IN THE COURT OF APPEALS OF IOWA

FILED
JAN 27 1988
CLERK SUPREME COURT

BERDELLA WEHRMACHER

Plaintiff-Appellee,

vs.

BOARD OF ADJUSTMENT OF THE CITY OF COUNCIL BLUFFS, IOWA,

Defendant-Appellant.

Filed January 27, 1988

7-615
87-863

311

Appeal from the Iowa District Court for Pottawattamie County (No. 58138) - James M. Richardson, Judge.

Defendant appeals trial court's order sustaining writ of certiorari granting plaintiff a variance. **AFFIRMED.**

Robert L. O'Brien, Assistant City Attorney, for defendant-appellant.

Raymond E. Pogge of Pogge, Root and Fleming, Council Bluffs, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, and Sackett, JJ. Schlegel, J., takes no part.

PER CURIAM 312

This case involves the issue of a trial court's overturning a decision of the Council Bluffs Zoning Board and granting a five foot variance to the set back ordinance. The variance would allow plaintiff to rebuild a condemned garage where the garage had previously been located. We affirm.

Plaintiff-appellee Berdella Wehrmacher applied to the Zoning Board of Defendant-Appellant City of Council Bluffs for a variance. Plaintiff wanted to rebuild her garage. She asked for a variance to the front yard set back in order to rebuild the garage in the same place it had been. The board voted 2-2 to approve the variance. Because three votes were required for approval the request was denied. Wehrmacher filed a petition for a writ of certiorari to the district court which, after hearing, granted the variance.

I.

The city contends the trial court erred in taking additional evidence. The scope of review of the trial court is defined in Iowa Code section 414.18 which provides:

> If upon the hearing which shall be tried de novo it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with the referee's findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.
>
> Costs shall not be allowed against the board, unless it shall appear to the court that it acted with gross negligence or in bad faith or with malice in making the decision appealed from.

As a result of section 414.18 the scope of review of the district court on writs of certiorari to boards of adjustment is somewhat unusual. Grandview Baptist Church v. Zoning Bd. of Adjustment, 301 N.W.2d 704, 706 (Iowa 1981). In a certiorari proceeding in a zoning case the district court finds the facts

anew on the record made in the certiorari proceeding. That record will include the return to the writ and any additional evidence which may have been offered by the parties. However, the district court is not free to decide the case anew. Illegality of the challenged board action is established by reason of the court's findings of fact if they do not provide substantial support for the board decision. If the district court's findings of fact leave the reasonableness of the board's action open to a fair difference of opinion, the court may not substitute its decision for that of the board. Id. Weldon v. Zoning Board, 250 N.W.2d 396, 401 (Iowa 1977).

The district court is authorized to take additional testimony but only for the submission and consideration of those questions of illegality raised by the statutory petition for writ of certiorari. We find the additional testimony was admissible because it addressed those questions raised by the petition.

II.

The city next claims the district court erred in granting the variance. The scope of review of this court on appeal from the trial court's judgment on such a writ of certiorari is governed by Iowa Rule of Civil Procedure 318:

> Appeal to the supreme court lies from a judgment of the district court in a certiorari proceeding, and will be governed by the rules applicable to appeals in ordinary actions.

Consequently our review is the same as from judgment following a special verdict by a jury. Grandview, 301 N.W.2d at 707; Weldon, 250 N.W.2d at 401.

The question before the district court was whether or not the board of adjustment had sufficient evidence to support its decision. There is illegality within the meaning of the rule where there is not substantial evidence to support the finding on which the inferior court or tribunal based its conclusion of law. Reed v. Gaylord, 216 N.W.2d 327, 334 (Iowa 1974). The trial court determined

the denial was unjust and contrary to the spirit of the ordinance. The trial court found the variance of five feet would allow a garage in a place one had been for fifty years. The court found the adjoining property owners had consented to the garage being built where it previously existed and no objections had been made. The court also found the prior location was the only logical place on the property to put a garage and to build it in another spot would create a hazardous condition.

We find substantial evidence in the record to support the court's findings that in essence the action of the board was unreasonable. See Eden Township School Dist. v. Carroll County Bd. of Educ., 181 N.W.2d 158, 167 (Iowa 1970).

AFFIRMED.