FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARION C. HAYNES, EDWARD L. HENDRICKSON and JAMES H. SPECK,

Plaintiffs-Appellants,

vs.

CITY OF AMES, IOWA, and the ZONING BOARD OF ADJUSTMENT OF THE CITY OF AMES, IOWA,

Defendants-Appellees.

Filed April 23, 1986

6-27
85-802

Appeal from the Iowa District Court for Story County (No. 31737) - Carl D. Baker, Judge.

Plaintiffs appeal from trial court's order annulling a writ of certiorari.

AFFIRMED.

William L. Lillis and Peter S. Cannon, of Connolly, O'Malley, Lillis, Hansen & Olson, Des Moines, for the plaintiffs-appellants.

John R. Klaus, Ames City Attorney, for the defendants-appellees.

Heard by Donielson, P.J., and Snell, and Sackett, JJ.

SACKETT, J.

Plaintiffs appeal from trial court's order annulling a Writ of Certiorari. They contend the trial court erred in annulling the writ and in failing to find defendant City of Ames acted arbitrarily, unreasonably or capriciously in denying plaintiffs' request for a use variance.

The parcels in question owned by plaintiffs are two contiguous parcels at 2046 and 2416 Grand Avenue in Ames. Both properties have single family dwellings and had been zoned single family residential. Present zoning permits the development of a twenty-three unit apartment building.

Plaintiffs seek a variance to make commercial use of the land to construct an office building and Quik-Trip convenience store on the premises. Immediately west of the parcels is a shopping mall and east of the property is a hardware store which is a nonconforming use.[1] The shopping mall was permitted to develop pursuant to a land use plan that retained medium density zoning uses on all other corners and has established the land use as a "buffer" around the shopping center to separate it from low-density residential development.

The City Board of Adjustment denied plaintiffs a variance and plaintiffs filed a petition for writ of certiorari. The trial court determined the decision of the board was not only reasonable on the basis of substantial evidence, it was required and annulled the writ.

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

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[1] This only inconsistent use was in existence prior to the area being annexed to the city.

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. The findings of fact of the district court have the effect of a special verdict of a jury and an appeal to this court is like that in an ordinary proceeding. See Weldon v. Zoning Board of City of Des Moines, 250 N.W.2d 396, 401 (Iowa 1977).

I. Unnecessary Hardship

Plaintiffs contend the trial court should be reversed because they have established that owing to special conditions a literal enforcement of the ordinance will result in unnecessary hardship.

An applicant for a zoning variance establishes unnecessary hardship by showing all of the following elements:

> (1) The land in question cannot yield a reasonable return if used only for a purpose allowed in the zone;
> (2) The plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and
> (3) The use to be authorized by the variance will not alter the essential character of the locality.

See Greenawalt v. Zoning Board of Adj. of Davenport, 345 N.W.2d 537, 542 (Iowa 1984); Board of Adj. v. Ruble, 193 N.W.2d 233 (Iowa 1982); Grazino v. Board of Adjustment, 323 N.W.2d 233 (Iowa 1982).

We review the record to determine whether substantial evidence supports the holding of the district court as to at least one of the three essential elements. See Greenawalt at 542.

Plaintiffs claim they proved the land in question cannot yield a reasonable return. The burden to proving a literal application of the ordinance will deprive them of a reasonable return is on the plaintiffs. Greenawalt at 542.

The record shows that a twenty-three unit apartment building can be built on the plaintiffs' land under the present zoning. The parties presented conflicting opinion evidence on whether such an apartment building could produce a "reasonable return" at the site. The board's appraiser analyzed the potential return on the basis of rents and operating statements pertaining to apartments on adjoining lots. Using a mortgage financing rate of thirteen percent, the board's appraiser determined that such development would produce a rate of return of 4 percent. The typical return for apartment complex developments is 3.3 percent for a cash dividend.

In Greenawalt v. Zoning Board of Adjustment, 348 N.W.2d 537, 542 (Iowa 1984) the court held:

> Lack of a reasonable return may be shown by proof that the owner has been deprived of all beneficial use of the land. All beneficial use is said to have been lost when the land is not suitable for any use permitted by the zoning ordinance. An ordinance deprives the landowner of a reasonable return if all productive use of the land is denied.

There is substantial evidence to support the trial court's determination that the land in question can yield a reasonable return under present zoning and plaintiffs fail to meet their burden of proving otherwise.

Plaintiffs have failed to show the land in question cannot yield a reasonable return if used only for the purpose allowed in that zone. They have failed to establish one of the three elements to establish unnecessary hardship and are not entitled to a variance. Greenawalt v. Zoning Board of Adj. of Davenport, 345 N.W.2d 537, 543 (Iowa 1984).

The trial court is affirmed.

AFFIRMED.