7-16-2010

County of Twin Falls v. Hettinga Respondent's Brief Dckt. 37047

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE COUNTY OF TWIN FALLS, IDAHO A Political Subdivision of the State of Idaho, Plaintiff/Respondent, vs. ERIC HETTINGA, Defendant/Appellant.	Supreme Court Docket No. 37047-2009

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR TWIN FALLS COUNTY

District Court Judge G. Richard Bevan, Presiding

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III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal of an Order by the District Court, enjoining the Appellant from conducting trucking and/or hay hauling operations of any kind from the subject property located at 2319 East 4000 North, Filer, Idaho. The District Court concluded that "'trucking and/or hay hauling operations' includes, but is not limited to parking, storing, driving onto or from, maintaining in any manner, however slight, any and all equipment, trucks and trailers used in any trucking business on the subject property located at 2319 East 4000 North, Filer, Idaho." R. p. 103.

B. COURSE OF PROCEEDINGS BELOW

On May 21, 2009, a court trial was held on the Respondent's Complaint, seeking an injunction to prohibit the Appellant from using the subject property, zoned R-A Residential Agricultural District, for trucking and/or hay hauling operations. On August 21, 2009, the District Court issued its Findings of Fact, Conclusions of Law, and Order granting the relief sought in the Complaint.

C. STATEMENT OF THE FACTS

The evidence established that the Appellant resided at 2319 East 4000 North, Filer, Idaho. This property is outside the City of Filer, but inside the area of city impact as established by ordinances adopted by the City of Filer and the County of Twin Falls. The property is zoned R-A Residential Agricultural District, and is part of a small lot residential subdivision on the outskirts of Filer, Idaho.

The Appellant developed the front (northerly) portion of the property as his residence. His residence occupies approximately one-quarter to one-third of the 1.11 acres of the residential subdivision lot. The remaining two-thirds to three-quarters of the residential subdivision lot were developed as a parking lot/secure storage yard for the Appellant's semi-trucks and trailers and equipment used for his trucking business. The parking lot has been completely paved with recycled asphalt paving material, is surrounded by a six-foot high chain link fence topped by two strands of barbed wire, is lighted with a yard light, and is monitored with cameras. In addition to four semi-trucks, the Appellant parked three sets of hay trailers (total of six trailers), plus a belly dump trailer, a front loader used for loading large bales of hay, and other miscellaneous items related to the trucking and hay hauling operation on the residential lot. The Appellant periodically did maintenance on the trucks and trailers on the residential lot, and also hired seasonal employees to operate his trucks from the property during the haying season.

The next door neighbors complained to the City of Filer and Twin Falls County Planning and Zoning about the problems associated with the trucking operation. They testified that the noise, vibration, and diesel smoke coming from the Appellant's property, especially during the early morning hours, is extremely disturbing to the residential use and enjoyment of their own residential property.

IV. ISSUES PRESENTED ON APPEAL

The sole issue presented on appeal by the Appellant is whether the District Court erred in finding that the Appellant's use of the subject property was in violation of the R-A Residential Agricultural zoning of the property.

The second issue presented is whether the County should be entitled to an award of attorney fees pursuant to Idaho Appellate Rule 41 and Idaho Code §12-121, and costs pursuant to Idaho Appellate Rule 40.

V. ARGUMENT

A. FACTS RELEVANT TO THE ISSUE ON APPEAL

1. At all times relevant, Appellant resided at 2319 East 4000 North, Filer, Idaho. Tr. p. 108, L. 2.

2. The subject property lies outside the Filer city limits, but is within the City's area of city impact ("area of impact") as designated by Twin Falls County Ordinance §8-9-19(C). Exhibits 1 and 2. Twin Falls County Code § 8-9-19(C)(2) adopts the City of Filer's zoning regulations by reference and makes such regulations applicable to the area of impact. Tr. p. 14, L. 7-25. Exhibits 2 and 3.

3. Filer's zoning and subdivision regulations govern land use issues within the area of impact. Exhibits 2 and 3.

4. The area of impact zoning map, as adopted by Filer and the County defines the area of impact. Exhibit 1.

5. The area of impact zoning map designates the subject property as lying within an R-A Residential Agricultural District, within Filer's area of impact. Exhibit 1. Tr. p. 14, L. 9.

6. Filer City Code §9-5-2 provides the use regulations for R-A Residential Agricultural District. The R-A Residential Agricultural District is "intended to provide areas for low density residential development and continuation of farm uses where compatible with each other."

Exhibit 5.

7. The following uses are permitted in the R-A Residential Agricultural District:

   a. Cemeteries.

   b. Churches and religious facilities.

   c. Home occupations, suburban, rural or external.

   d. Noncommercial public parks and recreation grounds and buildings.

   e. One- and two-family dwellings.

   f. The growing of soil crops, including all farming, livestock and poultry raising activities.

8. The ordinance prohibits any use not specified in the ordinance, "unless administrative determination is made that the use is similar enough to a use listed [in the ordinance] that [the] distinction between them is of little consequence." Filer City Code §9-5-2 (C). Exhibit 4.

9. Appellant maintains his personal residence on the subject property. Tr. p. 108, L. 2. The residence is a one-family home, approximately 2000 square feet, with the front (northerly) one-quarter to one-third of the subject property containing the residence. Tr. p. 113, L. 1-4. The remaining three-quarters to two-thirds of the residential lot is covered by recycled asphalt. Tr. p. 136, L. 18-25, P. 137, L. 1. The witnesses generally called this area a parking lot. Tr. p. 50, L. 10-17.

10. The entire parking lot is paved with recycled asphalt paving material. Tr. Pp. 131-132. It is surrounded by a six-foot high chain-link fence topped by two strands of barbed wire, lighted with a yard light, and is monitored by security cameras. Tr. p. 126. Overall, there is very

little difference between the Appellant's parking lot and any other secure storage yard in a commercial or industrial area. R. p. 77

11. Appellant has parked as many as four semi-trucks, six semi-trailers, a belly dump trailer, a large front loader, and other miscellaneous items, in the secured parking lot. Tr. p. 47-49.

12. Appellant has also had employees who drive his trucks for him come to the property, park for the day while driving the hay trucks, and leave at the end of the day. Tr. p. 53, L. 6-25.

13. A digital video recording (DVD) admitted in evidence in the trial court shows the Appellant driving his semi onto the property, parking, and letting the truck idle while cleaning it. The idling semi is very noisy and creates vibration that is noticeable on the recording. The DVD also shows a number of other items of personal property consistent with equipment maintenance, including a ladder, a garbage can, 5-gallon buckets and other containers and tarps consistent with maintenance-storage. The DVD also shows workers performing maintenance on a truck while on the property. Exhibit 6.

14. The DVD also records loud noise coming from a semi truck on the subject property during night-time hours. Exhibit 6. The testimony at trial was that this occurred at all hours of the night, as late as 11:00 p.m. to as early as 3:00 a.m. Tr. p. 51, L. 2-22.

15. The Appellant's next door neighbors, the Nielsons, complained to both City and County officials about the trucking and/or hay hauling operation being conducted next door to them, and the adverse impact of the noise, smoke and vibration on the residential use and

enjoyment of their residential property. Tr. p. 51, L. 2-22.

B. STANDARD OF REVEW

A trial court's findings of fact will not be set aside unless clearly erroneous, which is to say that findings that are based upon substantial and competent, although conflicting, evidence will not be disturbed on appeal. DeChambeau v. Estate of Smith, 132 Idaho 568, 571, 976 P.2d 922, 925 (1999).

C. LEGAL AUTHORITY APPLIED TO RELEVANT FACTS

This case presents the Court with issues of statutory interpretation and application of the Filer City Code §9-5-1, et seq. to the facts noted above. Statutory interpretation presents a legal question, which must be resolved beginning "with an examination of the statute's literal words." State v. Burnight, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction. State v. Rhode, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). "Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations. Albee v. Judy, 136 Idaho 226, 231, 31 P.3d 248, 253 (2001)." Idaho Conservation League, Inc. v. Idaho State Dep't of Agriculture, 143 Idaho 366, 368, 146 P.3d 632, 634 (2006).

> Moreover, unless a contrary purpose is clearly indicated, ordinary words will be given their ordinary meaning when construing a statute.... In construing a statute, this Court will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions....

Curlee v. Kootenai County Fire & Rescue, 148 Idaho 391, 224 P.3d 458 (Idaho 2008) (citations omitted).

"The comprehensive plan and subsequent amendments thereto together with the zoning and subdivision ordinances and subsequent amendments thereto, as officially adopted by the city and all national and state uniform codes so adopted, shall apply to the agreed upon area of city impact." Twin Falls County Code §8-9-19(C)(2). Filer City Code §9-5-2(A) sets forth permissible uses within the R-A Residential Agricultural District where the subject property is located.

The ordinance in question is a "permissive zoning ordinance." A permissive zoning ordinance "is drawn to show those uses which are permitted for a particular district, and any use which is not expressly permitted in a given zone or district is thereby excluded from it." State ex rel. Barnett v. Sappington, 266 S.W.2d 774, 777 (Mo. App. 1954). The Filer ordinance prohibits those uses not specified in the ordinance: "Uses not specified above are prohibited unless administrative determination is made that the use is similar enough to a use listed above that distinction between them is of little consequence." Filer City Code §9-5-2(C).

The definitions of permitted uses in §9-5-2(A) are plain and unambiguous, and the statute readily provides notice of those uses that are allowed in the R-A Residential Agricultural District. Conspicuously absent from the permitted uses is any type of trucking operation. For purposes of the issues presented in this case, any use not specified is prohibited. That pronouncement is straightforward on its face and not subject to multiple interpretations.

Therefore, Appellant has failed to establish that his use is either: 1) specified in the ordinance, or 2) an ancillary use of his residential property. Whether the required burden of proof on a particular issue has been met is a question for the trier of fact. County of Canyon v. Wilkerson, 123 Idaho 377, 848 P.2d 435 (Ct. App. 1993) (citing In re Estate of Bogert, 96 Idaho 522, 526, 531 P.2d 1167, 1171 (1975)).

The ordinance provides that a one-family dwelling, such as Appellant's home, is clearly allowed in this zone. Moreover, the intent of the regulation is to provide for both "low density residential development and *continuation of farm uses where compatible with each other*." Id. §9-5-1. Nothing that Appellant is doing regarding his trucks is part of a farming operation at the subject property. While his trucks haul hay from farmers to buyers, his business is trucking, not farming. It is beyond dispute that trucking is not a permitted use in the R-A zone under the city ordinance.

The Idaho Supreme Court has discussed accessory uses of property under a zoning dispute. See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Ashton, 92 Idaho 571, 574, 448 P.2d 185, 188 (1968). The Court there noted that "[w]here use for [certain] purposes is allowed in a zone, uses customarily incidental or accessory to [those] uses may not be excluded or unduly restricted. *But such incidental uses must be reasonably closely related, both in substance and in space, to the main [allowed] purpose."* (Emphasis added). The Idaho Court of Appeals also ruled upon this issue in City of Boise City v. Gabica, 106 Idaho 94, 675 P.2d 354, 356 (Ct.App. 1984). There the court interpreted a city ordinance's definition of "accessory uses" and held that it is clear as a matter of law that operating a business was not "incidental" to residential

use of single-family dwelling. Another case provided a similar definition: "A valid accessory use to a single-family dwelling is one which actually furthers or enhances the use of the property as a residence and not one which merely helps finance the property." Lerner v. Bloomfield Township, 106 Mich.App. 809, 308 N.W.2d 701, 703 (1981). See also Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 579, 524 S.E.2d 404, 410 (1999):

> Accessory uses are those which are customarily incident to the principal use. "In order to qualify as a use incidental to the principal use of a nonconforming premises, such use must be clearly incidental to, and customarily found in connection with, the principal use to which it is allegedly related." ... An accessory use must be one "so necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it."

(Citations omitted).

Here the Appellant's trucking business is not so necessary or commonly to be expected, or so closely related, both in substance and in space, to his main purpose, which is to live on the residential property, that the trucking activities can be called an incidental use to his residing there. To apply the Michigan definition in Lerner, supra, Appellant's helping to finance his property through a trucking business does nothing to further or enhance the use of his home.

There does not appear to be any Idaho case with significant factual similarity to this case to give guidance. However, authority from other jurisdictions, have nearly uniformly determined that parking heavy trucks or equipment in a residential, or residential-agricultural zone, is not a use incidental to residential use. See, e.g., Potts v. City of Hugo, 416 N.W.2d 465 (Minn. App. 1988) (holding as a matter of law that parking a semi-truck and trailer is not customarily incidental to a residential use); Galliford v. Commonwealth, 60 Pa.Cmwlth. 175, 179, 430 A.2d

1222, 1224 (1981) (14,500 pound, commercially registered truck is not accessory to a residential use; it is commercial in nature); St. Louis County v. Taggert, 866 S.W.2d 181 (Missouri App. 1993) (The parking of defendants' dump trucks used in their gravel hauling business can hardly be said to be an accessory use. The Court held, "as a matter of law, that the parking of such trucks is not a use which 'serves only' to further the successful utilization of the primary residential use, and therefore is not an accessory use within the County's zoning ordinance."); Taddeo v. Commonwealth, 49 Pa.Cmwlth. 485, 412 A.2d 212 (1980), zoning violation upheld where a business owner parked heavy equipment on his residential property, concluding that:

> The use of the equipment parked at Appellant's home and in the vacant lot adjacent to it is such an integral part of Appellant's business, which is certainly commercial in nature, as to be inseparable from that business. By parking the equipment at his residence, *Appellant has transferred that part of his commercial enterprise to a residential site, something the zoning ordinance will not permit him to do.*

Id. 412 A.2d at 213 (Emphasis added). These cases are striking in their factual similarity to this case and they support the District Court's decision.

Appellant cites the activities of neighbors as evidence to support his claim that his parking of equipment is "the kind of use normally incidental" to the residential use in his neighborhood. The activities cited are dissimilar in scope and nature to the scope and nature of Appellant's activities. As an aside, Appellant has failed to establish selective enforcement or discriminatory enforcement practices on the part of the County or the City in this case. As such, the County's failure to enforce the ordinance against others in Appellant's subdivision is not a defense regarding Appellant's conduct in this case. See City of Chicago v. Unit One Corp., 218 Ill.App.3d 242, 578 N.E.2d 194 (1991) (city was not estopped from enforcing ordinance even

though it had issued permit for signs for over 15 years, and its failure to prosecute other obvious violators did not violate equal protection absent showing that selection of owner was based on some invidious classification); Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 576-577, 524 S.E.2d 404, 408-409 (1999) (discriminatory enforcement not established where, even though trucker presented eleven photographs of "other large commercial vehicles in the immediate area that were not subjected to any enforcement action," he failed to establish any purposeful discrimination on the part of the planning and zoning officials.).

The District Court recognized, as did the Court in City of Boise City v. Gabica, 106 Idaho 94, 675 P.2d 354 (1984), that "a residential use may have many components." As the Gabica court stated:

> Use by a family of a home under our customs includes more than simple use of a house and grounds for food and shelter. It also includes its use for private religious, educational, cultural and recreational advantages of the family. Pursuit of a hobby is clearly customarily a part of recreational activities.

Id. (quoting Borough of Chatham v. Donaldson, 69 N.J.Super. 277, 174 A.2d 213, 216 (1961)). Appellant's business operation, however, does not fit within any of these components of residential living. Appellant's operation of his trucking business starts and ends with parking and maintaining his trucking assets. The court in Gabica stated:

> Our characterization of the business is consistent with the general view that a commercial enterprise, conducted to make money, is a principal use, of itself, and is not occasioned by day-to-day living in a residential area. See, e.g., Perron v. City of Concord, 102 N.H. 32,150 A.2d 403 (1959). It is also consistent with Idaho case law that an "accessory use" will be recognized where it is "sufficiently connected with," and an "integral part" of, the principal land use.

106 Idaho at 96, 675 P.2d at 356.

Appellant argues, not that the trucking and/or hay hauling operation is an accessory or incidental use to his residential property, but rather, that it is "farming". This argument fails because the Appellant is not engaged in "[t]he growing of soil crops, including all farming, livestock and poultry raising activities" on the subject property, as permitted by Filer City Code §9-5-2(A). He argues that this trucking and/or hay hauling operation *could be* accessory to or incidental to a farming operation, if the subject property was a farm instead of residential property. Since no portion of the subject property is used for farming (the growing of soil crops, including all farming, livestock and poultry raising activities), Appellant's trucking and/or hay hauling operation is not an incidental or accessory use to farming on the subject property.

The flaw in the Appellant's argument can be illustrated by examples of other uses that *could be* incidental or accessory to a farming use, if they were located on a farm and incidental or accessory to *that farm*. Farmers often perform repair work on their farm equipment and trucks, so the Appellant would argue that an independent tractor repair shop or truck repair shop should be permitted to be established in a residential subdivision in the R-A Residential Agricultural District. Farmers often maintain their own grain storage facilities on their farms, so the Appellant would argue that an independent grain elevator and storage facility should be permitted in a residential subdivision in the R-A Residential Agricultural District. Farmers often spray herbicides and pesticides on their crops using their own equipment, so the Appellant would argue that an independent spraying operation should be allowed to be established in a residential subdivision in the R-A Residential Agricultural District. Surely, there are more examples of farm-related activities that would be considered incidental or accessory to a farming operation, if located on and related only to that farm, that would be

considered commercial or industrial uses when performed commercially and independently of any particular farm. The purpose of the R-A Residential Agricultural District makes it clear that the Appellant's establishment of a trucking and/or hay hauling operation is inconsistent with permitted uses in the zone: "The R-A residential agricultural zone is intended to provide areas for *low density residential development and continuation of farm uses where compatible with each other.*" Filer City Code §9-5-1 (Emphasis supplied). The Appellant's use is not a continuation of a farm use, but rather establishment of a new commercial/industrial type use which is totally incompatible with residential use.

Respondent seeks an award of attorney fees pursuant to Idaho Code §12-121 and costs pursuant to Idaho Appellate Rule 40. An award of attorney's fees is proper under Idaho Code §12-121 if the Court is left with the "abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably and without foundation." Balderson v. Balderson, 127 Idaho 48, 54, 896 P.2d 956, 962, cert. denied, 516 U.S. 865, 116 S.Ct. 179, 133 L.Ed.2d 118 (1995) (citing Minich v. Gem State Developers, Inc., 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979)). While Respondent recognizes the burden placed on it to recover attorney fees under this section, Respondent believes that the burden is met in this case. Appellant's appeal is truly without merit given the language of the ordinances involved, the cardinal rules of statutory construction, and the undisputed facts of the case. Applying the rules of statutory construction to this case, no legitimate issue was raised by Appellant.

VI. CONCLUSION

For the foregoing reasons, the Findings of Fact, Conclusions of Law and Order by the District Court should be affirmed, and Respondent should be awarded its attorney fees and costs in defending the appeal.

DATED THIS 15th day of July, 2010.

WONDERLICH & WAKEFIELD

By_____
Fritz A. Wonderlich
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 15th day of July, 2010, I caused a true and correct copy of the RESPONDENT'S BRIEF to be hand-delivered to the following person via Courthouse Mail to:

Tim J. Williams
P.O. Box 282
Twin Falls, ID 83303-0282

_____
Frtiz A. Wonderlich