. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 In December 2006, the City served plaintiffs with a stop-use order, insisting that they "cease and desist" from storing hay on their property because it was a violation of the City's zoning laws. The City explained that plaintiffs' property was located in a "General Commercial District," which did not permit the storage of hay. Plaintiffs responded by appealing to the Board.

¶ 7 At an August 2007 hearing on plaintiffs' appeal, the parties presented the following background through (1) testimony from plaintiffs, citizens, and city officials, and (2) exhibits, including photographs, rezoning petitions, and construction applications.

¶ 8 In 1989, plaintiffs purchased the property at issue. From that time through the time of the hearing, plaintiffs' property was located in a part of the City that was zoned as a "General Commercial District." The City's general-commercial-district zoning ordinance specifically allowed for, among other similar uses, (1) "Limited Retail Sales," including book stores, florists, and grocery sales; (2) "General Merchandise Sales," including department stores and furniture stores; and (3) "Eating and Drinking Establishments," including bars, lounges, and restaurants. The City zoned other property–which was not a part of plaintiffs' property–as a "Light Industrial District," which allows for, among other similar uses, (1) "Agricultural Uses," including farm equipment and supplies and plant nurseries; (2) "Commercial Uses," including drive-in restaurants and vehicle sales; and (3) "Warehousing and Wholesale Trade," including commercial warehousing and self-service storage facilities.

¶ 9 Beginning in 2003, plaintiffs petitioned the City for permission to rezone their property from general commercial to light industrial to operate a hay storage and sales facility. The City denied plaintiffs' request, in part, because of concerns about (1) the highly combustible nature of hay and (2) the fact that hay on the site might attract snakes, rats, mice, and raccoons. (Plaintiffs attempted to have their property rezoned on at least two occasions.)

¶ 10 In May 2004, having been unsuccessful in their attempts to have their property rezoned, plaintiffs applied for a building permit to construct "an enclosed steel building for the purpose of a commercial parking facility." Such a facility was a permitted use in their zoning district, the general-commercial-district zone. The City later approved plaintiffs' request, and shortly thereafter, plaintiffs constructed a 120- by 115-foot steel building on their property. By their own admission, among other uses, plaintiffs used the building to sell bailed hay to retail consumers, with the vast majority of their sales going to dairy farms. Normally, by the time the hay reached the building, it was inventory that had already been sold and was simply awaiting delivery.

¶ 11 Following the August 2007 hearing, the Board voted to affirm the City's stop-use order. As part of its written order, the Board found that (1) plaintiffs were storing hay in violation of the City's zoning laws, and (2) plaintiffs were not operating a commercial parking facility in the building.

¶ 12 In September 2007, plaintiffs filed a complaint for administrative review, seeking review of the Board's decision. In July 2008, the circuit court affirmed the Board's decision, finding as follows:

"It is clear to this [c]ourt that after *** [p]laintiffs failed to

> have their property rezoned from general commercial to light industrial, they attempted an end around by obtaining a building permit for a commercial parking facility. However, they immediately used the property for an agricultural use, which is not allowed under the ordinance in the general commercial district. The ordinance is clear and unambiguous."

Shortly thereafter, plaintiffs filed a motion to reconsider, which the court later denied.

¶ 13 This appeal followed.

¶ 14 II. PLAINTIFFS' CLAIM THAT THE BOARD ERRED BY DENYING THEIR APPEAL

¶ 15 Plaintiffs argue that the Board erred by denying their appeal. Specifically, plaintiffs contend that (1) on-hand inventory of hay bales did not qualify as "storage" of hay bales under that term's common meaning and therefore rendered their use permissible under the City's general-commercial-district zoning, (2) their use of the building fell within the parameters of a general commercial district as "retail sales," and (3) their operation did not pose a public health and safety risk to it and surrounding properties. We address plaintiffs' contentions in turn.

¶ 16 A. Plaintiffs' Claim That Their On-hand Inventory of Hay Bales Did Not Qualify as Storage

¶ 17 Plaintiffs first contend that the Board erred by denying their appeal because their on-hand inventory of hay bales did not qualify as "storage" under that term's common meaning and therefore rendered their use permissible under the City's general-commercial-district zoning. Plaintiffs assert that the Board's finding that they were storing hay bales on their property in violation of the City's commercial zoning was against the manifest weight of the evidence. We

disagree.

¶ 18 In *Kimball Dawson, LLC v. City of Chicago Dept. of Zoning*, 369 Ill. App. 3d 780, 786, 861 N.E.2d 216, 222 (2006), the First District of this court succinctly outlined the standard required to reverse factual findings made by an administrative board in cases involving zoning, as follows:

> "In an action under the Administrative Review Law, factual determinations by an administrative agency are held to be *prima facie* true and correct and will stand unless contrary to the manifest weight of the evidence. 735 ILCS 5/3-110 (West 2004). [Citation.] To find a determination against the manifest weight of the evidence requires a finding that all reasonable people would find that the opposite conclusion is clearly apparent. [Citation.] We review the decision of the Board, not the circuit court, as the hearing officer is the fact finder responsible for overseeing testimony, making credibility determinations and assigning weight to statements made by witnesses. [Citation.] In making this determination, we do not weigh the evidence or substitute our judgment for that of the administrative agency. [Citation.] Simply put, if there is evidence of record that supports the agency's determination, it must be affirmed. [Citation.]"

¶ 19 Here, contrary to plaintiffs' contention, the Board received ample evidence to conclude that they were storing hay in their building. Indeed, the Board heard evidence from

plaintiffs that they used the building to sell baled hay to retail consumers and that the hay was housed in their building as inventory until it was to be delivered to their buyer. Storing hay–which is clearly an agricultural undertaking–was permitted only in the light industrial district of the City.

¶ 20 Because the record supports the Board's finding that plaintiffs stored hay in their building, we conclude that its finding in that regard was not against the manifest weight of the evidence.

¶ 21 B. Plaintiff's Remaining Claims

¶ 22 Plaintiffs' also contend that their use of the building fell within the parameters of a general commercial district as "retail sales." Specifically, plaintiffs assert that because they were not "storing" their hay but were housing it temporarily before their retail sales were completed, their use was permissible under the "Similar Retail Sales" section of the City's general-commercial-district zoning law. Because plaintiffs' contention in this regard is premised upon the fact that the Board erred by finding that they were storing hay, and we have concluded that the Board did not err by finding that plaintiffs were storing hay on their property, we reject it.

¶ 23 Plaintiffs further contend that the Board erred because their operation did not pose a public health and safety risk. Plaintiffs' assertion in this regard is perplexing because it has nothing whatsoever to do with whether their business operation fell outside the parameters of the general commercial district zoning. Instead, this assertion goes to whether their property should be rezoned. Essentially, plaintiffs' claim attacks the wisdom to include or exclude certain types of commerce from a particular district within each zone. Such a concern should be

addressed to the City's governing body rather than this court. See *Village of Chatham v. County of Sangamon*, 351 Ill. App. 3d 889, 902, 814 N.E.2d 216, 228 (2004) ("We will not disturb an enactment merely over a difference of opinion concerning its wisdom, necessity, and expediency").

¶ 24 In closing, we note that we agree with the circuit court's assessment of this case. Namely, that it is clear that after plaintiffs failed in their attempt to have their property rezoned from general commercial to light industrial, they attempted to circumvent the City's zoning laws by obtaining a building permit for a commercial parking facility. The Board and the circuit court were apparently not impressed with plaintiffs' actions in this regard. Neither are we.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the trial court's judgment.

¶ 27 Affirmed.