FILED
APR 29 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HARVEY CONSTRUCTION CO.,

Plaintiff-Appellant,

vs.

BOARD OF ADJUSTMENT, CITY OF BETTENDORF, IOWA,

Defendant-Appellee,

HARDEE'S FOOD SYSTEMS, INC.,

Intervenor-Appellee.

Filed April 29, 1980

0-42
2-63092

Appeal from Scott District Court - R. K. Stolr, Judge.

Plaintiff appeals district court judgment annulling writ of certiorari and upholding defendant-board's decision to grant intervenor's application for building permit. - Reversed; Writ Sustained.

Frank D. Tucker, Jr. & David A. Millage, of Tucker Law Office, Bettendorf, for plaintiff-appellant.

Paul Macek, Bettendorf City Attorney, for defendant-appellee.

Robert Weinberg & Charles Munson, of Munson Law Offices, Bettendorf, for intervenor-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

SNELL, J.

Plaintiff appeals from the district court judgment annulling the writ of certiorari and upholding defendant-board's decision to grant intervenor's application for a building permit. Plaintiff contends that intervenor's facility did not meet the seating area requirement to qualify as a restaurant that is permitted in the particular zoning district. Plaintiff further contends that a drive-up window addition to intervenor's facility precludes its qualification as a permitted use in the zoning district. We reverse the district court's judgment and sustain plaintiff's writ of certiorari.

Intervenor applied for a building permit for the expansion of its fast food restaurant and the addition of a drive-up window. The zoning administrator granted the application and plaintiff objected. On appeal to the board of adjustment, the zoning administrator's decision to grant the building permit application was upheld. On certiorari to the district court, the board of adjustment's decision was upheld and the writ of certiorari was annulled.

The scope of review of the district court is de novo only in the sense that the district court can allow new evidence to be considered if it believes additional evidence would be necessary for a proper disposition of the case. Weldon v. Zoning Board, 250 N.W.2d 396, 401 (Iowa 1977). The district court then determines whether there is substantial support for the board's action. If the district court's findings of fact leave the reasonableness of the board's action open to a fair difference of opinion, the district court may not substitute its decision for that of the board. Id. The district court's decision has the effect of a jury verdict. Id; Johnson v. Board of Adjustment, 239 N.W.2d 873, 878 (Iowa 1976). If there is substantial evidence for the district court's decision, we may not substitute our decision for that of the district court. Johnson, 239 N.W.2d at 888-89.

I. Plaintiff contends that intervenor's facility, as remodeled, would not qualify as a permitted use in the zoning district where it is located. The only express permitted use in the zoning district for which intervenor's facility could qualify would be that

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[1] Intervenor's facility is located in a C-2, or community shopping center zoning district. Section 15.22 of the Bettendorf Zoning Ordinance includes among the uses permitted in a C-2 district those retail businesses permitted in C-1, or local shopping districts. Retail businesses permitted in a C-1 district are listed in § 15.12(1).

listed at section 15.12(1)(p) of the Bettendorf Zoning Ordinance[1]: "Restaurants, excluding drive-in service." Uses prohibited in the zoning district are stated in section 15.26 as: "[a]ll uses not expressly authorized in sections 15.22, 15.23, 15.24, and 15.25, including, but not limited to: .... 2. Drive-in restaurant." Thus, we initially confront the definitional issue of whether intervenor's facility constitutes a restaurant, which is permitted if it does not provide drive-in service, or a drive-in restaurant, which is expressly prohibited.

The Bettendorf Zoning Ordinance defines "restaurant" as:

> A business where the dispensing and the consumption at indoor tables of edible foodstuff and/or beverage is the principal business operation; including a cafe, cafeteria, coffee shop, lunch room, tearoom, and dining room but not including a bar, cocktail lounge or tavern. The total seating area located within the enclosed portion of the premises shall be more than fifty (50) per cent of the total floor area.

Bettendorf, Iowa, Zoning Ordinance § 5. "Restaurant, drive-in or carry-out" is defined as:

> A business whose principal operation is the dispensing of edible foodstuff and/or beverage for consumption in automobiles, at outdoor tables, at stand-up counters or to be carried off the premises. The total seating area located within the enclosed portion of the premises, if provided, shall be less than fifty (50) per cent of the total floor area.

Id. The definitions thus place a dual requirement for facilities, one based on principal use and the other based on percentage seating area.

It is uncontradicted that the principal use of intervenor's facility conforms to that described in the definition of "restaurant." Plaintiff's sole contention regarding the facility's conformity with the "restaurant" definition lies in the seating area requirement.

The board of adjustment found that 50.4% of the total floor area of intervenor's facility was seating area. The district court sustained that finding as reasonable. It is conceded that to arrive at the 50.4% figure, such areas as the condiments stand, the lobby area, and the waiting area in front of the serving counter were considered part of the seating area. It is clear that if those areas were not included, the total seating area would fall significantly short of the fifty percent requirement. Plaintiff contends the board's decision was unreasonable in concluding that intervenor's facility met the seating area requirement of a "restaurant" and the district court's judgment sustaining

the board's decision was not supported by substantial evidence regarding this issue. We agree.

Although "seating area" is a term that has not, to the best of our knowledge, experienced judicial interpretation, the plain meaning of the words leaves little room for interpretation. "Seating," as defined in Webster's Third New International Dictionary 2049 (unabridged 1971) is "the act of providing with seats." "Seat" is defined as "something (as a chair, stool, bench) intended to be sat on." Id. "Area," in the context pertinent to the term "seating area," is defined as "a definitely bounded part or section of a building set aside for a specific use or purpose." Id. at 115. Thus, the plain meaning of "seating area" would seem to be: a definitely bounded part or section of a building set aside for the specific purpose of providing something to be sat on. Areas such as the condiment stand, the lobby area, and the waiting area in front of the serving counter, where there are no seats provided, and where people must necessarily stand can hardly be reasonably considered a part of the seating area within the plain meaning of that term. Therefore, we conclude that the board of adjustment acted unreasonably in deciding that intervenor's facility met the fifty percent seating area requirement of a restaurant, as defined in the zoning ordinance, and, consequently, there was no substantial support for the district court's judgment sustaining that aspect of the board's decision.

Having concluded that intervenor's facility does not qualify as a "restaurant" under the Bettendorf Zoning Ordinance, we must address the question of whether it still may be permitted in the zoning district. The zoning district in question is a C-2 zoning district. Section 15.26, which applies to C-2 districts, prohibits all uses not expressly authorized in sections 15.22, 15.23, 15.24, and 15.25. Section 15.22 provides that retail businesses permitted in a C-1 district are permitted in a C-2 district. The only retail businesses related to intervenor's facility that are permitted in a C-1 district are "[r]estaurants, excluding drive-in service." Bettendorf, Iowa, Zoning Ordinance § 15.12(1)(p). Since we have already determined that intervenor's facility does not qualify as a restaurant, it cannot qualify as a permitted use under that provision. There is no other provision expressly authorizing a use such as intervenor's facility in a C-2 district. Consequently, intervenor's facility must constitute a prohibited use pursuant to section 15.26.

II. Our ruling in division I of this opinion only applies as long as intervenor's facility does not meet the seating area requirement of the zoning ordinance's definition of a restaurant. If intervenor were to increase the actual seating area of the facility so that it met the definitional requirement, then intervenor's facility would constitute a restaurant, and thus, a permitted use in the zoning district. However, plaintiff argues that even if the facility met the definition of a restaurant, it would still not qualify as a permitted use due to the addition of a drive-up window to the facility. Plaintiff bases this argument on the provision that permits only "restaurants, excluding drive-in service" in the zoning district. Bettendorf, Iowa, Zoning Ordinance §§ 15.12(1)(p), 15.22(a). Plaintiff asserts the drive-up window constitutes drive-in service, and thus, petitioner's facility would still not qualify as a permitted use. The narrow issue thus becomes whether a drive-up window constitutes drive-in service.

"Restaurant with drive-in service" has been defined as: "[a]n establishment designed in whole or in part, to cater to or accommodate the consumption of food and/or beverage in automobiles on the premises of such establishment." Ederer v. Board of Zoning Appeals, 18 Ohio Misc. 143, 148, 248 N.E.2d 234, 237 (1969) (quoting R. Anderson, American Law of Zoning § 12.11, at 527 (1st ed. 1968). "Drive-in service" is not limited to the proverbial "car-hop" service. See Franchise Realty Interstate Corp. v. Rab, 72 Misc.2d 1061, 1064, 340 N.Y.S.2d 446, 450 (1973). In fact, the plain meaning of the term "drive-in" indicates that it is not to be limited to describing "car-hop" service, but could also apply to drive-up windows that facilitate a carry-out service. Webster's Third New International Dictionary 692 (unabridged 1971) defines a "drive-in" as "a place of business laid out and equipped so as to allow its patrons to be served or accommodated while remaining in their automobiles." "Drive-in service" would thus seem to describe an operation that allows patrons to be served or accommodated while they remain in their automobiles. The absence of such a service has been a factor in determining that a particular facility is a "restaurant" as opposed to a "drive-in restaurant." See Burger King, Inc. v. Weisz, 444 S.W.2d 517, 518-19 (Mo. App. 1969) (facility in which there were to be no car-hops or waitresses and no take-out windows did not constitute a "drive-in"); Vitolo v. Chave, 63 Misc.2d 971, 975-76, 314 N.Y.S.2d 51, 58 (1970) (term "drive-in" is not reasonably applicable to an operation in which no service of patrons in their cars is provided); Ederer, 18 Ohio Misc. at 148-49, 248 N.E.2d

at 238 (absence of car hops or other service personnel to serve food to persons in their automobiles led to conclusion that facility was not a "drive-in").

We conclude that intervenor's drive-up window constitutes "drive-in service" by virtue of its purpose of serving patrons while they remain in their automobiles. Consequently, even if intervenor's facility met the definitional requirements of a "restaurant", it would still not constitute a permitted use under section 15.12(1)(p) since the drive-up window would provide "drive-in service" that precludes a restaurant from qualifying as a permitted use. Thus, since intervenor's facility is not expressly authorized by any other provision, it is prohibited pursuant to section 15.26.

REVERSED; WRIT SUSTAINED.

Carter, J., and Oxberger, C.J., concur specially.

CARTER, J. (concurring specially)

I concur in division I and the reversal, but disagree with the interpretation placed on the applicable ordinances in division II of the majority opinion. Although inartfully drafted, I conclude it was the clear intent of the ordinance to define two types of restaurants. These are (1) "restaurant" and (2) "restaurant, drive-in or carry-out". I further conclude that it was the intention of the ordinances that those facilities falling within the definition of "restaurant" and not falling within the definition of "restaurant, drive-in or carry-out" are permissible uses in C-1 and C-2 districts.

Oxberger, C.J., joins in this special concurrence.