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TED THIEMAN, AN INDIVIDUAL, APPELLEE, V. CEDAR VALLEY FEEDING COMPANY, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS.

789 N.W.2d 714

Filed February 23, 2010. No. A-09-639.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Zoning: Ordinances.** A zoning regulation may not operate retroactively to deprive a property owner of his previously vested rights.
3. **Zoning: Ordinances: Proof: Time.** The burden is upon the landowner asserting a right of nonconforming use to prove that his use existed prior to the effective date of the ordinance.
4. **Zoning: Ordinances.** Ordinances which limit and plan for the elimination of nonconforming uses are generally considered a proper exercise of a municipality's power.
5. ____: ____. Zoning laws should be given a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.
6. ____: ____. Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.
7. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Boone County: MICHAEL J. OWENS, Judge. Affirmed.

Jeffery T. Peetz and Monica L. Freeman, of Woods & Aitken, L.L.P., for appellants.

Gregory D. Barton, of Harding & Schultz, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and IRWIN and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

In this appeal from a permanent injunction enforcing zoning regulations against a livestock feeding operation, we first consider whether the scope of a nonconforming use is dictated by the physical capacity of the premises or the actual number of cattle confined. We conclude that under the specific language of the regulations, actual usage controls. We then review the evidence de novo to determine whether such usage is limited to 5,000 cattle, as the district court concluded, or a greater number, as advocated by the operation. We find the evidence supporting the lesser number more persuasive, and accordingly, we affirm.

BACKGROUND

Richard Van Ackeren is part owner and manages the operations of Cedar Valley Feeding Company, Inc., and Van Ackeren Farms, Ltd. Van Ackeren's siblings own the remaining shares of these two entities. The first entity is a cattle feeding company. The second owns and leases the land on which the feeding operation is located. We refer to Van Ackeren and the two entities collectively as "Cedar Valley."

Ted Thieman owns real property in Boone County, where Cedar Valley's operations are located. Thieman filed a complaint pursuant to Neb. Rev. Stat. § 23-114.05 (Reissue 2007) as an "owner . . . of real estate within the district affected by the [zoning] regulations" to request that Cedar Valley be enjoined from violating the Boone County zoning regulations. Thieman claimed that the regulations prohibit Cedar Valley from having more than 5,000 cattle on its premises.

The zoning regulations, which became effective on October 1, 1999, included regulations governing livestock feeding operations. The regulations classified livestock feeding operations based on the number of animal units in the operation and contained setback requirements. Where a livestock owner could not comply with the setback requirements, the regulations required that the owner obtain a conditional use permit. The regulations also required the owner to obtain a waiver of

the setback requirements in order to receive the conditional use permit.

The regulations additionally provided for the nonconforming use of land where the use was in existence prior to the effective date of the zoning regulations. Article 11 of the applicable regulations, in pertinent part, provided as follows:

> Section 2. Non-Conforming Uses of Land.
>
> Where at the effective date of adoption or amendment of these regulations, lawful use of land exists that is made no longer permissible under the terms of this resolution as enacted or amended, such use may be continued so long as it remains otherwise lawful, subject to the following provisions:
>
> 2.1 No such non-conforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of these regulations;
>
> . . . .
>
> 2.3 If any such non-conforming use of land ceases for any reason for a period of more than twelve (12) months, any subsequent use of such land shall conform to the regulations specified by this resolution for the district in which such land is located.

The "Rules and Definitions" section of the index defined the term "enlargement" as "the expansion of a building, structure[,] or use in volume, size, area, height, length, width, depth, capacity, ground coverage, or in number." The regulations also required any livestock feeding operation "expanding to the next level" which did not meet the new setback requirements to obtain a conditional use permit. Under the regulations, an operation with 5,000 animal units is at a different level than an operation with more than 5,000 animal units.

The zoning administrator sent out a questionnaire to determine the extent of nonconforming uses in the context of livestock feeding operations. Not all operations received this questionnaire, and the questionnaires were sent to different operations at different times. The questionnaire, which the parties also described as the "no-fee" form, as completed and returned by Cedar Valley, stated as follows:

Date 9-26-00

. . . .

To protect residents, farms and livestock operations of Boone County, the Boone County Zoning Regulations, adopted on _____, 1999, requires any size livestock or poultry operation (confinement or open lot) to complete a no-fee registration permit.

Do you own any livestock or poultry? YES or NO [YES was circled.]

If yes, enter an average number of the livestock or poultry you have had in your operation at any one time.

Beef Cattle 5,000

Horses 7

. . . .

/s/ Richard Van Ackeren

Signature of Registrant

In 2007, Cedar Valley filed an application for a conditional use permit to construct waste control facilities and to expand its operation to 8,000 cattle, at least in part, by building additional pens. The Boone County Planning Commission and Board of Commissioners approved the application on the condition that Cedar Valley obtain a waiver of the distance requirements. Cedar Valley was not able to do so and withdrew the application. However, at trial, Van Ackeren testified that at the time of the application, Cedar Valley's facilities had a grandfathered capacity of 7,500 cattle. The 2007 application for a conditional use permit does not state the operation's existing capacity.

In 2008, Cedar Valley applied for a conditional use permit for the purpose of constructing waste control facilities only. The application specified that Cedar Valley no longer sought to construct additional pens but specifically reserved the right to "maintain the present animal capacity of such operations that existed on September 13, 1999, the date of enactment of the Boone County Zoning Regulations." The permit was granted.

The evidence adduced at trial indicated that Cedar Valley's confinement pens had a physical capacity in excess of 5,000 cattle but were not normally filled to capacity. Van Ackeren

testified that the first 17 pens were installed in 1978. In 1988, 14 additional pens were installed. According to a 1988 letter Van Ackeren wrote to the other owners of Cedar Valley, the new pens (then yet to be built) would increase the operation's capacity to "5,000 head." Ten additional pens were installed in 1997, and no new pens were constructed thereafter.

Van Ackeren testified that he calculated the maximum capacity of all these pens at 7,500 cattle. Van Ackeren stated that he determined the capacity of his pens based on industry standards by calculating the total amount of "fence line bunk" (5,650 feet) and dividing it by 9 to 10 inches per head of cattle. By our calculations, this would provide Cedar Valley with a maximum capacity of 6,780 to 7,533 head of cattle. Cedar Valley also provided an exhibit which showed 5,582.5 "feet of bunk" and which, based upon 9 inches per animal, stated a capacity of "7444" animals.

The parties disputed the actual number of cattle that were on the property immediately before the zoning regulations took effect and thereafter. Van Ackeren was not able to provide any records kept by Cedar Valley regarding the number of cattle that were on the property immediately prior to when the zoning regulations went into effect or at any other time in the surrounding years. Van Ackeren testified that he had stored these records electronically but that an employee had deleted them. Van Ackeren also testified that in general, the number of cattle in a pen depended on how many cattle a particular customer would place in a pen, that not all customers filled their pens to capacity, and that he would not place the cattle of two separate customers in the same pen. Van Ackeren also explained that the number of cattle in the operation fluctuated by season.

In addition to the "no-fee" form, the evidence included records from the Nebraska Department of Environmental Quality (DEQ) which list the number of cattle on the property as specified by Cedar Valley. In the DEQ's initial inspection of Cedar Valley on May 19, 1999, the data sheet stated that the total number of animal units on the property consisted of 5,000 feeder cattle. The DEQ inspector stated that this information was provided by Cedar Valley and that this number was carried forward to subsequent inspections. The inspector explained that

if Cedar Valley had wished to increase the number of cattle in the operation, it would have had to submit an application for a construction and operating permit. In an October 11, 2000, inspection, Cedar Valley proposed to add 2,500 more cattle to existing pens and expand to include 2,500 additional cattle but did not ultimately expand at that time. In three separate documents signed by Van Ackeren and submitted to the DEQ after the zoning regulations went into effect, the number of existing cattle was listed as 5,000. One of these documents is a 2007 application for construction approval in which Cedar Valley requested to increase its capacity from 5,000 cattle to 8,000 cattle, which application was approved by the DEQ. In a fourth document received by the DEQ on November 16, 2000, and signed by Van Ackeren, the "maximum number of Livestock" was listed as 5,000.

Van Ackeren testified that he did not know who told the DEQ that Cedar Valley had a capacity of 5,000 cattle. However, he admitted that he had never told the DEQ Cedar Valley actually had a capacity of 7,500 cattle and that he had signed the documents which stated Cedar Valley had a capacity of 5,000 cattle. Van Ackeren testified that he believed Cedar Valley would not have to get a permit from the DEQ to have a capacity of 7,500 cattle unless the DEQ found that Cedar Valley was otherwise in violation of the DEQ regulations. Van Ackeren also testified that he believed that the DEQ's use of the number 5,000 was incorrect and that his 2007 request to expand Cedar Valley was actually a correction.

The district court determined that at the time the zoning regulations went into effect on October 1, 1999, the existing use of Cedar Valley was "a maximum of 5,000-head feeder cattle operation" and enjoined Cedar Valley from maintaining more than 5,000 head of cattle on its premises as a nonconforming use.

This timely appeal followed.

ASSIGNMENTS OF ERROR

Cedar Valley assigns, reordered and restated, that the district court erred in (1) finding that Cedar Valley failed to prove that the grandfathered capacity of its cattle feeding operation was

7,500 head of cattle when the zoning regulations went into effect; (2) finding that Cedar Valley's cattle feeding operation had a grandfathered maximum of 5,000 head of cattle; (3) interpreting and applying the zoning regulations to require identification of a specific number of cattle on the premises on the date the zoning regulations went into effect; (4) making a finding of fact that when the zoning administrator accepted Van Ackeren's claim that Cedar Valley was operating at an average maximum capacity of 5,000 at the time the zoning regulations were passed, Cedar Valley received a grandfathered capacity of 5,000; and (5) basing its judgment on forms from the DEQ, because they are not probative of Cedar Valley's grandfathered capacity.

STANDARD OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

ANALYSIS

The sole issue we must address in this appeal is the extent of Cedar Valley's right to a nonconforming use of its real property stemming from its use of the property before the zoning regulations went into effect. We briefly recount the general rules that govern nonconforming uses.

[2,3] It is fundamental that a zoning regulation may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning regulation cannot deprive the owner of a use to which his property was put before the zoning regulation became effective. *Board of Commissioners v. Petsch*, 172 Neb. 263, 109 N.W.2d 388 (1961). The burden is upon the landowner asserting a right of nonconforming use to prove that his use existed prior to the effective date of the ordinance. *Hanchera v. Board of Adjustment*, 269 Neb. 623, 694 N.W.2d 641 (2005).

In order to determine the nature of Cedar Valley's right to a nonconforming use, we must first determine whether the actual

physical capacity of the facility or the extent of its use controls the extent of the nonconforming use that is exempted from the zoning regulations. We must answer this question because, from our review of the evidentiary record, it is apparent that the actual capacity of the facility was different from the number of animals that were placed in confinement.

Zoning regulations can limit the extent of the nonconforming use to the scale of operations existing at the time the regulation was enacted and, in the instant case, limit the use to the number of cattle actually utilized in the operation. An ordinance which "confine[s] a nonconforming use to its scale of operations at the time of the enactment of the restrictive ordinance . . . will prohibit an extension or an increase in intensity of a nonconforming use." 101A C.J.S. *Zoning and Land Planning* § 186 at 268 (2005).

[4-6] While no published Nebraska case has addressed this precise question, the general principles explained in several Nebraska cases focus our attention on the language of the zoning regulations and require us to enforce the plain meaning of the regulations. The right to maintain a legal nonconforming use "runs with the land," meaning it is an incident of ownership of the land, and is not a personal right. *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009). Ordinances which limit and plan for the elimination of nonconforming uses are generally considered a proper exercise of a municipality's power. *Mossman v. City of Columbus*, 234 Neb. 78, 449 N.W.2d 214 (1989). Zoning laws should be given a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole. *City of Lincoln v. Bruce*, 221 Neb. 61, 375 N.W.2d 118 (1985). Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning. *Id.* As the Supreme Court of Indiana explained in *Ragucci v. Metropolitan Development Com'n*, 702 N.E.2d 677 (Ind. 1998), drawing conclusions from the cases

is dangerous because the zoning regulations governing nonconforming uses vary widely, both from state to state and also from municipality to municipality within a state. Thus, the *Ragucci* court held that the interpretation of ordinances that restrict the expansion of nonconforming uses turns in the first instance on the specific language of the relevant ordinance, giving its words their plain, ordinary, and usual meaning. The Indiana court's holding seems to us entirely consistent with the Nebraska case law.

The plain language of the zoning regulations in the instant case definitively limits nonconforming uses of land. One regulation specifies that "[n]o . . . non-conforming use shall be enlarged or increased . . . ." Another defines the term "enlargement" to include an "expansion . . . in number." When read in the context of zoning regulations that specifically limit the permissible number of animals that may be kept on the premises of a particular livestock feeding operation, this provision prevents the addition of livestock beyond the extent of the nonconforming use in existence when the zoning regulations went into effect.

Two cases cited by Cedar Valley illustrate the danger in comparing cases, which was recognized by the Indiana court. To support the argument that the facility's capacity controls, Cedar Valley cites *City of Central City v. Knowlton*, 265 N.W.2d 749 (Iowa 1978), and *Jahnigen v. Staley*, 245 Md. 130, 225 A.2d 277 (1967). However, the ordinances in these cases differ significantly from the regulations in the case before us. In *Knowlton*, the ordinance did not define "enlarged" in terms of numbers. In *Jahnigen*, the code defined nonconforming use solely in terms of area. On the other hand, the unpublished case cited by Thieman, *Gem City Metal Spinning Co. v. Dayton Bd. of Zoning Appeals*, No. 22083, 2008 WL 185535 (Ohio App. Jan. 18, 2008), involved ordinances regulating both "area" as well as "use." The latter case more aptly compares to the case before us than those cited by Cedar Valley.

Cedar Valley also argues that the Nebraska Supreme Court's decision in *Board of Commissioners v. Petsch*, 172 Neb. 263, 109 N.W.2d 388 (1961), requires us to conclude that capacity, as opposed to actual use, determines the extent of the

nonconforming use. We distinguish *Petsch* because it decides an entirely separate issue—the extent to which a property owner has an interest in a nonconforming use resulting from an improvement which is partially completed at the time the zoning regulation becomes effective. In *Petsch*, at the time a zoning regulation went into effect which prohibited the use of real property as a trailer court, a property owner had completed substantial work on a trailer court and it was partially occupied. The district court limited the nonconforming use to the use of those trailer spaces that were already in use. The Nebraska Supreme Court reversed this decision based on its determination that the property owner had a vested interest in the nonconforming use of the entire trailer park, which was not fully constructed. The court explained that "where a trailer-court project is partially completed when zoning regulations become effective, and the evidence is clear as to the extent of the project, the completed project will ordinarily determine the scope of the nonconforming use." *Id.* at 268, 109 N.W.2d at 391-92. In the instant case, however, all construction had been completed more than a year prior to when the zoning regulations became effective. Thus, Cedar Valley had the opportunity to use its property as it wished but did not fill the property to what Cedar Valley now claims is its full capacity. In addition, there is no evidence that Cedar Valley was in the process of expanding its operation at the time the zoning regulations became effective but was prevented from doing so. Therefore, the extent of Cedar Valley's nonconforming use is limited by the number of livestock in its operation at the time the zoning ordinance was enacted.

Thus, the remaining question is the extent of the nonconforming use which existed at the time the zoning regulations went into effect. We conclude that the nonconforming use consisted of the confinement of 5,000 cattle.

We first base our conclusion, in part, on the information provided in the "no-fee" form that the average number of cattle in Cedar Valley's operation was 5,000 as of September 26, 2000. Cedar Valley has argued, and we agree, that this form has no legal effect on the extent of the grandfathered exemption. However, this evidence is probative of the number of

cattle in the operation at the time the zoning regulations went into effect.

Second, we base this conclusion on the numerous documents on file with the DEQ, some of which were signed by Van Ackeren, which state that Cedar Valley had 5,000 head of cattle. Cedar Valley insists that these documents are not probative of its grandfathered capacity, because the DEQ has nothing to do with zoning. It is true that the documents were not generated for this purpose. However, the information contained in the documents is relevant to our present inquiry, which is the number of cattle on Cedar Valley's property at the time the zoning regulations went into effect. It reflects that Cedar Valley reported 5,000 cattle in 1999, that Cedar Valley never requested that this number be corrected, and that Cedar Valley did not increase the number until 2007.

While we have weighed Van Ackeren's trial testimony, we find the documentary evidence more persuasive. Cedar Valley consistently reported having 5,000 cattle both before and after the zoning regulations went into effect. Therefore, the evidentiary record leads us to the conclusion that Cedar Valley's nonconforming use of the property is limited to the confinement of 5,000 cattle and that the district court did not err in granting an injunction recognizing that Cedar Valley's nonconforming use was limited to this number.

Resolution of the instant case does not require us to determine how the extent of nonconforming use would be calculated if more precise records showed seasonal and yearly fluctuations in the number of cattle.

Although we have considered Cedar Valley's other arguments in our review of the evidence, we need not address its remaining assignments of error. The third assignment of error pertains to the district court's interpretation of the zoning regulations. As an appellate court, we review questions of law independently of the lower court's conclusion. See *R & D Properties v. Altech Constr. Co.*, 279 Neb. 74, 776 N.W.2d 493 (2009). The fourth and fifth assignments of error relate to the district court's evidentiary findings and the weight it accorded to specific portions of the evidentiary record. Because we review the case de novo on the record, we do not review

the district court's findings in this regard and reach our own conclusions. See *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

[7] While our analysis differs to some degree from that of the district court, we ultimately reach the same conclusion. Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009).

CONCLUSION

We conclude that under the applicable zoning regulations, the extent of the grandfathered nonconforming use of a livestock feeding operation is based on the actual use, and not capacity. Because Cedar Valley consistently reported that there were 5,000 cattle on its premises, we affirm the district court's decision to grant an injunction prohibiting Cedar Valley from maintaining in excess of 5,000 cattle on its premises as a nonconforming use.

AFFIRMED.