

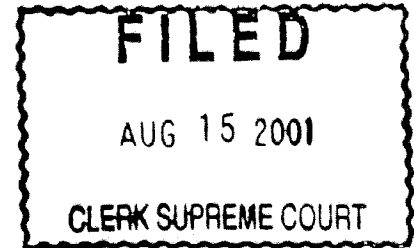
IN THE COURT OF APPEALS OF IOWA

No. 1-349 / 00-1034
Filed August 15, 2001

JON DELANEY, BARB DUNAKEY, TOM TAUCHER, SHARON TAUCHER,
TIMOTHY DUNAKEY AND MARK WEIDNER,
Plaintiffs-Appellants,

vs.

BOARD OF ADJUSTMENT OF THE CITY OF WATERLOO,
Defendant-Appellees.



Appeal from the Iowa District Court for Black Hawk County, Bruce B.
Zager, Judge.

The plaintiffs appeal from a district court order denying their petition for writ of certiorari challenging the board of adjustment's decision to grant the National Cattle Congress a special permit to allow them to hold stock car races at the former Waterloo Greyhound Park. **AFFIRMED.**

David J. Dutton and Carolyn A. Rafferty of Dutton, Braun, Staack &
Hellman, Waterloo, for appellants.

Sang-Ki Han, Assistant City Attorney, Waterloo, and Christopher S.
Wendland of Clark, Butler, Walsh & Hamann, Waterloo, for appellee.

Heard by Streit P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

The National Cattle Congress (NCC) owns a Waterloo property in a planned industrial zone. It applied for a special permit to convert the property from a greyhound racetrack to a stock car racetrack. The Waterloo Board of Adjustment granted the permit application over the objections of nearby residents. Those residents then filed a district court challenge to the legality and constitutionality of the board's action. The court rejected the challenge. We affirm.

I. Background Proceedings

The proceedings leading up to the court challenge are extensive but relevant. NCC's application sought two types of city action: (1) a special permit and (2) a site plan amendment. The application was first referred to Waterloo's Planning, Programming and Zoning Commission, which held a public hearing on the matter. After listening to the concerns of Waterloo residents, the commission tabled the application until it could obtain additional information addressing those concerns. Two months later, the commission held a second public hearing where it considered new information relating to the potential noise the track would generate and the impact of the facility on Waterloo's economy.

The commission prepared a report on the NCC's special permit application that was sent to the board of adjustment, the ultimate arbiter of permit applications. The report noted concerns with the days and hours of operation and recommended the use of sound barriers and mufflers. After considering the commission's report as well as comments from the public, the board granted the special permit subject to the recommended restrictions.

The commission also approved the NCC's application for a site plan amendment and submitted the file to the Waterloo City Council for review and final approval. The city council held a public hearing on the matter. The council resolved to: (1) table review of the site plan amendment pending preparation of a sound and economic impact study; (2) send the application for the site plan amendment back to the zoning commission for consideration of the new sound study, with instructions to return the matter to the council after the study was considered; and (3) remand the special permit application to the board of adjustment for consideration of the sound and economic impact study.

In response to the city council's actions on the site plan amendment, the zoning commission considered the new reports and recommended approval of the site plan amendment subject to restrictions on the days and hours of operation and the addition of sound protections. On further review, the city council approved the site plan amendment.

On remand of the special permit application, the board of adjustment considered the additional studies as well as comments from the public, then unanimously reaffirmed its prior grant of the permit.

Residents filed an application for writ of certiorari with the district court, challenging the legality and constitutionality of the board of adjustment's grant of the special permit application. The district court annulled the writ. The residents filed a motion for enlarged findings and conclusions pursuant to Iowa Rule of Civil Procedure 179(b). The court denied the motion and this appeal followed. Only the special permit is at issue.

II. Summary of Arguments and Scope of Review

The residents argue: (1) the board of adjustment did not fully and adequately consider the question of whether the racetrack was a nuisance; (2) the board's action was not supported by substantial evidence; (3) the city council acted illegally in reviewing and remanding the permit application to the board; and (4) Waterloo's zoning ordinance is unconstitutional. Our review of these issues is for errors of law, with the district court's fact findings binding us if supported by substantial evidence. *Ackman v. Board of Adjustment*, 596 N.W.2d 96, 100 (Iowa 1999).

III. Absence of Nuisance Findings

The residents' primary argument is that the board of adjustment had a duty to determine whether the racetrack would pose a nuisance, and it failed to make this determination. The city responds that Waterloo's zoning ordinance does not require the board to make a determination of whether a proposed use will constitute a nuisance. We agree with the city.

The provision of the zoning ordinance addressing special permits requires the board to be:

guided by the general rule that the exceptions shall by their design, construction, and operation adequately safeguard the health, safety, and welfare of the occupants of adjoining and surrounding property, shall not impair an adequate supply of light and air to adjacent property, shall not increase congestion in the public streets, shall not increase public danger of fire and safety and shall not diminish or impair established property values in surrounding areas.

Although this standard may implicate concerns associated with nuisances, it does not mandate a board finding that a proposed facility is or is not a "nuisance" as defined by statute and caselaw. See Iowa Code §§ 657.1; 657.2 (listing

examples of nuisances); *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996) (stating statutory list of nuisances is only skeletal and common law must fill the gaps). While another section of the ordinance does require the board to act in conformity with nuisance law, that provision deals with occupancy permits rather than special permits. Therefore, nothing in the ordinance compels a nuisance determination by the board under the circumstances of this case.

The nuisance cases cited by the residents are inapposite. All were independent statutory or common law nuisance actions rather than board of adjustment proceedings. See, e.g., *Perkins v. Madison Co. Livestock & Fair Ass'n*, 613 N.W.2d 264, 271 (Iowa 2000); *Weinhold*, 555 N.W.2d at 458; *Patz v. Farmegg Products, Inc.*, 196 N.W.2d 557, 562 (Iowa 1972); *Bates v. Quality Ready-Mix Co.*, 261 Iowa 696, 703, 154 N.W.2d 852, 857 (Iowa 1967); *Schlottfelt v. Vinton Farmers' Supply Co.*, 252 Iowa 1102, 1106, 109 N.W.2d 695, 698 (Iowa 1961). This case, in contrast, is a challenge to a zoning action made under an ordinance which does not mandate a formal nuisance analysis. Cf. *Johnson v. Bd. of Adjustment*, 239 N.W.2d 873, 888-89 (Iowa 1976) (noting ordinance required board made finding in zoning action on whether mortuary was nuisance). As the ordinance did not create a duty to determine if the racetrack was a nuisance, a finding on this question was not necessary. Instead, all that was required was consideration of the competing concerns of economic development and the health, safety and welfare of adjoining residents. The board considered the position of the NCC as well as the local residents at length and incorporated those concerns when it issued and approved the permit.

IV. Substantial Evidence

The residents next contend the board of adjustment's decision is unsupported by substantial evidence because the board did not consider the factors necessary for determination of a nuisance. Our disposition of the issue above disposes of this issue. The board applied the general "health, safety, and welfare" standard governing the issuance of special permits. In response to noise objections, the board imposed restrictions on the dates and times of races, ordered the construction of a sound barrier, and mandated that the race cars have mufflers. This was all the board was required to do. See *Bond & Mortgage Co. v. Sioux City*, 219 Iowa 572, 579, 259 N.W. 33, 39 (1935) (noting purpose of board is to adjust difficulties between adjacent property owners and applicant); 83 Am. Jur. 2d *Zoning & Planning* § 1008 (1998).

V. Action of City Council

The residents' next argument turns on the power of a city council to review different types of zoning actions. Under Iowa law, a city council has the power to review a variance granted by a board of adjustment but not a special permit. 1986 Op. Atty. Gen. No. 86-12-3. A variance is "an authorization for the construction or maintenance of a use of land which is prohibited by a zoning ordinance." *Greenawalt v. Zoning Bd. of Adjustment*, 345 N.W.2d 537, 541 (Iowa 1984). A special permit or special exception, in contrast, permits a use not otherwise permitted in a particular district when certain conditions specifically set out in the ordinance are satisfied. See *Vogelaar v. Polk County Zoning Bd. of Adjustment*, 188 N.W.2d 860, 862 (Iowa 1971).¹

¹ These types of permits are also referred to as special uses, or special use permits *Depue v. City of Clinton*, 160 N.W.2d 860, 862 (Iowa 1968); 1986 Op. Atty. Gen. No. 86-12-3.

There is no question NCC applied for a special permit rather than a variance. However, the residents contend the council's review of the board's permit action and the council's decision to remand the case to the board essentially converted the permit into a variance, subjecting it to different "proofs and restrictions" which were not satisfied. Alternately, the residents contend the council's decision to review the permit in the absence of authority to do so rendered the permit void.

We reject the residents' first contention because nothing in the council's minutes of proceedings suggests that the council either misconstrued the nature of the action it was reviewing or purposefully converted the permit application into an application for a variance. To the contrary, the minutes reflect that the city attorney cautioned the council not to review the permit proceedings handled by the board of adjustment but only the site plan amendment report prepared by the zoning commission. It is also apparent from the record reviewed by the council that no one deemed the stock car racetrack a prohibited use triggering variance rather than special permit proceedings. As the district court stated, "[t]he essential character of the special permit continued before and after the request by the City Council that it consider additional evidence and documentation."

As for the residents' alternate argument that the council's decision to review the board of adjustment's permit action rendered the permit void, we note that the city council did nothing more than ask the board to reconsider its decision in light of new evidence, an action that the city attorney advised the city council representatives they could take. The council did not usurp the board's

authority to render the ultimate decision on permit applications. *Cf. City of Des Moines v. Lohner*, 168 N.W.2d 779, 783 (Iowa 1969) (holding city council lacked authority to bypass board of adjustment and grant application for special use permit). Therefore, we also reject this contention.

VI. Constitutionality of Zoning Ordinance

Finally, the residents contend Waterloo's zoning ordinance violates the due process and equal protection clauses of the state and federal constitutions by "granting virtually unlimited power to the Board of Adjustment." At oral arguments they clarified that their challenge is based on the perceived vagueness of the ordinance. The residents specifically take issue with the following ordinance provision on the ground that it places no duty on the board to follow the commission's recommendations:

Before issuance of any special permit for any of the above buildings or uses, the Board of Adjustment shall refer the proposed application to the City Planning, Programming and Zoning Commission, which shall be given 45 days in which to make a report regarding the effect of such proposed building or use upon the character of the neighborhood, traffic conditions, public utility facilities and other matters pertaining to the general welfare. No action shall be taken on any application for a proposed building or use above referred to until and unless the report of the Planning, Programming and Zoning Commission has been filed; provided, however that if no report is received from the Commission within 45 days, it shall be assumed that the approval of the application has been given by the said Commission.

Minor changes that do not substantially alter the character of any special permit may be administratively reviewed and approved by the City Planning, Programming and Zoning Commission and approved by the Board of Adjustment. If the staff determines that the magnitude of such a change is significant in nature, the special permits shall be referred to the Board of Adjustment, who may require a public hearing if deemed necessary.

They also challenge the ordinance provision authorizing a special permit for a "community building or recreation field", contending that the provision contains no mandatory minimum criteria.

Ordinances are presumed constitutional. *Cyclone Sand and Gravel Co. v. Zoning Bd. of Adjustment*, 351 N.W.2d 778, 780 (Iowa 1984). To overcome this presumption, a party must negate every reasonable basis upon which the ordinance could be sustained. *Id.* "To sustain a challenge based on vagueness, the aggrieved party must show that the language in the ordinance does not convey a sufficiently definite warning of proscribed conduct, when measured by common understanding or practice." *Ackman*, 596 N.W.2d at 104-5. We are not convinced the residents met this heavy burden of proof.

As the city points out, the ordinance contains standards to circumscribe the board's discretion. It specifies the purpose of the ordinance is:

to promote the health, safety, morals, order, convenience, prosperity and general welfare; to conserve and protect the value of property throughout the City and to encourage the most appropriate use of land; to lessen congestion in the street; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage [sic], schools, parks and other public requirements.

Additionally, as noted, the specific provision addressing the board of adjustment's powers requires the board to ensure that the special permit will "adequately safeguard the health, safety, and welfare" of the adjoining occupants.

The standards are similar to standards upheld in *Ackman*, 596 N.W.2d at 105. As the court there stated, the standards "are general enough to deal with unforeseeable circumstances that may arise and yet are not so specific that they

defeat the county's desire to provide a flexible means of accomplishing use changes without rezoning." *Id.* at 106; accord *Cyclone*, 351 N.W.2d at 782.

The residents, however, respond that the language of Waterloo's ordinance is virtually identical to the language of an ordinance held unconstitutional in *Chicago, R.I. & P.R. Co. v. Liddle*, 253 Iowa 402, 404, 112 N.W.2d 852, 854 (Iowa 1962). The ordinance at issue in *Liddle*, however, did not include a set of standards such as those contained in the general purpose section of Waterloo's ordinance and in the section relating to the board of adjustment's powers. See *Liddle*, 253 Iowa at 405, 112 N.W.2d at 855 (stating "we find in the ordinance no other guides or standards for the board's exercise of this particular power"). Therefore, *Liddle* is inapposite.

We conclude Waterloo's ordinance is not unconstitutionally vague.

VII. Disposition

We affirm the district court's dismissal and annulment of the residents petition for writ of certiorari.

AFFIRMED.