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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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N. R. FERSON and JANET FERSON,	)	
Plaintiff-Appellees,	)	Filed February 23, 1983
vs.	)	
TOWN OF PLEASANT HILL, IOWA, and THE BOARD OF ADJUSTMENT OF THE TOWN OF PLEASANT HILL, IOWA,	)	2-395 2-68115
Defendants-Appellants.	)	

Appeal from Polk District Court - Louis A. Lavorato, Judge.

Defendants, Town of Pleasant Hill, Iowa, and The Board of Adjustment of the Town of Pleasant Hill, appeal from the district court decision on certiorari review that plaintiffs' operation of an ammunition reloading business from their home constituted a legal nonconforming use under applicable zoning ordinances. AFFIRMED.

Patrick H. Payton, Des Moines, for defendants-appellants.

William J. Lillis and Eugene E. Olson of Connolly, O'Malley, Lillis & Hansen, Des Moines, for plaintiffs-appellees.

Heard en banc.

DONIELSON, J.

Defendants, Town of Pleasant Hill, Iowa, and The Board of Adjustment of the Town of Pleasant Hill, appeal from the district court decision on certiorari review that plaintiffs' operation of an ammunition reloading business from their home constituted a legal nonconforming use under applicable zoning ordinances. On appeal defendants assert: (1) that pursuant to a stipulation of the parties the court should not have considered the issue of nonconforming use; (2) that the evidence was insufficient to support the court's finding that the operation was a legal nonconforming use; and (3) that the court should not have found that a legal nonconforming use existed when plaintiffs failed to obtain a certificate of occupancy as required by zoning ordinance. We affirm.

Our scope of review in cases such as this one has been termed "unique" since, under Iowa Code §§ 414.18 and 358A.21 (1981), the hearing on certiorari is tried de novo but the trial court's decision "has the effect of a special verdict and is appealable to us on assigned errors only." Johnson v. Board of Adjustment of the City of West Des Moines, 239 N.W.2d 873, 877 (Iowa 1976). This is because:

> [t]he term "de novo" as used in either section does not bear its equitable connotation. It authorizes the taking of additional testimony, but only for the submission and consideration of those questions of illegality raised by the statutory petition for writ of certiorari.

Trailer City, Inc. v. Board of Adjustment of the City of Council Bluffs, 218 N.W.2d 645, 647 (Iowa 1974). Accordingly, we review the record to determine whether the trial court applied the correct legal standards and whether its decision is supported by substantial evidence. See Johnson, 239 N.W.2d at 877-78.

I.

Between 1958 and 1975 the property in question was zoned as a residential district also permitting customary home occupations. Since 1962 plaintiffs have operated an ammunition reloading business from a portion of their basement.

In 1975 the language permitting customary home occupations was removed from the ordinance but legal nonconforming uses existing at that time were permitted to continue. Plaintiffs continued to operate their ammunition reloading business from their home without obtaining a certificate of occupancy for a nonconforming use as required by the 1975 revision of the ordinance.

In April, 1977, plaintiffs received a letter from the City of Pleasant Hill directing them to discontinue operation of their reloading business. Plaintiffs appealed to the Board of Adjustment which upheld the zoning administrator's decision that plaintiffs' operation was unlawful. Plaintiff then sought, on certiorari, a variance or, in the alternative, a nonconforming use. After an extended time during which no action was taken, plaintiffs hired a new attorney who filed an application for certification of occupancy claiming a profession and accessory use. The application, filed May 1, 1980, was denied by the zoning administrator and the denial was subsequently affirmed by the board of adjustment. The plaintiffs again sought certiorari review of the board's decision. The court consolidated the two cases on certiorari and set a trial date.

During the pendancy of trial the parties stipulated that the claim that plaintiffs should be granted a variance was without merit and would not be an issue at trial. The trial court ruled that the transcript of the board's decision was inadequate in its findings of fact and conclusions of law and remanded the case for a new hearing before the board. On remand the board again heard plaintiffs' application for accessory use and again ruled that the plaintiffs' business was being operated illegally. The plaintiffs filed a new writ of certiorari, which the court consolidated with plaintiffs' two previous petitions. The defendants filed their answer and with it an application for injunctive relief to permanently enjoin plaintiffs and their agents, servants and assigns from operating the ammunition reloading business on the premises.

The district court found that the language of the stipulation did not preclude consideration of the issue of nonconforming use and that the business was a customary home occupation under the 1958 ordinance. The court thus concluded that since the plaintiffs' business was a legal customary home occupation under the 1958 ordinance it became a legal nonconforming use after 1975 notwithstanding plaintiffs' failure to obtain the certificate of occupancy for a nonconforming use required after 1975. Defendants then instituted this appeal.

II.

Defendants' first contention is that the court erred in considering the issue of nonconforming use since that issue was allegedly removed from the issues to be tried by virtue of the stipulation. We disagree.

The court determined that a fair reading of the stipulation required that the variance issue be removed from consideration but not the issue of nonconforming use. Stipulations are to be construed in an attempt to ascertain and effectuate the intent of the parties. Hawkins/Korshoj v. State Board of Regents, 255 N.W.2d 124, 126 (Iowa 1977). To do so the court must interpret "the stipulation with reference to its subject matter and in light of the surrounding circumstances and whole record including the state of the pleadings and issues involved." Id. at 126-27.

The defendants assert that the parties' intent was to eliminate all claims from the first action, including the issue of nonconforming use. The stipulation sets forth the law number assigned to the first petition for certiorari and highlights "particularly the provisions dealing with whether or not plaintiff is or should be granted a variance, as alleged in the plaintiffs' petition is not an issue for purposes of trial . . . ." This language must be read in light of the other petitions for certiorari with which the initial petition was joined for trial. Both the second and the third petitions for certiorari raise the issue of nonconforming

use. In addition, if the intent of the parties was to remove all issues from the first petition, we fail to see why they would not simply dismiss that petition and litigate only the claims in their second and third petitions. We agree with the trial court that the record as a whole supports the conclusion that the parties intended to remove only the variance issue from consideration at trial. Accordingly, we believe the court properly addressed the issue of nonconforming use.

III.

Defendants' second contention is that there was no evidence before the board or before the court to support the court's finding of a nonconforming use. A nonconforming use is a use which is allowed to continue notwithstanding the fact that a zoning ordinance does not permit similar uses in the area in which the property is located. 101A C.J.S. Zoning & Land Planning § 154 (1979). As a general rule, the enactment of a zoning ordinance will not limit the right of a landowner to continue the use of his land in the manner in which it was used when the ordinance was enacted. Id; see also McJimsey v. City of Des Moines, 231 Iowa 693, 699-700, 2 N.W.2d 65, 68-69 (1942) (nonconforming use allowed to continue after enactment of ordinance although use cannot be altered or modified). In order to constitute a nonconforming use, the use must be lawful at the time the ordinance was promulgated. 101A C.J.S. Zoning & Land Planning § 160 (1979); see also City of Des Moines v. Lohner, 168 N.W.2d 779, 784 (Iowa 1969). In this case, the City of Pleasant Hill, Iowa, Ordinance § 1.8 (1975) provides that uses which were lawful prior to enactment of the ordinance would continue notwithstanding the fact that similar uses created in the future would be prohibited.

We note that the construction of zoning ordinances is a question of law upon which the court is not bound in certiorari proceedings. Jersild v. Sarcone, 260 Iowa 288, 294, 149 N.W.2d 179, 184 (Iowa 1967). Here the court found that plain-

tiffs' use of the land since 1962 was a proper "customary home occupation" under the 1958 ordinance section 1.5(B)(1). Defendants argue that the court erred in concluding that plaintiffs' ammunition reloading business was a customary home occupation. In its findings and conclusions, the court made a detailed analysis of whether plaintiffs' business would constitute a "profession" under the 1975 ordinance. After noting the definition of "profession" set forth in Halverson v. Lincoln Commodities, Inc., 297 N.W.2d 518, 522 (Iowa 1980), the court concluded that plaintiffs' business was not a profession since it requires no "special mental attainments, special discipline [or] a liberal education." From the record it is apparent that the 1958 ordinance did not refer to "professions" but only to "customary home occupations." We believe it was within the court's province to determine that the definition of "customary home occupation" was not as rigorous as is the definition of "profession" in the 1975 ordinance, thus allowing the ammunition reloading business to fall within "customary home occupation," but not within the definition of "profession." In light of the rule that exercises of the zoning power must be strictly construed, Business Ventures, Inc. v. Iowa City, 234 N.W.2d 376, 381 (Iowa 1975), we believe the court was correct in construing the 1958 ordinance in favor of plaintiffs. Accordingly, we believe plaintiffs' business was lawful at the time the 1975 ordinance was enacted, and thus constituted a valid nonconforming use under the 1975 ordinance.

IV.

Finally, defendants argue that, even if the plaintiffs' use was lawful under the 1958 ordinance, the plaintiffs' nonconforming use did not exist at the time of the present conflict since plaintiffs failed to file a certificate of occupancy within twelve months of the ordinance's enactment. Section 1.29 of the 1975 ordinance provides, in part:

> No land shall be occupied or used, and no building hereafter erected or structurally altered shall be occupied or used in whole or part for any purpose whatsoever, until a certificate is issued by the Zoning Administrator, stating that the building and use comply with the provisions of this ordinance.
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> * * *
>
> Nothing in this part shall prevent the continuance of a non-conforming use as hereinbefore authorized unless a continuance is necessary for the safety of life or property.
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> * * *
>
> A certificate of occupancy shall be required of all non-conforming uses. Application for a certificate for non-conforming uses shall be filed with the Zoning Administrator within twelve (12) months from the effective date of this ordinance, accompanied by affidavits of proof that such non-conforming use was not established in violation of previous ordinances.

We believe the rules cited in the previous division are pertinent here; construing the ordinance is a matter for the court and such ordinances are to be strictly construed. In addition, we note that the Iowa Supreme Court has refused to invalidate a nonconforming use due to the user's failure to obtain a license for such. Trailer City, Inc. v. Board of Adjustment of the City of Council Bluffs, 218 N.W.2d 645, 648 (Iowa 1974) ("valid nonconforming use is not destroyed . . . by any failure to comply with local or State licensing provisions where the defect, assuming that it exists can be easily remedied [as in obtaining annual renewals]."); see also 101A C.J.S. Zoning & Land Planning § 155 (1979) ("nonconforming use exception to zoning ordinances must be interpreted so as to guarantee that zoning will not take from an owner property rights . . . acquired by a nonconforming use.")

Here the twelve-month requirement is arguably in direct conflict with the provision providing that "[n]othing shall prevent the continuance of a nonconforming use . . . unless a discontinuance is necessary for the safety of life or property." We believe the court correctly construed the ordinance in plaintiffs'

favor. If the certificate of occupancy was not filed within the twelve-month period, this defect can be easily remedied by allowing a late filing, as was the case in the Trailer City case. We do find defendants' distinction between the Trailer City case and the instant case persuasive. In light of the fact that a nonconforming use is to continue, with the one exception set forth above, we do not believe the certificate is an "independent and completely separate requirement of the nonconforming use provisions." The certificate procedure appears to us to be very similar to the licensing requirement in Trailer City; should the owner fail to file the certificate a late filing—even with a late penalty fee—is an easy remedy. In any event, we believe the failure to file the certificate would not discontinue the nonconforming use as would the finding that such discontinuation is necessary for the safety of life or property. No showing was made that plaintiffs' business threatened the safety of life or property which would justify its discontinuation. Accordingly, having found that the court applied the correct legal principles and that there is substantial evidence to support its determinations, we affirm the decision below.

AFFIRMED.