

IN THE COURT OF APPEALS OF IOWA

No. 6-456 / 95-1204

CITY OF OTTUMWA,

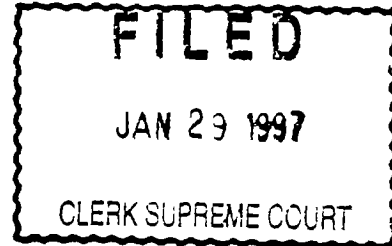
Petitioner-Appellee/Cross-Appellant,

vs.

**TWILA G. HILL, Individually, and FRED
HILL, Individually and as Conservator
for the Property of Twila G. Hill,**

Respondents-Appellants/Cross-Appellees.

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Appeal from the Iowa District Court for Wapello County, Dan F. Morrison,
Judge.

The Hills appeal from that part of the district court's ruling ordering them to
pay the costs of towing and storing seized and impounded motor vehicles.

AFFIRMED IN PART AND REVERSED IN PART.

Patrick F. Curran of Vinyard & Curran, Ottumwa, for appellants.

R.E. Breckenridge of Johnson, Hester, Walter & Harrison, L.L.P., Ottumwa,
for appellee.

Heard by Sackett, P.J., and Cady and Huitink, JJ.

SACKETT, P.J.

This case arises out of the operation by respondents-appellants/cross-appellees Twila Hill and Fred Hill of a car junkyard and sales area on property currently within the city limits of petitioner-appellee/cross-appellant City of Ottumwa, Iowa. The property is a nonconforming use under the city zoning ordinance. The City seized a number of vehicles from the junkyard under an administrative warrant and filed a petition for declaratory judgment seeking to invalidate the nonconforming use area of the Hills' property because the City contends the Hills had failed to comply with city codes and licensing provisions and the Hills failed to comply with a variance agreement. The district court found the property complied with city ordinances and the Hills' earlier failure to comply did not invalidate a variance granted the Hills in 1988. The trial court further ordered the Hills pay storage and towing costs for thirty cars the City took from their property under the administrative warrant.

The Hills appeal from the ruling requiring them to pay towing and storage. The City cross-appeals contending the trial court should have permanently enjoined the operation of the junkyard. We affirm in part and reverse in part.

We first address the Hills' claim they should not have been ordered to pay the storage and towing costs. They argue the presently stated costs are excessive and the City should be required to seek these costs as restitution in a pending criminal case. The Hills' contend the City seized the cars using a criminal remedy in conjunction

with a civil remedy and, therefore, the only way the City can recover the charges, if at all, is through a restitution order in the criminal proceedings. The City argues these challenges were never made in the district court and, therefore, are not properly before this court.

The facts that preceded the removal are as follows: On July 14, 1994, a judicial magistrate entered an "administrative warrant"¹ directed to any peace officer in the State and the city administrator of Ottumwa or his designated representative. The magistrate found probable cause existed that the place locally known as 1002 Harvey Street had three hundred junk motor vehicles as defined by chapter 24½-2 of the Ottumwa Municipal Code, and commanded an immediate search of the property and a seizure of the specified property if found, or that portion logistically feasible, for protective storage. The order further directed the leaving of a receipt for the seized property and storage of the seized property in a secure location. On July 14 and 15, 1994, the Ottumwa Health Department impounded thirty vehicles. On July 15, 1994, the Hills were notified, among other things, unless they reclaimed the

¹ Administrative warrants are authorized under Iowa Code section 808.14, which provides:

The courts and other appropriate agencies of the judicial branch of the government of this state may issue administrative search warrants, in accordance with the statutory and common law requirements for the issuance of such warrants, to all governmental agencies or bodies expressly or impliedly provided with statutory or constitutional home rule authority for inspections to the extent necessary for the agency or body to carry out such authority, to be executed or otherwise carried out by an officer or employee of the agency or body.

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vehicles within fourteen days, which right to reclaim was dependent upon payment of towing and storage charges, they would waive their interest in the vehicles and give their consent to sell the vehicles at public auction or to demolish them.

On August 1, 1994, the Hills filed an application for temporary and permanent writs of injunction to enjoin the City from removing motor vehicles from the Hills' property and from disposing of those seized on July 14 and 15. The clerk of court entered a temporary writ and provided for a \$1000 bond. The City filed a resistance to the application for temporary and permanent writs. The City's resistance was overruled by the district court. In its decision, the district court found the vehicles were seized in abatement of a nuisance and ordered the Hills to pay costs of storage and towing but set no dollar amount.

After trial, the City notified the Hills the towing was \$700 and the sum of \$9154.80 was for security and \$5460 for storage costs. The Hills contend they should not be required to pay the costs, and if they are, costs should be limited to those amounts presented at trial.

The cars were seized under an administrative warrant. The cars were impounded under the warrant. The City cannot now argue they were taken to abate a nuisance when the procedure to abate a nuisance was not utilized. Pursuant to Iowa Code section 808.9, "property seized under an administrative warrant is disposed of under the directive of Iowa Code chapter 809." The procedure to abate a nuisance

and obtain storage and towing charges cannot be circumvented by the issuance of an administrative search warrant. *See generally Christenson v. Iowa District Court*, ___ N.W.2d ___ (Iowa 1996). We reverse the judgment for storage and towing charges.

The second question is whether the trial court should have entered a permanent injunction permanently enjoining the operation for the junkyard.

The Hills' property, locally known as 1002 Harvey Street, is described as Auditor's Lots 21, 22, 23, 24, 25, 26, 34, 35, 36, and 38. The Hills' junkyard has operated since the 1950's. The property lies within an R-1 zoning district which is a residential district. There have been long-term complaints about the Hills' junkyard. In 1982, a magistrate determined Lot 34 and portions of Lots 24, 25, and 26 were being put to a nonconforming use.

In 1988, the Hills and the City entered into an agreement whereby the Hills would be granted a variance to the zoning ordinance allowing them to use portions of their property "only for salvage operations and for uses secondary and completely incidental to salvage operations." Attached to the agreement was a map showing what was termed the original "nonconforming area," the "variance area," and an "auto sales area." As part of the agreement, the Hills promised to fence the junkyard area, which was also to "comply with all codes at all times."

In 1988 and 1989, the Hills had licenses to operate a junkyard. The State licensed them to sell used cars from 1981 through 1990.

In 1990, a dispute arose over whether the operation of the junkyard complied with city code provisions. The Hills received a notice from the city health department they were storing junk motor vehicles outside the fenced junkyard in violation of Municipal Code section 24½-9, and this constituted a nuisance. The Hills were told to remove or properly license the vehicles within ten days.

The property was reinspected in February 1991. The Hills received similar nuisance notices. The Hills were denied a junkyard license in 1991. The State rejected the Hills' application for a license for auto sales in 1991.

On June 14, 1994, the City filed the petition giving rise to this appeal asking the district court to permanently enjoin the Hills from operating a junkyard at 1002 Harvey Street. The City's petition proceeded to trial. The district court found the property was now in compliance with city ordinances and the Hills' earlier failure to comply did not invalidate the 1988 variance. The court ordered:

Defendants are enjoined from violating the terms of the variance agreement from the date of this ruling. Furthermore, defendants are ordered to store all junk motor vehicles, as defined by Ottumwa Code section 24½-2(2), behind the fenced junkyard area. Junk motor vehicles meeting this definition shall not be stored in the auto sales area.

Defendants are also ordered to maintain records of all purchases and sales by the junk dealership as required by Ottumwa Code, Article III, section 22-52, from the date of this ruling.

The City contends the trial court should have permanently enjoined the Hills' operation. The City contends the Hills do not have a lawful nonconforming use.

The Ottumwa City Code defines "nonconforming use" as follows:

3.30: Nonconforming use. The lawful use of any building or land at the time of the passage of this ordinance or amendment thereto, which use does not conform with the provisions of this ordinance for the district in which it is located.

The City bears the burden of proving violation of the ordinance. *City of Central City v. Knowlton*, 265 N.W.2d 749, 753 (Iowa 1978). A party asserting a nonconforming use has the burden to establish the lawful and continued existence of the use. *City of Jewell Junction v. Cunningham*, 439 N.W.2d 183, 186 (Iowa 1989). Not every change in particulars or details in the method of the nonconforming use or in the equipment, object, or processes, in connection therewith constitutes an unauthorized change in use. *Id.* The question is whether the current use is different in kind in its effect upon the surrounding area. *Id.* at 186-87.

The land in question has been used as a junkyard since the 1950's. There is no evidence of a showing of any substantial change in the mode of operation. A failure to comply with local or state licensing provisions where the defect, assuming it exists, can be easily remedied does not alter a valid nonconforming use. *See Trailer City, Inc. v. Board of Adjustment of the City of Council Bluffs*, 218 N.W.2d 645, 648 (Iowa App. 1974). We affirm on this issue.

AFFIRMED IN PART AND REVERSED IN PART.