

Land Use Case Briefs

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Middle Road Developers, et. al. v. Windmiller Design and City of Bettendorf (Iowa Court of Appeals, January 16, 2008)

Notation on a plat map was sufficient to create a use restriction preventing the city from selling a parcel of land to developer without deference to the restriction.

Middle Road Developers, L.C., owned real estate platted as Century Heights Twelfth Addition in the city of Bettendorf. When the property was being developed, the city required outlots be set aside in the creek area of the addition for use as a stormwater detention area. Middle Road complied with the requirement and sold outlot A to the city in February 2003 for below market price.

General notes on the plat map for the Twelfth Addition signified that outlot A shall be used as a recharge-infiltration-detention area with native vegetation. As a result, the designation of outlot A made the adjacent residential housing lots more valuable. In May 2001, purchasers of lot 21, which backed up to outlot A, were informed by the city that outlot A was green space and that its designation could not be altered by the city. In early 2005, lot 21 owners were again assured by the city that nothing could be built on outlot A. Windmiller Design built a home on Lot 17, which also adjoins outlot A. At the time of its sale Windmiller informed the purchaser that outlot A was to remain a green space. The owners of lot 16, which also adjoins outlot A, paid a premium for the lot and specifically built a house that architecturally takes advantage of the green space.

In mid-2005 Windmiller approached the city about purchasing all or a portion of outlot A because a buyer was interested in developing the property. The city determined that outlot A was larger than necessary for stormwater detention, and after notification of the proposed sale was posted in the Bettendorf News, the city sold the eastern portion of outlot A to Windmiller for the same amount the city had purchased the land from Middle Road. No special notification of the sale was given to the surrounding homeowners and Windmiller began the construction process in the fall of 2005.

Middle Road filed a petition for temporary and permanent injunction against Windmiller and later amended it to include the city of Bettendorf. In December 2006 the trial court issued an order enjoining Windmiller and the city from using any portion of outlot A for any purpose other than as a recharge-infiltration-detention with native vegetation.

On appeal Windmiller and the city argued that the note on the plat map does not create a covenant or use restriction running with the land. Further, they asserted that pursuant to section 354.23, a city or county “may vacate part of any official plat that had been conveyed to the city....or dedicated to the public which is deemed by the governing body to be of no benefit to the public.” The Court of Appeals disagreed, stating that while the city was empowered the sell

the portion of outlot A, the city could not sell the land free of restrictions contained in the plat. “Where each lot owner is presumed to have bought with notice of and in reliance on the material in the plat dedication, private rights have arisen.” The adjoining land owners acquired rights to the restrictions because of the increased value and desirability of their properties.

The Court of Appeals relied heavily on *Gray v. Osborn*, [discussed in a previous CoZO newsletter], which made clear that a plat map alone can provide the necessary language to bind successive owners of real estate to restrictions or limitations on its use. In *Gray* the court looked to the intention of the parties to determine the existence of an easement. The court applied the same reasoning and held that the plat map clearly denoted an intention to create use restrictions and those restrictions survived the city’s ownership and were applicable to Windmill.

City of Okoboji v. Okoboji Barz, Inc. (Iowa Supreme Court, March 14, 2008)

Resumption of sale of alcoholic beverages is a permissible accessory use to a nonconforming use; not an impermissible expansion or “new” nonconforming use..

This was an appeal from a 2007 Iowa Court of Appeals case reported in the Spring 2007 CoZO Newsletter. Please see that brief for the facts of the case.

The issue was whether resumption of alcohol sales after a 10-year hiatus would constitute an impermissible expansion of a legal nonconforming use or, alternatively, a new, separate nonconforming use. The nonconforming use provision in the city of Okoboji ordinance states, “nonconformities shall not be enlarged upon, expanded or extend, or be used as grounds for adding other structures or uses prohibited elsewhere in the same district.” No mention is made to alcoholic beverages in the definition of a restaurant given by the ordinance. The city asserted this expresses clear intent for the sale and service of alcoholic beverages to be a separate and distinct use of property from the property as a restaurant.

The Supreme Court held the interpretation by the city ignores the doctrine of accessory uses of property. The Court determined the sale and service of alcoholic beverages in conjunction with the operation of a nonconforming use of property as a restaurant does not constitute an expansion of the nonconforming use as a matter of law. The sale of alcoholic beverages is permissible as an accessory use because the use is so common the ordinance could not have intended to prevent its use; this was evident by the numerous restaurants in the region that customarily serve alcoholic beverages to patrons. The Court expressed no opinion as to whether the restaurant owner was entitled to a liquor license but only determined the city ordinance does not prevent a restaurant from serving alcoholic beverages as an accessory use, and the sale and service of alcoholic beverages does not, by itself, constitute an unlawful expansion of the nonconforming restaurant.

Simpson, et. al. v. Kollasch, et. al. and General Development Corp. (Iowa Supreme Court, March 28, 2008)

A court-ordered injunction to stop development of CAFO based on theory of anticipatory nuisance was not appropriate.

In 2003, General Development filed an application with the Iowa DNR for a permit to construct a 10,900-hog CAFO in Kossuth County. A public meeting was held concerning the proposed facility and the Kossuth County Board of Supervisors submitted a list of concerns to the DNR. Prior to the issuance of the permit by the DNR, the neighbors of the proposed CAFO filed this case alleging anticipatory nuisance. The district court granted partial summary judgment in favor of General Development and dismissed the neighbors' nuisance claim. Neighbors appealed.

The Supreme Court agreed with the district court that an injunction based on an anticipatory nuisance is an extraordinary remedy requiring a high burden of proof that a nuisance will result. The Court cited precedent which stated, "An anticipated nuisance will not be enjoined unless it clearly appears a nuisance will necessarily result from the act...it is sought to enjoin." Several neighbors testified they had existing health problems they feared would worsen because of the facility. The Court stated when determining whether a nuisance exists, it uses a "normal person standard" to determine whether a nuisance involving personal discomfort or annoyance is significant enough to constitute a nuisance; also the health concerns were merely speculative. Measures were taken to ensure water contamination would not occur as a result of the facilities presence and odor issues were considered to be minimal considering the distance of the neighbors' property relevant to the CAFO site.

The Court stated until the facility is in operation, it cannot inevitably be determined the facility will be a nuisance. Lay and expert testimony regarding potential odors, water contamination, health effects and reduction in property values was presented by both sides. Such conflicting evidence made it impossible for the Court to conclude negative effects would necessarily result.

Wiebbecke v. Benton County Board of Supervisors, (Iowa Court of Appeals, July 16, 2008)

Landowner may not voluntarily withdraw land included in agricultural land preservation ordinance under Iowa Code 335.27.

Wiebbecke purchased two acres of agricultural land in rural Benton County in 2004 without checking first for any restrictions on the land. Wiebbecke intended to build a large metal pole building in which he would reside. He later discovered his land was within Benton County's Agricultural Land Use District. On January 12, 2005 Wiebbecke requested a land use change. The Benton County Board of Supervisors denied the request at a February 4, 2005 public hearing. The minutes of the meeting reflected a finding by the supervisors that the land had a corn suitability rating of eighty-five, and "the current rule is that any change on land with a CSR over 70 is not allowed."

Wiebbecke appealed this decision to the Benton County Board of Adjustment. After a public hearing on March 30, 2005, the Board agreed with the Board of Supervisors, citing the County Agricultural Land Preservation Ordinance. On September 7, 2005, the Board of Adjustment had another public meeting to reconsider its previous decision, but again denied Wiebbecke's request. Wiebbecke filed a petition in district court, but the district court affirmed the Board's denial of Wiebbecke's request for a variance. Wiebbecke appealed the ruling.

On appeal Wiebbecke asserted the Board's decision was not supported by substantial evidence because it failed to make sufficient written findings of fact. The Court disagreed. It found the

Board's reasoning and conclusions were included in the reported and transcribed hearing, and that this record was sufficient support

Wiebbecke also argued that the creation of the Agriculture Land Preservation Ordinance was contrary to statutory provisions, because Iowa Code sections 352.6 and 352.9 required the county to either obtain his permission to include his land in the preservation area or allow for him to withdraw his land upon request. The Court distinguished between ag land preservation ordinances, such as Benton County's, enacted according to 335.27 and agricultural areas created under chapter 352. Ag preservation ordinances are enacted after notice and hearing, whereas agricultural areas are "self-imposed zoning" initiated by the landowners. Ag preservation ordinances are not subject to the consent and withdrawal provisions of an agricultural land area.

The Court also rejected Wiebbecke's claim that the ordinance was an unconstitutional taking of property without just compensation