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NO. COA01-1415

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

TOWN OF WARSAW,
Plaintiff

v.

Duplin County
No. 00 CVD 979

ANGELIA RODRIGUEZ,
Defendant

Appeal by defendant from judgment entered 13 June 2001 by Judge Sarah C. Seaton in District Court, Duplin County. Heard in the Court of Appeals 20 August 2002.

Thompson & Mikitka, P.C., by Susan Collins Mikitka, for plaintiff-appellee.

Fredric C. Hall for defendant-appellant.

TIMMONS-GOODSON, Judge.

The Town of Warsaw, North Carolina ("plaintiff" or "the town"), filed the present action against resident, Angelia Rodriguez ("defendant"), based upon her failure to comply with plaintiff's Zoning Ordinance 8.8, governing "R-8 Residential Districts."

In April 2000, defendant applied for and received a building permit to construct a "garage" on her property. Defendant subsequently built a structure which she used to shelter four horses. Based upon complaints from defendant's neighbors,

plaintiff notified defendant that she was violating Town of Warsaw Ordinance 8-2002, prohibiting those within the town's corporate limits from maintaining any hog pen, keeping any hogs, cows, chickens or ponies. Believing that defendant's action was more appropriately classified as a property use violation, plaintiff later notified defendant that she was in violation of Zoning Ordinance 8.8 and requested that she remove the horses.

Defendant's refusal to cease the nonconforming use prompted plaintiff to file for preliminary and permanent injunctive relief. Plaintiff moved for summary judgment, and the trial court granted plaintiff's motion in its order of 13 June 2001. From this order, defendant now appeals.

Defendant presents two arguments on appeal: (I) that defendant did not violate Zoning Ordinances 8.8 by maintaining horses in a "R-8 Residential District;" and (II) that plaintiff's application of the Ordinance to prohibit defendant's allegedly nonconforming use violated the Equal Protection Clause of the United States and North Carolina Constitutions.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). As there is no genuine issues of material fact, we must

determine whether defendant was entitled to judgment as a matter of law.

I.

Defendant first contends that her actions did not violate Zoning Ordinance 8.8 because keeping horses was permitted in "R-8 Zoning Districts." We disagree.

"A zoning ordinance, like any other legislative enactment, must be construed so as to ascertain and effectuate the intent of the legislative body." *In re Application of Construction Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968) (citations omitted). We apply the same rules of construction to municipal zoning ordinances as apply to legislatively enacted statutes. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 303, 554 S.E.2d 634, 638 (2001). In ascertaining the intent of a municipality in enacting the challenged ordinance, we must consider "the ordinance as a whole, . . . and the provisions in pari materia must be construed together[.]" *George v. Town of Edenton*, 294 N.C. 679, 684, 242 S.E.2d 877, 880 (1978) (citations omitted).

Three of plaintiff's zoning ordinances are relevant to the disposition of the present case. First, plaintiff's Zoning Ordinance 8.6 governs plaintiff's "R-20 Residential Agricultural Districts." "R-20" districts are multi-use which expressly allow "[a]ny form of agricultural, horticultural, or husbandry uses excluding poultry houses and hog parlors," and further allow the construction of "public or private stables." (Emphasis added). Next, Zoning Ordinances 8.7 and 8.8 govern "R-10 Residential

Districts" and "R-8 Residential Districts," respectively. These are, as their titles indicate, typical residential districts allowing family housing, schools, churches, and other similar and ancillary uses.

Plaintiff maintains "R-10" districts to encourage the construction and use of land for residential purposes. Likewise, the town maintains "R-8" districts for residential purposes, but with a slightly higher density than "R-10" districts. Plaintiff's ordinances do not allow agricultural uses in district "R-20" or "R-8." Defendant's property lies within a "R-8 Residential District."

Here, it is uncontroverted that defendant maintained and sheltered horses within a "R-8 Residential" district. Although this particular use was expressly permitted in "R-20" districts, it was not allowed in a "R-8" district, the district within which defendant resided. It follows that defendant was in clear violation of plaintiff's Zoning Ordinance 8.8.

Defendant contends, to the contrary, that her horses were not kept for husbandry or other similar purposes but only as pets, the ownership of which was allowed in her zoning district. We are unpersuaded by defendant's arguments as there is a marked difference between animals ordinarily kept as pets, such as dogs and cats, and a group of horses. This conclusion is confirmed by our General Assembly's consistent categorization of horses as "livestock." See *County of Durham v. Roberts*, 145 N.C. App. 665, 669-70, 551 S.E.2d 494, 497-98 (2001) (concluding upon examination of various state statutes concerning animal licensing and the like

that horses are livestock). Furthermore, "raising livestock" is an activity squarely within the traditional and ordinary meaning of the word "agriculture," the uses of which are not permitted within district "R-8." *Webster's New International Dictionary* 44 (3rd ed. 1968).

Defendant further contends that the structure housing the horses was also allowed in her "R-8" district. In support of her contention, defendant notes that the structure was not a "stable" because it was not enclosed and did not have separate stalls for each horse. Here again, we disagree with defendant's assertion. First, the shelter is certainly not a garage, the structure for which she obtained a permit. Second, whether or not the shelter falls squarely within the meaning of the word "stable" is irrelevant. Zoning Ordinance 8.8 allows neither a stable, *per se*, or any structure for any agricultural purpose. Here, the building was being used for an agricultural purpose - to shelter four horses being raised by defendant. It is therefore not a structure, use, or structure ancillary to any uses allowed in plaintiff's "R-8" districts. Accordingly, we conclude that despite her arguments to the contrary, defendant was in violation of Zoning Ordinance 8.8.

II.

Although defendant concedes that plaintiff's Zoning Ordinance Section 8.8 is facially valid, she argues that if she was indeed in violation of the ordinance, plaintiffs selectively enforced the ordinance against her in violation of her Equal Protection rights

under the United States and state constitutions. See U.S. Const. amend. XIV and N.C. Const. art. I, § 19. Again, we disagree.

A party alleging selective enforcement has the heavy burden to prove "a pattern of conscious and intentional discrimination, done with 'an evil eye and an unequal hand.'" *Brown v. City of Greensboro*, 137 N.C. App. 164, 167, 528 S.E.2d 588, 590 (2000) (quoting *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 445, 358 S.E.2d 372, 376 (1987)). To satisfy this burden, one must prove more than "[m]ere laxity in enforcement." *Grace Baptist Church*, 320 N.C. at 445, 358 S.E.2d at 376 (citation omitted). Even "the conscious exercise of some selectivity in enforcement of the law is not in itself a constitutional violation." *People v. Goodman*, 290 N.E.2d 139, 143 (N.Y. 1972) (citation omitted).

In the present case, the evidence demonstrated that residents other than defendant maintained horses within "R-8" zoning districts but were not held in violation of Ordinance 8.8. Also, town resident George Jackson stated in an affidavit that he maintained horses within a "R-8 District" as of 4 May 2001. Jackson did not receive notice that he was in violation of any town ordinance until March 2001. Jackson further stated that on 4 May 2001, Mayor Elmer Schorzman informed him that he would have to remove his horses before 14 May 2001, the date of the summary judgment hearing. According to Jackson, Mayor Schorzman informed him that Jackson could return the horses to his property after the "Angelia Rodriguez matter had been resolved."

Plaintiff admitted that it did not enforce the relevant ordinance against many of its nonconforming residents. However, plaintiff noted that many of these residents began their nonconforming use prior to the enactment of Zoning Ordinance 8.8. Furthermore, after defendant complained about other residents' noncompliance, plaintiff began investigating and taking action against these residents.

While Mayor Schorzman's comments to Jackson were certainly inappropriate, this one comment, even coupled with the other evidence of selectivity, does not indicate a pattern of conscious and intentional discriminatory enforcement. Plaintiff explained that the zoning ordinances did not apply to some residents because their nonconforming uses existed prior to the enactment of Zoning Ordinance 8.8. Although the evidence indicated some laxity in enforcement and a conscious exercise of some selectivity, plaintiff has since attempted, in most cases, to strictly enforce its municipal regulations against those maintaining horses in violation of Ordinance 8.8. Given these circumstances, we conclude that defendant failed to meet her heavy burden of demonstrating a constitutional violation based upon selective enforcement. Accordingly, defendant's argument that plaintiff violated her right to Equal Protection is overruled.

Conclusion

For the above-stated reasons, we affirm the trial court's 13 June 2001 Order granting plaintiff's motion for summary judgment. Affirmed.

Judges Greene and Hunter concur.

Report per Rule 30(e).