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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CITY OF EARLHAM,	)	
Plaintiff-Appellee,	)	Filed September 30, 1987
vs.	)	51
ROBERT VERN MORRIS,	)	7-141 86-1311
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Madison County (No. 22674), Darrell J. Goodhue, Judge.

Defendant appeals from judgment for plaintiff in an action seeking enforcement of a municipal licensing ordinance, asserting that the ordinance in question operates as an unconstitutional taking and a denial of equal protection. **AFFIRMED.**

Peter S. Cannon and William J. Lillis of Connolly, O'Malley, Lillis, Hansen & Olson, Des Moines, for defendant-appellant.

Kasey W. Kincaid of Nyemaster, Goode, McLaughlin, Emery & O'Brien, P.C., Des Moines, and Dean R. Nelson and Samuel H. Braland of Peer, Nelson & Braland, Earlham, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Hayden, JJ.

PER CURIAM

The appellant, Robert Vern Morris, operates a salvage yard within the city limits of Earlham, Iowa. The appellee, City of Earlham, Iowa, has a licensing ordinance regulating such an operation. The focus of this case is whether that ordinance impermissibly infringes upon Morris's rights as secured by the federal and state constitutions. The district court, following submission of the controversy on an agreed statement of facts pursuant to Iowa Code section 678, resolved this issue in favor of the ordinance's constitutionality. Morris, unpersuaded by that court's decision, brings this appeal. Our review is de novo. Kasparek v. Johnson County Bd. of Health, 288 N.W.2d 511, 515 (Iowa 1980).

I.

Morris maintains the ordinance at issue, as applied to him, results in a taking of his property without just compensation. As such, he contends the ordinance runs afoul of federal and state constitutional prohibitions of such governmental action. See U.S. Const. amends. V, XIV; Iowa Const. art. I, § 18. Morris's "takings" claim arises from the application of a provision in the ordinance which states that "[t]he business of junk dealer shall not be located within . . . five hundred (500) feet of any building used for business or residential purposes." Such businesses are not eligible for a license required by the ordinance. According to the agreed statement of facts submitted in this case, Morris is not eligible for a license because of this proximity limitation.

Our supreme court has stated that:

> Land use restrictions . . . reasonably related to the promotion of health, safety, morals, or general welfare repeatedly have been upheld even though the challenged regulations destroyed or adversely affected recognized real property interests or flatly prohibited the most beneficial use of the property. Hence, such laws, when justifiable under the police power, validly enacted and not arbitrary or unreasonable, generally are held not to be invalid as taking of property for public use without compensation. However, some instances

> of government regulation are "so onerous as to constitute a taking which constitutionally requires compensation."

Stone v. City of Wilton, 331 N.W.2d 398, 402 (Iowa 1983) (citations omitted). Similar principles have guided the federal courts in their analyses under the federal constitution. See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 55 U.S.L.W. 4326 (1987); Agins v. Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). Although this case involves a licensing regulation and not a zoning ordinance, the rules laid down in our courts' zoning law decisions provide the basic principles to be applied. Kasparek, 288 N.W.2d at 515; see Town of Scituate v. O'Rourke, 103 R.I. 449, 503, 239 A.2d 176, 180 (1968) (similar licensing ordinance said to "so meaningfully curtail the use to which land may be employed for junk yard purposes as to be deemed the equivalent of an ordinance which regulates the use of land. In fact, the use of land is controlled to such an extent by the Scituate junk yard act that it could well be designated as a quasi-zoning ordinance."); Jourdan v. Wyoming Township, 358 Mich. 496, 498, 100 N.W.2d 284, 286 (1960); Warholak v. Northfield Township Supervisor, 57 Mich. App. 360, 362, 225 N.W.2d 767, 770 (1975).

In order to determine whether a challenged ordinance, as applied, constitutes a taking, our courts balance the societal benefits arising from the regulation against the specific restraint or burden placed on the individual. Kent v. Polk County Bd. of Supervisors, 391 N.W.2d 220, 226 (Iowa 1986); see also DeBenedictis, 55 U.S.L.W. at 4330 ("We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land." (quoting Agins v. Tiburon, 447 U.S. at 260, 100 S. Ct. at 2145, 65 L. Ed. 2d at 114)). In evaluating this balance, we look to the nature of the public interest involved, the regulation's economic impact on the owner and the extent to which the

regulation interferes with distinct investment-backed expectations. Kent, 391 N.W.2d at 226; Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 278 (Iowa 1979).

The gist of Morris's takings claim is that as his use of the affected property as a junkyard predated the enactment of the ordinance here in question, the ordinance may not be applied to him in such a way as to terminate that use. In the vernacular of zoning law, Morris's characterization of his property is known as a "nonconforming use." This term describes "a use that existed and was lawful when the restriction became effective and which has continued to exist since that time." Board of Supervisors of Cerro Gordo County v. Miller, 170 N.W.2d 358, 361 (Iowa 1969). Our zoning law recognizes the elimination of such nonconformities as a valid objective of municipal ordinances. Incorporated City of Denison v. Clabaugh, 306 N.W.2d 748, 754 (Iowa 1981). However, consistent with our cases in the area, whether or not the exercise of municipal authority toward such an end is so oppressive that it constitutes a taking depends on the circumstances of each case. Id.

Our courts have recognized the constitutional protection accorded nonconforming uses. E.g., Stover McCray Sys. v. City of Des Moines, 247 Iowa 1313, 1324, 78 N.W.2d 843, 850 (1956). In order to establish a protected nonconforming use, however, it is essential to show nonconformance in a reasonably substantial manner. Township of Fruitport v. Baxter, 6 Mich. App. 283, 285, 148 N.W.2d 888, 889 (1967); People v. Miller, 304 N.Y. 105, 108, 106 N.E.2d 34, 37 (1952); 82 Am. Jur. 2d Zoning and Planning § 186 at pp. 186-87 (1976). This principle is analogous to that of "vested rights" which our courts have applied to claims similar to Morris's. See 82 Am. Jur. 2d, Zoning and Planning, § 186 at p. 187. In Kasparek, 288 N.W.2d at 518, our supreme court summarized the concept in the following manner:

> The vested rights concept is a part of the balancing of the respective legitimate interests of the private property owner against those of the general public, keeping in mind that legitimate and valuable expenditures in connection with the use of an affected tract or in a business conducted on it, before imposition of the regulation, may create a property right which cannot be arbitrarily interfered with or taken away without just compensation.

See also Incorporated Town of Carter Lake v. Anderson Excavating & Wrecking Co., 241 N.W.2d 896, 902 (Iowa 1976); Board of Supervisors v. Paaske, 250 Iowa 1293, 1296-99, 98 N.W.2d 827, 829-31 (1959); Stover McCray Sys., 247 Iowa at 1320-21, 78 N.W.2d at 849-50.

The present case, as we have noted, was submitted on an agreed statement of facts and without trial. Those facts establish both that Earlham's junk dealer licensing ordinance was enacted in 1959 and codified into the Earlham Revised Ordinances in 1980 and that at the time of the ordinance's enactment, use of property for junking purposes was not prohibited by law. With respect to the challenged use of the property, the parties agreed to the following facts:

> Prior to the enactment of [the challenged ordinance], the [affected] property was put to various uses by Defendant's father, Vern Morris, among which were raising livestock, storing machinery and cars, and buying and selling junk. In addition to those activities carried out on the property, Vern Morris was employed as a truck driver and brick tender. During and subsequent to these periods, the use of the property for the activities described above has not been discontinued.

Conspicuously absent from these agreed facts is any mention of matters such as Morris's business investment in the challenged use, the value of any improvements on the land made because of that use, the extent of hardship--in terms of monetary detriment or otherwise--arising from the application of that ordinance, or the amount of time by which the challenged use of the property predated the ordinance's enactment. Such have been treated as important factors in the balancing of public and private interests which has dictated the results in our land-use cases. See, e.g., Kasparek, 288 N.W.2d at 518-19; Board of Super-

visors of Cerro Gordo County, 170 N.W.2d at 363-64. Although the parties agree that enforcement of the ordinance will mean an end to Morris's junk dealer operation at the present location, Morris's abstract claim of harm is devoid of a particularized factual basis which we think is necessary in order to make Morris's takings claim constitutionally concrete. Quite to the contrary, the above-cited agreed factual statement demonstrates that the land on which Morris's junk dealing operation is located is put to a variety of uses which, we may assume, are not affected by the Earlham ordinance. Accordingly, the ordinance's enforcement does not deprive Morris of reasonable use of his land. Such a factor is key in our takings jurisprudence. E.g., Nollan v. California Coastal Comm'n, 55 U.S.L.W. 5145, 5147 (U.S. June 26, 1987); Kasparek, 288 N.W.2d at 519.

Balanced against the ending of Morris's junk-dealing business is the city's interest in the regulation of such business. This interest is clearly legitimate and substantial. See Town of Grundy Center v. Marion, 231 Iowa 425, 433, 1 N.W.2d 677, 681-82 (1942). In cases such as this, the burden of proving that a taking has occurred falls upon the party who challenges the pertinent regulation or ordinance. See e.g., Stone v. City of Wilton, 331 N.W.2d 398, 404 (Iowa 1983). Given the present record, we think Morris has failed to carry this burden. He has demonstrated neither the substantial nature of his use of his property as a junk dealer operation nor the unreasonableness of striking the balance of the pertinent public and private interests in favor of the former. Such being the case, we reject his takings claim.

II.

Morris alleges a violation of his right to equal protection of the laws as secured by the Iowa and federal constitutions. See U.S. Const. amend. XIV; Iowa Const. art. I, § 6. Morris claims this violation is demonstrated by the

disparate treatment given his interests by the Earlham Zoning Ordinances—which contain a "grandfather clause" allowing for nonconforming uses—and the Earlham Junk Dealer Licensing Ordinance—which does not contain such a clause. As these land-use provisions do not infringe on any fundamental right, Scott v. City of Sioux City, 736 F.2d 1207, 1216 (8th Cir. 1984), cert. denied, 471 U.S. 1003, 105 S. Ct. 1864, 85 L. Ed. 2d 158 (1985), the challenged distinction will survive if it rationally furthers a legitimate state interest. Veach v. Iowa Dept. of Transp., 374 N.W.2d 248, 249 (Iowa 1985).

The city clearly possesses a legitimate interest in the regulation of Morris's business. Town of Grundy Center v. Marion, 231 Iowa 425, 433, 1 N.W.2d 677, 682 (1942). Although confronted with the question of a municipality's authority to declare a junk dealership a nuisance, the Grundy Center court sanctioned in the following manner an ordinance similar to that involved in the present case:

> The requirement that the business of junk dealer shall not be carried on within 300 feet of a building used for business or residential purposes is reasonably necessary to prevent an infringement upon the rights of the inhabitants of the city to the comfortable enjoyment of their life and property.

Id. We think this analysis is applicable also to the present equal protection challenge and adopt it for that reason. As a result, Morris's equal protection claim must fail.

The judgment of the district court is affirmed.

AFFIRMED.