

FILED
FEB 23 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

EUGENE VISLISEL,)

Plaintiff-Appellant,)

vs.)

BOARD OF ADJUSTMENT OF)

CEDAR RAPIDS, IOWA, and)

CEDAR RAPIDS, IOWA, et al,)

A Municipal Corporation,)

Defendants-Appellees.

Filed February 23, 1983

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2-356
2-68038

Appeal from Linn District Court - Thomas M. Horan, Judge.

Plaintiff appeals from the district court decision on certiorari review affirming defendant board's decision that a certain individual's operation of a real estate business from her home did not violate the applicable municipal zoning ordinance. REVERSED AND REMANDED.

Eugene Vislisel, Cedar Rapids, pro se, for plaintiff-appellant.

David P. McManus, Assistant City Attorney, Cedar Rapids, for defendants-appellees.

Heard en banc.

DONIELSON, J.

Plaintiff, Eugene Vislisl, appeals from the district court decision on certiorari review affirming defendant board's decision that a certain individual's operation of a real estate business from her home did not violate the applicable municipal zoning ordinance. On appeal plaintiff asserts that a real estate business is not a home occupation activity permitted under the ordinance, and that a nonconforming land use permit was never issued to the individual to allow for operation of the real estate business. We reverse and remand.

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 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.

Plaintiff filed a complaint with the Cedar Rapids Zoning Administrator alleging that a person named Mary Doyle was operating a real estate office from her property which is zoned only for single family residential use in violation of the applicable Cedar Rapids Zoning Ordinances. The zoning administrator found that Mary Doyle was lawfully using her property as a "home occupation" under Cedar Rapids, Iowa, Ordinance § 32.14 (1979). Plaintiff appealed the zoning

administrator's decision to the Cedar Rapids Board of Adjustment pursuant to ordinance section 32.17, where the decision was affirmed. Pursuant to Iowa Code § 414.15 (1981), plaintiff petitioned the Iowa District Court for certiorari review of the board's decision. The court made the following findings and conclusions in upholding the board's decision:

Under I.C.A. 414.17, the defendant Board of Adjustment of Cedar Rapids, Iowa, has the power to grant a special exception to the City of Cedar Rapids, Iowa's zoning ordinances to allow a nonconforming use of the property in question under certain conditions, which is what the Board has done in this case. Board of Supervisors of Cerro County v. Miller, 170 N.W.2d 358.

The Petition shows defendants had jurisdiction and the act complained of is nothing more than an interpretation of the provisions of the Zoning Ordinance of the City of Cedar Rapids, which defendant had jurisdiction to make and which was not illegal.

Plaintiff then instituted this appeal.

II.

Initially, we note that defendant's argument that plaintiff is without standing to initiate this action to enforce the applicable zoning ordinances is without merit. Section 32.17(a)(4) of the ordinance specifically provides that, among others, "any taxpayer" may petition for certiorari on grounds that the board's action is illegal. The plaintiff is a taxpayer and thus standing is conferred upon him by the ordinance itself. Moreover, defendants' assertion was never presented to the trial court and was not preserved for our review on appeal. See Randa v. U.S. Homes, Inc., 325 N.W.2d 905, 907 (Iowa Ct. App. 1982).

III.

Plaintiff contends that the trial court's ruling cannot be upheld since there is no evidence in the record to support the finding that the board of adjustment granted a nonconforming use for the property in question pursuant to Iowa Code § 414.17. We agree.

Section 414.7 provides the following:

414.17 Board of adjustment. The council shall provide for the appointment of a board of adjustment and in the regulations and restrictions adopted pursuant to the authority of this chapter shall provide that the said board of adjustment may in appropriate cases and subject to appropriate conditions and safeguards make special exceptions to the terms of the ordinances in harmony with its general purpose and intent and in accordance with general or specific rules therein contained and provide that any property owner aggrieved by the action of the council in the adoption of such regulations and restrictions may petition the said board of adjustment direct to modify regulations and restrictions as applied to such property owners. (emphasis added)

A nonconforming use is one which lawfully existed when the zoning restriction was made effective and which has "continued to exist without legal abandonment since that time." Board of Supervisors of Cerro Gordo County v. Miller, 170 N.W.2d 358, 361 (Iowa 1969); see also Cedar Rapids, Iowa, Ordinance ch. 32, § 11(15) (1979). There is nothing in the record to suggest that the real estate business here was in existence on the property in question when the zoning ordinance was enacted. Nor does there appear any request that the zoning administrator grant a special exception pursuant to section 414.7. Moreover, ordinance section 32.15 governing nonconforming uses is not set forth in the record. On this record, the court's reliance on section 414.7 and the nonconforming use analysis is misplaced.

The zoning administrator testified that he initially ruled that Mary Doyle's real estate business "was operating within all of [the] limitations for home occupation." Section 32.04(59) defines a home occupation as "an activity conducted for gain within a residential building, or an accessory building thereto, which is incidental and secondary to the use of such building for dwelling purposes and which does not change the essential residential character of such building." Under ordinance section 32.04(b)(4) "home occupations" are permitted "subject to the provisions of section 32.14." The statement of purpose for and the limitations on

home occupation activities are set forth in section 32.14 as follows:

- (a) Statement of purpose: The regulations of this Section dealing with Home Occupations are designed to protect and maintain the residential character of a neighborhood while permitting certain limited commercial activities which have traditionally been carried out in a home.
- (b) Limitations on home occupation activities:
1. No person who is not a member of the immediate family and residing on the premises shall be employed in the activity on the premises.
 2. The activity shall be conducted entirely within the principal dwelling unit or in a permitted accessory building.
 3. The activity shall not involve any outside storage nor in any way create outside the building, any external evidence of the operation.
 4. No alteration of a building shall be made which changes the character and appearance thereof as a residential building.
 5. No more than twenty-five percent nor, in any event, more than 350 square feet of floor area of the principal building, and no more than 250 square feet of floor area of an accessory building, shall be devoted to the activity.
 6. Not more than one motor vehicle and trailer shall be permitted in conjunction with the activity.
 7. No mechanical, electrical, or other equipment shall be used except of a type normally used on a residential premises.
 8. No sign other than one unlighted sign not over 2 square feet in area and stating only the resident's name and occupation shall be allowed.
 9. No activity shall be permitted which is noxious, offensive or hazardous by reason of pedestrian or vehicular traffic, or by creation of noise, odor, refuse, heat, vibration, smoke, radiation or any other objectionable emissions, or by interference with televisions or radio reception.
 10. There shall be no off-premise signs, radio, television, newspaper, handbill, or similar types of advertisement linking the premises with the home occupation.
 11. No commodities shall be sold on the premises.

(emphasis added).

On appeal the board of adjustment denied plaintiff's appeal based on their finding that "Mary Doyle Real Estate uses no signs, no additional employees, and

the actual business is being done outside the home . . . (emphasis added)." This finding is in direct conflict with the ordinance limitations. There is evidence on the record demonstrating that Mary Doyle Real Estate also published yellow page advertisements. There is no evidence that the board, or the court on certiorari, considered the specific provisions limiting home occupation activities. Indeed, both the board and the court made rulings apparently inconsistent with the definition and limitation of home occupation, the board finding that the business was conducted outside the home and the court finding that the use was nonconforming. If the real estate business had fallen within the definition of "home occupation" then apparently, there would be no "nonconforming use," nor a need for a special exception under Iowa Code § 414.7. Moreover, we note that the board's decision was conclusory at best. We cannot help but to query how the reviewing court could determine the legal principles upon which the board relied. In Citizens, Etc. v. Pottawatomie City Board of Adjustment, 277 N.W.2d 921, 925 (Iowa 1979), the court sought to avoid such a situation by adopting the following rule:

. . . that boards of adjustment shall make written findings of fact on all issues presented in any adjudicatory proceeding. Such findings must be sufficient to enable a reviewing court to determine with reasonable certainty the factual basis and legal principles upon which the board acted. This rule shall apply to board of adjustment proceedings after the date this opinion is filed.

Id. The board did not heed this mandate in the instant case.

The real estate business is not specifically mentioned in the ordinance provisions. However, we note that some of those home occupations which are permitted or prohibited are as follows:

(c) Home occupations permitted:

1. Representative activities: Permitted home occupations include, but are not limited to, the following list of activities; provided, however, that

each permitted home occupation shall be subject to the limitations in Section 32.14(b) above, and to all other regulations applicable to the district in which it is located.

- A. Facilities used by a physician, surgeon, dentist, lawyer, clergyman, or other professional person, for emergency consultation or treatment, but not for the general practice of their profession.
- B. Providing instruction to no more than four students at a time.
- C. Day care or baby-sitting of no more than five nonresident children.
- D. Studio of an artist, photographer, craftsman, writer, or composer.
- E. Renting of rooms by a resident owner to no more than two roomers.
- F. Millinery, dressmaking, tailoring, canning, laundering, and similar domestic service activities.

(d) Occupations prohibited:

- 1. Barber and beauty shops.
- 2. Automobile repair shops.

We do not believe the court applied the correct legal standards in this case. Neither the court nor the board considered the allegations and the evidence specifically in light of the applicable ordinance provisions. Accordingly, we remand this case to the trial court for a redetermination, under the applicable ordinance provisions, of whether the board applied incorrect principles of law or otherwise acted illegally.

REVERSED AND REMANDED.