IN THE COURT OF APPEALS OF IOWA

No. 2-636 / 11-1853
Filed October 3, 2012

DAN ZENNER and SARAH ZENNER,
Plaintiffs-Appellants,

vs.

DUBUQUE COUNTY ZONING BOARD OF ADJUSTMENT,
Defendant-Appellee.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

Appeal from the denial of a petition for writ of certiorari. **REVERSED.**

James Quilty of Quilty Law Firm, Des Moines, for appellants.

Ralph Potter, County Attorney, and Brigit Barnes, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

EISENHAUER, C.J.

Dan and Sarah Zenner appeal from the district court's denial of their petition for writ of certiorari. Although the Zenners' stated argument is, "[t]he district court erred in finding that there was substantial evidence to support the board of adjustment's decision," in their brief they contend the court should have found the Dubuque County Zoning Board of Adjustment acted illegally in holding the Zenners' greyhound kennel violated zoning regulations. We reverse.

Background Facts and Proceedings

In July 2003 when the Zenners planned to purchase the property in question, they requested a variance from the 500-foot setback requirement for kennels. They wanted to build the kennels with a 200-foot setback from the surrounding residences. On July 3 the county zoning administrator, not mentioning the setback issue, requested an opinion from the county attorney on whether a greyhound kennel would be a permitted use in an area zoned A-1, Agriculture. The county zoning ordinance, section 1-15.2(a)(20)(c) allows kennels, but provides "no kennel shall be allowed to harbor, breed, train, buy, sell, exchange or offer for sale any animal to be used solely for attack purposes nor any animal *not normally associated with domestic enjoyment.*" (Emphasis added.) The ordinance also lists examples of the types of animals prohibited: "Such ban shall include but shall not be limited to jungle cats, venomous snakes or other reptiles larger than four feet in length, pit bulls, coyotes, wolves, foxes, skunks, deer or other similar wild animals." The zoning administrator specifically asked whether "greyhounds raised for racing at the dog track" were allowed under that section.

On July 10, 2003, an assistant county attorney sent a letter to the zoning administrator opining the described use would not fall within the permitted uses under the zoning ordinance. After they were notified of the county attorney's opinion, the Zenners withdrew their application for a variance, so no decision was made by the zoning administrator or appealed to the board. In August 2003 the Zenners purchased the property. They constructed a kennel and began raising and selling greyhounds. The kennel complied with the 500-foot setback on three sides, but was only 200 feet from other residences on one side.

In 2009 the county zoning office received complaints from neighbors about noise from the kennel. On May 13 the assistant zoning administrator sent a letter notifying the Zenners they were in violation of the county zoning ordinance quoted above. The Zenners appealed to the county zoning board of adjustment.

On July 7, 2009, the board heard the Zenners' appeal. Following testimony from the Zenners and neighbors and statements from the attorneys, the board voted unanimously to uphold the zoning administrator's decision. The Zenners filed a petition for writ of certiorari in district court on August 6, 2009, and requested a stay.

On September 27, 2011, the petition came before the court for a trial de novo. *See* Iowa Code § 414.18 (2009) (describing how a certiorari action is tried in a zoning case). The district court reviewed what the board had considered, looked at definitions of various words in the dictionary, and determined the board's decision was based on substantial evidence.

Scope and Standards of Review

"A somewhat unusual scope of review has been developed for district courts considering certiorari challenges to the action of boards of adjustment." *Lauridsen v. City of Okoboji Bd. of Adjustment*, 554 N.W.2d 541, 543 (Iowa 1996). Iowa Code section 414.18 provides for trial de novo in district court, which

> should be confined to the questions of illegality raised by the petition for the writ. Arbitrary and unreasonable actions, or proceedings not authorized by or contrary to the terms or spirit and purpose of the statute creating and defining the powers of the board, or contrary to, or unsupported by facts on which the power to act depends, or within which the power must be exercised, are illegal.

Weldon v. Zoning Bd., 250 N.W.2d 396, 401 (Iowa 1977) (citation omitted).

On appeal from the district court's certiorari ruling, our review is at law. Iowa R. Civ. P. 1.1412; *Chrischilles v. Arnolds Park Zoning Bd. of Adjustment*, 505 N.W.2d 491, 493 (Iowa 1993). We are bound by the district court's factual findings if supported by substantial evidence. *Chrischilles*, 505 N.W.2d 2d at 493. However, we are not bound by erroneous legal rulings that materially affect the court's decision. *Id.* Construction and interpretation of a zoning ordinance is a question of law for this court to decide. *See Good v. Iowa Civil Rights Comm'n*, 368 N.W.2d 151, 155 (Iowa 1985). We construe zoning restrictions strictly in order to favor the free use of property, and we will not extend such restrictions by implication or interpretation. *Greenawalt v. Zoning Bd. of Adjustment*, 345 N.W.2d 537, 545 (Iowa 1984). We also will not construe zoning restrictions in such a way that they will be arbitrary or unreasonable and will avoid an

interpretation that would make them confiscatory. *Jersild v. Sarcone*, 149 N.W.2d 179, 183 (Iowa 1967).

Merits

The Zenners contend the district court should have found the Dubuque County Zoning Board of Adjustment acted illegally when it upheld the zoning administrator's determination the Zenners were operating a greyhound kennel in violation of zoning regulations. They assert the board's action directly contradicts the language in the ordinance permitting kennels unless they fall within two categories—housing animals used solely for attack purposes or housing animals not normally associated with domestic enjoyment. They argue "greyhounds are indeed animals that are associated with domestic enjoyment." The Zenners point out greyhounds were one of the first breeds to be domesticated. They argue Iowa Code section 99D.27, which requires dog tracks to maintain a racing dog adoption program, is evidence public policy and law in Iowa considers greyhounds to be normally associated with domestic enjoyment. They further argue the district court's inquiry into the dictionary definition of "domestic" and "normal" illustrates "the utter lack of evidence" supporting the board's decision.

The May 2009 notice-of-violation letter from the assistant zoning administrator to the Zenners stated:

> The establishment and operation of a kennel for the raising of greyhounds for racing purposes is not an allowed use in the A-1, Agricultural zoning district. According to the County Attorney, a greyhound kennel "is a non-exempt commercial use and, by its very nature, is not allowed in the agricultural district."

After hearing the appeal in July, the board voted unanimously to uphold the decision of the zoning administrator. The district court determined "the

finding by the Board that raising greyhounds in a kennel in the A-1 zoning district is not a permissive use is based on substantial evidence."

The county attorney's opinion in 2003 appears to be based primarily on the determination this was a commercial operation. The definitions of types of "kennels" in the ordinance allow for animals to be bred and offered for sale. *See* Dubuque County Zoning Ordinance §§ 1-2.45 through 1-2.48. The default uses appear to us to be commercial because the ordinance defines a separate category of "kennel, hobby" that does not include commercial activity or breeding or sale for a consideration. *Id.* § 1-2.49. We conclude the county attorney misinterpreted the ordinance.[1] Following the county attorney's analysis could lead to a determination that any kennel raising dogs for show instead of as pets would not be permitted because it would be "a non-exempt commercial use."

Based on the county attorney's opinion, the zoning administrator determined the greyhound kennel violated the ordinance. The board affirmed the zoning administrator's decision. From the testimony and evidence submitted to the board, it is clear the underlying concern was the barking of the greyhounds.

The ordinance does not define the phrase "not normally associated with domestic enjoyment," but it provides a list of examples of the types of animals meeting that description. When specific words follow general words in a statute or ordinance, the general term is construed to embrace only objects similar in

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[1] The county attorney also opined "it is our opinion that, at the current time, the only zoning classification which allows for a commercial greyhound kennel would be in the 'M-2' Heavy Industrial District." The ordinance does not provide for kennels in the M-2 Heavy Industrial District. Kennels are listed among the "permitted *principal uses* and structures" only in the A-1 Agricultural District. They are among the "*special permit* uses and structures" only in the B-1 Business District and the R-1 Rural Residential District.

nature to those objects enumerated in the subsequent specific terms. 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:17, at 188 (5th ed. 1992). The only canine breed mentioned in the list is "pit bulls." The examples listed inform our understanding of "not normally associated with domestic enjoyment." We conclude greyhounds do not fall within the general term "not normally associated with domestic enjoyment." Nothing suggests they possess any of the characteristics of the litany of prohibited animals. The statutory provision for an adoption program for racing dog breeds supports our conclusion.

Construing the zoning restrictions strictly in order to favor the free use of property, we conclude the greyhound kennels fall within the permitted principal use set forth in section 1-15.2(a)(20)(c) of the zoning ordinance.[2] *See Greenawalt v. Zoning Bd. of Adjustment*, 345 N.W.2d 537, 545 (Iowa 1984). Consequently, we reverse the decision of the district court. The court should have sustained the writ.[3]

The Zenners also argue the board's decision amounts to an unconstitutional "taking." As this was not decided by the district court, we do not consider it for the first time on appeal. *See Jones v. Schneider Nat'l, Inc.*, 797 N.W.2d 611, 617 (Iowa Ct. App. 2011) (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) ("Our preservation rule requires that issues must be

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[2] The question whether the open kennels comply with the setback requirements of section 1-15.2(a)(20)(b) is not before us.

[3] It appears to us the district court and the parties all focus on a substantial-evidence analysis. The question before us, however, is the legal question of the meaning of the ordinance.

presented to and passed upon by the district court before they can be raised and decided on appeal.")).

REVERSED.