IN THE COURT OF APPEALS OF IOWA

No. 3-308 / 12-1501
Filed May 30, 2013

DONALD MOYER,
Plaintiff-Appellant,

vs.

ZONING BOARD OF ADJUSTMENT,
CITY OF DES MOINES, IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Donald Moyer appeals a district court order affirming a determination by the City of Des Moines zoning board of adjustment that he abandoned his property's nonconforming use to display used vehicles. **AFFIRMED.**

Robert A. Nading II of Nading Law Firm, Ankeny, for appellant.

Michael F. Kelley, Assistant City Attorney, Des Moines, for appellee.

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

TABOR, J.

Donald Moyer challenges the City of Des Moines's refusal to issue a letter to the Iowa Department of Transportation certifying a parcel of property he owns is zoned to permit the operation of a used car lot. The city's zoning board of adjustment determined that Moyer abandoned his nonconforming use designation by discontinuing his operation of a vehicle display lot on the property. Moyer argues insufficient evidence supports the board's finding.

Because the board could reasonably infer—from Moyer's choice to allow his auto dealer's license to lapse and from his tenant's application to operate an auto window tinting business at that location—that Moyer stopped using the lot for used car sales, sufficient evidence supports the finding of abandonment.

I. Background Facts and Proceedings

Moyer owns Hawkeye Motors, Inc. By 1997, Hawkeye Motors held title to multiple parcels of property on the corner of East 14th Street and Washington Avenue in Des Moines, including the lot located at 1433 East 14th Street. Lot 1433 spans 20,500 square feet over two parcels and contains a 1652 square foot building originally built for auto repair.

From the time Hawkeye Motors purchased the property until 2006, the company either sold vehicles from Lot 1433 or leased the property to other tenants to sell or repair used cars. The lot was originally zoned as C-2, which allowed used vehicle display. The city later rezoned Lot 1433 as C-1, a "neighborhood retail commercial district" that prohibits used vehicle display. On August 23, 2001, the city granted the property a legal nonconforming status for

used auto sales and issued a certificate of occupancy to Hawkeye Motors to utilize the property as a "used automobile sales lot."

To obtain a used car dealer's license from the Iowa Department of Transportation (DOT), an applicant must provide a letter from the city showing the dealership's authorization to occupy the property. Moyer held a used car dealer's license for Hawkeye that included Lot 1433, but allowed the license on the lot to lapse in 2004. Moyer and his wife, Gloria, would eventually sell the northernmost property to his son, Paul Moyer, to operate his own car dealership, Extreme Motors, Inc.

In January 2006, Moyer leased Lot 1433 to Diaz Tinting, Inc. The city issued Leonardo Diaz a certificate of zoning compliance, which on January 10, 2006, authorized "building reuse from used cars to detailing and tinting." The certificate provides: "No change of use may be made at this location unless a new Certificate of Occupancy is granted for such use and no change in this building or land may be made without first consulting the Zoning Enforcement Office." In March 2007, Hawkeye Motors sold Lot 1433 on contract to Don and Gloria Moyer, and issued the deed to the couple in 2011.

During a property inspection by the city development zoning division on January 23, 2009, the enforcement officer discovered cars were being sold and repaired on Lot 1433. Six days later, the division first notified the Moyers that this parcel lost its legal nonconforming use status and consequently the auto sales and repair activities were unauthorized. On March 23, 2009, the division again notified the Moyers that they were violating municipal code by allowing

auto repair and parking on unimproved surfaces. The couple did not appeal either determination.

An April 24, 2010 inspection of Lot 1433 found continued illegal auto repair. Three days later, the city again notified the Moyers of "illegal business operations, storage of junk, debris, unlicensed and/or inoperable vehicles and illegal parking on unimproved surfaces."

When the Diaz Tinting lease ended in April 2011, Moyer asked the city for a letter to the DOT stating that Lot 1433 was properly zoned for displaying and selling used cars. On October 31, 2011, the city denied Moyer's request.

Moyer appealed the city's denial. On December 21, 2011, the zoning board of adjustment held a hearing on Moyer's appeal and upheld the city's refusal.[1] The board issued a written decision the following month upholding the zoning enforcement officer's determination the property lost its legal nonconforming status for vehicle display and vehicle repair.

Moyer petitioned for a writ of certiorari with the district court. On July 23, 2012, the court annulled his writ and affirmed the city's denial. He timely filed this appeal.

II. Scope and Standard of Review

We review certiorari proceedings for correction of legal error. *State v. Iowa Dist. Ct. for Johnson Cnty.*, 750 N.W.2d 531, 532 (Iowa 2008). We review the board's fact findings to determine whether they are supported by substantial evidence. *Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d

[1] Because of procedural irregularities regarding rebuttal evidence, the board held a second hearing in January.

483, 495 (Iowa 2008). Substantial evidence is "'the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.'" *Bownman v. City of Des Moines Mun. Housing Agency*, 805 N.W.2d 790, 796 (Iowa 2011) (quoting Iowa Code section 17A.19(10)(f)(1)).

"If the reasonableness of the board's action is open to a fair difference of opinion, the court may not substitute its decision for that of the board." *W & G McKinney Farms, L.P. v. Dallas Cnty. Bd. of Adjustment*, 674 N.W.2d 99, 103 (Iowa 2004) (citation and internal quotation marks omitted). If the board's findings are supported by substantial evidence, we are bound by them. *Id.*

Because our review is limited to correction of legal error, it is not our place to reweigh evidence nor assess witness credibility. *See EnviroGas, L.P. v. Cedar Rapids/Linn Cnty. Solid Waste Agency*, 641 N.W.2d 776, 785 (Iowa 2002).

III. Analysis

Moyer asserts insufficient evidence supports the board's ruling that he abandoned his nonconforming use. He alleges the board surmised that Lot 1433 had not hosted used car sales for a period of six months, but the evidence presented to the board actually showed he had been continuously displaying used vehicles on the property.

A nonconforming use of property is a use that lawfully existed before a zoning ordinance was enacted or changed, yet continues after the enactment despite its failure to comply with the ordinance restrictions. *City of Okoboji v.*

Okoboji Barz, Inc., 746 N.W.2d 56, 60 (Iowa 2008). The property's prior use essentially establishes a vested right to continue the operation once the ordinance takes effect. *Id.* The nonconforming use may continue until legally abandoned. *Id.*

Under Des Moines Ordinance 134-1353, land and the accompanying structure will remain legally nonconforming until the nonconforming use is discontinued "for more than one year for any reason whatsoever between February 1, 2001, and September 1, 2008; or for more than six months for any reason whatsoever after September 1, 2008."

Moyer contends because Iowa law requires city ordinances to be strictly construed, the city bears the burden to establish the owner abandoned the property use. Like the district court, we will assume for the sake of argument the city must prove Moyer's discontinuation of the nonconforming use.

Moyer criticizes the district court's reliance on two pieces of evidence to uphold the board's decision: the 2006 certificate of zoning compliance and his wife Gloria's statement to the zoning officials concerning his business. We find no error in the court considering this proof in its substantial-evidence review.

Gloria Moyer told the board:

> [Moyer] owns right now, 1453, 1437 and 1433 East 14th Street. They were all deteriorating in 1989 when he purchased them. And he made a beautiful car lot and a beautiful car wash. And he has kept it perfectly in great shape. He, you know, has everyone taking care of, making sure there's no papers or refuse anywhere. . . . *And the people had a fix-it shop and the tinting cars and they were not doing the proper job of keeping it up. It was just, you know, not good. So he decided to retire and sold the car lot to my son. And he decided to go over to the smaller car lot. And just, you know, kind of have a few cars but, you know, more of a retiring, you know,*

> *that he wouldn't have to be so active. So, anyhow, I just hope you will find it in your heart to let him have the zoning back the way it was so that he can continue on and be happy because he cannot retire.*

(Emphasis by district court).

Moyer asserts Gloria's description of his business history does not prove he discontinued using the smaller lot to display used vehicles. We agree the wife's statement doesn't expressly recognize Moyer's nonuse of the property. But it does corroborate the fact that for a period of time, another entity was using the lot. That evidence, taken together with the certificates issued by the city—as we will discuss—creates an inference Moyer abandoned the property's nonconforming status.

Circumstantial evidence is as probative as direct evidence. *Huber v. Watson*, 568 N.W.2d 787, 790 (Iowa 1997). But if the inferences drawn from the circumstantial evidence are based on surmise, speculation, or conjecture, it does not hold equal probative force. *Matter of H.E.W., Inc.*, 530 N.W.2d 460, 463 (Iowa Ct. App. 1995).

Sometimes intent to abandon may be inferred from a failure to apply for a license to carry on the nonconforming use. *McQuillin*, The Law of Municipal Corporations, § 25:202 (cited in *City of Jewell Junction v. Cunningham*, 439 N.W.2d 183, 187 (Iowa 1989); *see Tscheschlog v. Bd. of Sup'rs of Tinicum Tp.*, 489 A.2d 958, 959 (Penn. 1985). We may infer the same from amending the licensed use of the property. *See Schaefer v. Zoning Bd. of Adjustment, of City of Pittsburgh*, 435 A.2d 289, 291 (Penn. 1981).

Because Des Moines Ordinance 134-1353 sets a timeframe for determining when discontinuation of a property's former use triggers the loss of its nonconforming designation, the city need not prove the owner's intent to abandon. *See Smith v. Board of Adjustment of City of Cedar Rapids*, 460 N.W.2d 854, 857 (Iowa 1990) (dispensing with subjective intent based on ordinance's one-year discontinuance limitation). But intent to abandon presupposes discontinued use. *See McQuillin*, The Law of Municipal Corporations, § 25:202 (recognizing nonuse as a factor to consider in determining whether property's nonconforming use was abandoned). Therefore, while proof of intent is not necessary to establish abandonment, an inference of the owner's intent to abandon is relevant to nonuse.

In 2004, Hawkeye's license to sell used cars on Lot 1433 lapsed. In January 2006, Leonardo Diaz obtained a Certificate of Zoning Compliance permitting "building reuse from used cars to detailing and tinting." The certificate declares, "No change of use may be made at this location unless a new Certificate of Occupancy is granted for such use and no change in this building or land may be made without first consulting the Zoning Enforcement Office." Because Moyer was without a dealer's license to sell vehicles on the property, and his tenants had a certificate permitting the property's repurpose to detailing and tinting, we believe the board could properly infer discontinued use as a display lot for at least six months or a year between 2006 and 2009.

Moyer distinguishes between the 2001 "Certificate of Occupancy" he received permitting his used car display and Diaz's 2006 "Certificate of Zoning

Compliance." He argues the 2006 certificate does not constitute evidence of abandonment because it did not revoke the 2001 certificate and the city did not present it to him, as property owner.

The Des Moines municipal code does not define the term "Certificate of Zoning Compliance." But an official explained its purpose is "to document the change in use mostly for office use." Both forms read substantially the same, including the requirement that "this certificate must be posted in a conspicuous place on the premises." The board was entitled to rely on the 2006 certificate as circumstantial evidence the property no longer served as a used car lot.

Moyer emphasizes evidence in his favor, including his oral lease with Diaz that included a right to display and sell used cars on Lot 1433; aerial photos of vehicles parked on the property from 2007 and 2008; the city's 2009 photographs of vehicle sales; and the city's inability to identify any direct evidence of a time period during which the lot did not display a vehicle.

But the presentation of substantial contrary evidence does not mean the board's determination is without foundation. *See Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 865 (Iowa 2008). As the district court put it:

> Was there evidence that could support a different conclusion than that which the Board reached? Of course. But it is not the court's proper role to second guess the Board. The issue is not whether the court would reach the same conclusion but rather whether the Board's conclusion is supported by substantial evidence.

We find substantial circumstantial evidence allowing the board to find Moyer abandoned the property's nonconforming use.

AFFIRMED.