

IN THE COURT OF APPEALS OF IOWA

No. 7-258 / 06-0269

Filed May 23, 2007

CITY OF OKOBOJI, IOWA,
Plaintiff-Appellee,

vs.

OKOBOJI BARZ, INC., d/b/a O'FARRELL SISTERS
and LEO PARKS JR.,
Defendants-Appellants.

Appeal from the Iowa District Court for Dickinson County, David A. Lester,
Judge.

The defendants appeal from the declaratory judgment order ruling that the
sale of alcoholic beverages was a distinct nonconforming use. **REVERSED**
AND REMANDED WITH DIRECTIONS.

Phil C. Redenbaugh, Storm Lake, for appellant.

Michael Chozen of Chozen & Saunders, Spirit Lake, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Baker, JJ.

BAKER, J.

The defendants appeal from the declaratory judgment order ruling that the sale of alcoholic beverages was a distinct nonconforming use. We reverse and remand with directions.

Background Facts and Proceedings.

The relevant facts are largely undisputed. Leo Parks Jr. is the sole owner of Okoboji Barz, Inc., under which he operates the O'Farrell Sisters Restaurant. Since 1958, the restaurant has been located on Lakeshore Drive in the City of Okoboji and operated as a family restaurant.¹ The restaurant seats approximately fifty people. It also has an area with five stools and a bar for waiting customers. Up until 1994, patrons were able to buy alcoholic beverages at the restaurant. The restaurant's liquor license was allowed to expire in 1994 and was not renewed.

In 1972, the City adopted a new zoning ordinance. At that time, the property on which O'Farrell Sisters sits was zoned C-Commercial. In 1978, the founding owner of the restaurant passed away. Apparently out of concerns about protecting the integrity of the existing residential areas around the restaurant, the property was rezoned R-1 Single-Family Residential. Under the zoning ordinance, restaurants, cocktail lounges, and taverns are not permitted.

In May 2004, Parks made an application to the City of Okoboji for a liquor license for the O'Farrell Sisters Restaurant. The city council denied the application on the basis that the proposed sale of alcohol constituted an expansion of a nonconforming use that had been discontinued for a period more

¹ Parks purchased the restaurant in 2004.

than one year.² Parks appealed this denial to the Iowa Alcoholic Beverages Division, which affirmed the City's decision. However, the final decision also noted that if Parks were to prevail on a then-ongoing zoning issue in the district court, then the license should be issued.

Just prior to that final decision, in July 2004, the City of Okoboji had filed a petition requesting that the district court issue an injunction prohibiting the defendants, Okoboji Barz, Inc., d/b/a O'Farrell Sisters and Leo Parks Jr., from operating a "bar or tavern" in the O'Farrell Sisters Restaurant. Later, the parties amended their petition and answer in order to request declaratory rulings concerning Parks' ability to serve alcoholic beverages at the restaurant. After a hearing on the matter, the court issued a ruling in which it concluded the sale of alcoholic beverages at the restaurant would constitute the addition of a separate nonconforming use under the City's zoning ordinance. The essence of the ruling was to preclude the restaurant from serving alcohol. Parks appeals.

Scope and Standards of Review.

The district court tried the request for declaratory judgment as an equity action. Therefore, our review is de novo. *Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264, 267 (Iowa 2000). Under this review, we give weight to the fact findings of the district court, especially as to the credibility of witnesses, but we are not bound by them. *Id.*

² The City's zoning ordinance provides that once a nonconforming use within a residentially zoned area is discontinued for a period of more than one year, that nonconforming use terminates and subsequent use of that land must conform to current zoning restrictions.

Final construction and interpretation of the 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 of Davenport*, 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 which would make them confiscatory. *Jersild v. Sarcone*, 260 Iowa 288, 293, 149 N.W.2d 179, 183 (1967).

Nonconforming Use.

The district court first declared that following the passage of the 1978 zoning amendment, by which the restaurant was rezoned to residential, the restaurant became a legal, pre-existing nonconforming use under the City's zoning ordinance. A nonconforming use is a use that was lawful when a zoning restriction was enacted and has continued to exist under a "grandfather" clause. See *Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264, 270 (Iowa 2000). The City's zoning ordinance provides that restaurants are not permitted uses in its R-1 Residential zoned area. Thus, we concur that, as currently situated, the O'Farrell Sisters Restaurant is a legal nonconforming use.

However, property may lose its protection as a permissible nonconforming use if the use of the property is enlarged or extended. *City of Jewell Junction v. Cunningham*, 439 N.W.2d 183, 186 (Iowa 1989). The supreme court has stated:

The prohibition against expanding or enlarging a nonconforming use defends against the growth of a pre-existing aggravation. That pre-existing aggravation, the nonconforming use, survives as a

matter of grace. The public is not required to expand upon that grace to its increasing aggravation.

Stan Moore Motors, Inc. v. Polk County Bd. of Adjustment, 209 N.W.2d 50, 53 (Iowa 1973). On the other hand, “an intensification of a nonconforming use is permissible so long as the nature and character of the use is unchanged and substantially the same facilities are used.” *City of Central City v. Knowlton*, 265 N.W.2d 749, 754 (Iowa 1978) (citation omitted). An increase in business, standing alone, does not constitute an illegal expansion of a nonconforming use. *Cunningham*, 439 N.W.2d at 186. “Reasonable and normal accessory uses are usually permitted in connection with nonconforming uses.” *City of Okoboji v. Okoboji Barz, Inc.*, 717 N.W.2d 310, 315 (Iowa 2006). The use made of the land at the time the ordinance became effective is the standard we use to determine whether there is an unlawful enlargement of a nonconforming use. *Knowlton*, 265 N.W.2d 749 at 754.

We next consider the court’s conclusion that by serving alcohol after a ten-year cessation of such sales the restaurant would thereby be engaging in a “separate and distinct nonconforming commercial” use of the property. As a result of this determination, the court further concluded that such an operation would constitute an “unlawful expansion of a nonconforming use.” For reasons that follow, we disagree with this conclusion.

The City’s zoning ordinance permits only single-family dwellings or duplexes in an R-1, single-family residential district. The ordinance further defines the terms “cocktail lounge/cabaret”, “nightclub”, “tavern”, and “restaurant”. All of these four distinct uses are permitted in a C-Commercial

district, but not in an R-1 Single-Family Residential district. Our review of these definitions leads us to disagree with the district court's conclusion that an alcoholic beverage-serving O'Farrell Sisters does not fall neatly into any of the first three categories. It would not become a cocktail lounge, night club, or tavern, because although it would be serving alcohol, the restaurant would not be "located in and accessory to" a separate business, "operated for the purpose of supplying entertainment or music," or "devoted primarily to the serving of spirituous liquors" O'Farrell Sisters Restaurant is a small family restaurant and even with the ability to sell alcoholic beverages will remain a restaurant.³

As a general principle, our supreme court has suggested that "considerable latitude will be allowed a landowner in making changes in the original nonconforming use if the changes are not substantial and do not impact adversely on the neighborhood." *Cunningham* 439 N.W.2d at 185. Furthermore, "an increase in business alone does not constitute an illegal extension of a nonconforming use." *Id.*

In *Cunningham*, a residential facility that had at one time housed elderly persons had moved toward the care of younger residents with records of mental illness and who are potentially more aggressive. *Id.* The court held that such a change did not alter the facility's status as a legal nonconforming use. *Id.* at 186.

The court analogized that situation to a grocery store. It commented that when

a grocer or other merchant is storing and selling merchandise of one type, his status as a nonconforming use should not be lost if he changes to another type of merchandise so long as the impact of the business on the neighborhood remains the same.

³ Restaurant is defined as "an establishment other than a boarding house where meals, which are prepared therein, may be secured by the public."

Id. Likewise, we believe similar reasoning applies in the present case. The service of alcoholic beverages in this restaurant occurred for many years before ceasing in 1994. Serving such drinks in a restaurant setting is not unlike choosing to add a different line of food or drink at a grocery store. There is absolutely no indication the character of the O'Farrell Sisters Restaurant will in any substantial way change by again serving alcoholic beverages. Indeed, the district court found "adding the sale of alcoholic beverages at O'Farrell Sisters would [not] have an adverse impact on the neighborhood or . . . result in any changes to the structure of area actually used for the operation of the restaurant" We believe that, under the City's zoning ordinance, O'Farrell Sisters will retain its essential status as a "restaurant."

Moreover, upon our *de novo* review we conclude that by re-acquiring the ability to serve alcoholic beverages from a small bar the nonconformity would not be excessively intensified or that the nature and character of the use would substantially change. Further, the sale of alcoholic beverages is not a change in use that is substantially different from the use the restaurant had at the time of the adoption of the zoning ordinance. *Cf. City of Okoboji*, 717 N.W.2d at 316. Parks testified that he has no plan to turn the restaurant into a tavern or nightclub if he is granted a liquor license. We agree with the district court's finding that, given the small size of the restaurant itself and the lot on which it sits, it is unlikely that it could be transformed into a busy bar or tavern. The majority of the space in the restaurant is devoted to restaurant seating, with only a small bar and a few barstools for customers waiting for a table. Even with the ability to sell

alcoholic beverages, it remains a legal, nonconforming use. That use would not be significantly expanded upon or changed merely by serving alcoholic beverages.

Conclusion.

When the evidence in this case is examined, we believe that even with the addition of liquor sales the O'Farrell Sisters Restaurant will retain its status as a legal nonconforming use, *i.e* a restaurant. There was no evidence of a material change in the structure or use itself, nor was there any substantial showing of an adverse impact on the neighborhood. Accordingly, we reverse the trial court and declare that the sale of liquor at the O'Farrell Sisters Restaurant is a legal nonconforming use. We further remand and order that the City of Okoboji shall issue a Class C liquor license to Okoboji Barz, Inc. for O'Farrell Sisters Restaurant. By virtue of this ruling, we need not reach the spot zoning issue.

REVERSED AND REMANDED WITH DIRECTIONS.