FILED
AUG 30 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-77 / 89-219

MARSHA HOMSEY; VERNON T. SMITH and PHOEBE SMITH, husband and wife; **WILLARD GODDARD and ALYCE GODDARD,** husband and wife; **JOHN STRAWN and MYRLENE STRAWN,** husband and wife; **LOUIS KACERE; ELMER T. SMITH and VIVIAN SMITH,** husband and wife; **LOUIS SMITH; FRED FREDERICK and BARBARA FREDERICK,** husband and wife; **WILLIAM MURPHY;** and **ELIZABETH A. MURPHY,**

Appellees,

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vs.

THE CITY OF CEDAR RAPIDS, IOWA, a Municipal Corporation,

Appellant,

HY-VEE FOOD STORES, INC.,

Intervenor-Appellant.

Appeal from the Iowa District Court for Linn County, L. Vern Robinson, Judge.

The City of Cedar Rapids and Hy-Vee Food Stores, Inc. appeal from the judgment of the district court that a Cedar Rapids zoning ordinance was invalid. **REVERSED.**

Robert C. Nelson, Walter Homsey, Jr., Cedar Rapids, for the appellees.

David F. McGuire, City Attorney, Mohammed H. Sheronick, Assistant City Attorney, for the appellant, City of Cedar Rapids.

Minor Barnes of Pickens, Barnes & Abernathy, Cedar Rapids, for the appellant Hy-Vee.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

DONIELSON, P.J.

The City of Cedar Rapids and Hy-Vee Food Stores, Inc. appeal from the judgment of the district court that a Cedar Rapids zoning ordinance was invalid. The City and Hy-Vee contend that the district court erred in: (1) finding that the reasonableness of the zoning ordinance was not fairly debatable; (2) considering the reasons or motives of the city council for adopting the ordinance; (3) substituting its judgment for that of the city council as to the propriety of the enactment of the ordinance; and (4) in holding that the validity of the ordinance could be challenged by a declaratory judgment action brought more than thirty days after enactment of the ordinance. We reverse.

On July 22, 1987, the Cedar Rapids city council approved a rezoning of the Cold Stream Meadows district from a single family district (R-3) to a commercial district (C-2). Hy-Vee had requested the rezoning pursuant to its plans to build a new 34,000 square foot building just north of its existing store. The property is bordered by two major thoroughfares, Oakland Road N.E. and 32nd Street N.E. Hy-Vee's current store is located on the northwest corner of the intersection. A drug store is situated on the northeast corner, a bakery is on the southwest corner, and an insurance agency is on the southeast corner. Center Street is directly north of and parallel to 32nd Street, both running in an east-west

direction. Hy-Vee proposed to build its new facility along Center Street N.E. for a distance of 660 feet, with a major ingress-egress drive on Center Street. The new facility, however, would face Oakland Road N.E.

Because the proposed facility would extend 300 feet farther into the surrounding residential area than the city council had previously allowed similar businesses, Hy-Vee agreed to certain conditions which were made part of the amendments to the zoning ordinance. Hy-Vee agreed to (1) plant trees around the proposed site to create a buffer zone between the store and adjoining residential homes; (2) construct detention ponds around the store property to inhibit flooding caused by rain runoff; and (3) pave Center Street, which was unpaved and surfaced with gravel.

The zoning committee recommended against the proposed amendment and indicated that a C-2 commercial zone was not compatible with the single-family residence zone. The Cedar Rapids planning commission, however, narrowly voted to approve the amendments. On June 17, 1987, the Cedar Rapids city council held a public hearing on the matter and subsequently passed the amendments. Following two more readings, the amendments were adopted and published on November 17, 1987.

On January 15, 1988, the plaintiffs filed a class action for declaratory judgment requesting the rezoning to be held invalid because the city council's actions were arbitrary and unreasonable. The plaintiffs alleged that

the city council had done little, if any, study regarding the environmental, economic, and social impact the new store would have on the area. The plaintiffs argued that Hy-Vee presented no evidence that the current store did not meet the needs of the community. The plaintiffs maintained that home values in the area would decline and that traffic volume would increase greatly. The plaintiffs also argued that the bright lights and heavy truck traffic would prevent the surrounding neighbors from safely enjoying their property.

The City and Hy-Vee argued that the rezoning was not inconsistent with the City's long-range land use policy. They argued that the rezoning would result in the construction of badly-needed sidewalks and the paving of Center Street N.E., and that the intersection of Oakland Road N.E. and 32nd Street N.E. would be widened. The City introduced testimony from a Cedar Rapids real estate appraiser that a store such as contemplated by Hy-Vee would not decrease property values, but might in fact be a catalyst in a price increase. The City additionally pointed out that the nature of the area is changing due to the completion of Interstate 380 through the area. Hy-Vee maintained that if it had to abandon the property and build elsewhere, the present building would likely remain empty and become a blight on the neighborhood. Hy-Vee also pointed out that several homes in the area had already been torn down because they were badly deteriorated and that

other homes in the area contained old cars and unused equipment in their yards.

Following a bench trial, the district court ruled that the zoning ordinance did not have any real, substantial relation to the public health, comfort, safety, and welfare of the concerned neighborhood. The district court concluded that the city council had supported the rezoning due to Hy-Vee's long tradition of providing jobs and a tax base for the City and that the new store would do nothing but bring increased traffic, pollution, and noise to the area. The district court further concluded that the City had not conducted sufficient studies regarding sewer problems, traffic, and noise pollution. The district court ultimately determined that the decision to rezone was arbitrary.

Because the present case was tried as an equity proceeding, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. Insurance Agents, Inc. v. Abel, 338 N.W.2d 531, 533 (Iowa App. 1983). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Hy-Vee and the City argue that the trial court erred in holding that the validity of the ordinance could be challenged by a declaratory judgment action brought more

than thirty days after the enactment of the ordinance. We note, however, that this issue was not presented to or passed on by the trial court. Though our scope of review is de novo, a party cannot try the case here on a new theory that was not advanced in the trial court. Mensch v. Netty, 408 N.W.2d 383, 386 (Iowa 1987). We therefore need not consider this issue.

We have long recognized that zoning decisions are an exercise of the police power to promote the health, safety, order, and morals of society. Anderson v. City of Cedar Rapids, 168 N.W.2d 739, 742 (Iowa 1969). In the enactment of such ordinances, including any amendments thereto, the city or town exercised its vested legislative powers with a strong presumption of validity. Id. In reviewing amendments to zoning ordinances, we must presume they are valid, and if their reasonableness is fairly debatable, we will not substitute our judgment for that of the legislative body. Montgomery v. Bremer Cty. Bd. of Sup'rs, 299 N.W.2d 687, 692 (Iowa 1980). "The test of whether a zoning ordinance is arbitrary and unreasonable is whether the means employed in the attempted exercise of the police power have any real, substantial relation to the public health, comfort, safety, and welfare, including the maintenance of property values . . . ." E & G Enterprises v. City of Mount Vernon, 373 N.W.2d 693, 694 (Iowa App. 1985), citing Anderson, 168 N.W.2d at 742.

The burden of proof in showing that the rezoning is unreasonable, arbitrary, or capricious lies with the party asserting the invalidity. Anderson, 168 N.W.2d 742; Plaza Recreational Center v. City of Sioux City, 253 Iowa 246, 252, 111 N.W.2d 758, 762 (1961). When constitutional questions are raised all reasonable intendments must be indulged in favor of the validity of the enactment. Id. We have also recognized that a classification of the use of property will not be held arbitrary unless it is clearly so. Id.

In considering the validity of the rezoning amendment, it has also been generally recognized that a court may not inquire into the motives of the members of the municipal zoning authority which approved and adopted the ordinance or amendment. 82 Am. Jur. 2d Zoning and Planning § 31 (1976). If the conditions in the area of the rezoning justify the enactment of the ordinance or amendment, the motives prompting the enactment will be of little or no consequence. Id.

Iowa law, however, requires municipalities to pass all zoning ordinances in accordance with a comprehensive plan. Iowa Code § 414.3. Such ordinances should be designed to encourage efficient urban planning development patterns, to lessen congestion in the streets, provide adequate light and air, prevent overcrowding and undue concentration of population, and numerous other factors affecting the health, safety, and welfare of the public. Neuzil v. City

of Iowa City, 451 N.W.2d 159, 164 (Iowa 1990). The municipality must consider the character of the area and encourage the retention of the value of the buildings. Id. It has been recognized, however, that changing conditions require a change in plans. A property owner therefore has no ironclad vested right to the continuity of zoning in the general area in which he or she resides. 1 Anderson, American Law of Zoning 3d, § 426, at 286 (1986).

Applying the foregoing analysis to the present case, we find that the district court erred in substituting its judgment for that of the city council. The expert testimony introduced at trial tended to reveal that the area in question is in a transitional phase. The evidence reveals that traffic volume has increased due to the completion of I-380 near the area. Evidence offered by Hy-Vee suggests that part of the residential area in question has deteriorated and that several homes in the area had to be torn down due to an advanced state of decay. Hy-Vee had operated in the area for over twenty years and had established a substantial clientele in that location and stated at trial that its proposed new building adjacent to its old building would make the old building more attractive to a new commercial business. The record reveals that given the size of the old building, it is likely that it would become vacant if Hy-Vee were to relocate to another location.

Because 26.1% of the residents in the area filed a protest, the city council held a series of public meetings wherein the residents opposed to the rezoning were permitted to express their concerns. Following these hearings, upon consideration of all the relevant information from both sides of the controversy, the city council by a three-fourths majority approved the rezoning pursuant to Iowa Code section 414.5 (1987). Recognizing the impact that a new store of the magnitude Hy-Vee wished to construct would have on the adjacent neighborhood, the city council required Hy-Vee to pave Center Street and construct a new drainage sewer system in order to handle the increased water runoff from an expanded parking lot. The council, recognizing the esthetic concerns of the neighborhood, required Hy-Vee to plant trees around the perimeter of its proposed site. Hy-Vee would also be required to construct sidewalks in the area in the interest of neighborhood safety and would result in other badly-needed sidewalks being constructed. The council also found that rezoning the area would precipitate a widening of Oakland Road and 32nd Street, necessitated by the increased volume of traffic from I-380 and also from increased traffic from large commercial areas along Center Point Road approximately one mile away.

We have recognized in the past that highly-concentrated stores catering to the public's needs are not ordinarily incompatible with a previously-enacted comprehensive plan.

Anderson, 168 N.W.2d at 743. The new store proposed by Hy-Vee is an extension of an already-existing use and is therefore not a situation involving spot zoning in an otherwise residential area. We therefore believe that the rezoning amendment, on its face, was a valid exercise of the council's authorized police power. While plaintiffs point out that there were numerous environmental and sociological studies which might have been done before the rezoning, we do not believe that the council was required by law to exhaust all avenues available in considering the propriety of the rezoning request.

We are mindful, however, that the residents of the area have a right to a safe, clean, and healthful environment in which to live. It is unavoidable that as our cities evolve, areas that were once quiet neighborhoods would transform into more commercial, industrialized sectors. It is therefore incumbent upon those residents who live in the affected area and the city officials empowered with the task of creating a comprehensive plan to work together to encourage growth and at the same time protect the residents' right to the enjoyment of their homes. In the present case, we believe the record evidences a recognition on the part of the council that with various restrictions and requirements on the design of the proposed building, badly-needed improvements benefiting a large number of people could be obtained. While the added tax revenues and increased number of jobs that would be created by the new

store would obviously be positive benefits, our examination of the record does not reveal that the city council focused solely on the potential dollar aspects of the requested rezoning.

In conclusion, we find that under the facts of this case the city council's actions to rezone the area in question from residential to commercial was a valid exercise of its police powers and that propriety of rezoning was at the very minimum debatable. As such, the district court erred in holding otherwise.

REVERSED.