

IN THE COURT OF APPEALS OF IOWA

437

CHARLES D. GRAZIANO and)
CORRINE R. GRAZIANO,)

Plaintiffs-Appellants,)

vs.)

BOARD OF ADJUSTMENT OF THE)
CITY OF DES MOINES,)

Defendant-Appellee,)

and)

WALTER E. STOHLGREN,)

Intervenor-Appellee.)

Filed March 23, 1982

FILED

MAR 23 1982

1-339 CLERK SUPREME COURT
2-65863

Appeal from Polk District Court - Van Wifvat, Judge.

Plaintiffs, adjoining landowners, appeal from district court's order on judicial review affirming defendant, Board of Adjustment's, grant of a zoning variance.

AFFIRMED.

Craig F. Graziano of Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, Iowa, for plaintiffs-appellants.

James E. Nervig for defendant-appellee.

Ray Sullins of Roehrick, Lavorato, Schuster, Sullins & Hassel, Des Moines, Iowa, for intervenor-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Plaintiffs, adjoining landowners, appeal from district court's order on judicial review affirming defendant, Board of Adjustment's, grant of a zoning variance. We affirm.

Plaintiffs assert district court erred in affirming the Board's action because 1) the record was devoid of evidence showing unnecessary hardship as required by section 414.12(3), The Code; 2) the lot for which the variance was sought should have been considered without regard for the circumstances of an adjacent lot upon which construction of a duplex was proposed; 3) the findings of fact of the Board were inadequate; 4) the Board improperly exercised original rather than appellate jurisdiction; and 5) intervenors' application for rehearing before defendant Board was both untimely and not based on a change of circumstances as required by section 2A-30 of the Des Moines City Ordinance.

Intervenor, Walter E. Stohlgren, is the owner of two adjoining lots between Cummins Parkway and 62nd Street in Des Moines, Iowa. The front yard of one lot adjoins Cummins Parkway while the front yard of the other adjoins 62nd Street. The back yards of the two lots adjoin each other. Intervenor resides in a one-family dwelling on the 62nd Street property. The Cummins Parkway property is vacant. Intervenor proposes to construct a duplex on the Cummins Parkway property, however, to do so he must extend the back yard of that property 4.15 feet into the backyard of his current residence. This extension will permit the proposed duplex site to meet the minimum 8000 square foot zoning requirement of the City of Des Moines. In so extending the rear yard setback of the Cummins property, the 62nd Street property will no longer have the minimum 35 foot rear yard setback required by the Des Moines Zoning Ordinance. Thus, on January 30, 1978, intervenor submitted a variance application to defendant seeking a variance from the minimum 35 foot rear yard setback on the 62nd Street property. Due to

an error in calculation, intervenor sought an eleven foot variance. On February 21, 1978, the Board denied the variance for the reason that it was "[n]ot in harmony with the immediate area on Cummins Parkway; also the granting of the appeal would set a precedent for other property owners on 62nd Street."

Eight months later, on October 27, 1978, intervenor filed an "Application for Rehearing" seeking a variance of 4.15 feet. The application stated that there existed "material facts . . . which have resulted in changed conditions." The "material change" claimed in the application was intervenor's error in calculating the rear yard requirements. On November 21, 1978, defendant granted the application for rehearing on the stated basis of "new evidence submitted" and subsequently mailed a notice to property owners on both streets that a "hearing of amended appeal" would be held December 19, 1978. The rehearing was held as scheduled and defendant granted the variance on the basis of the existence of an "exceptional situation," pursuant to Des Moines City Ordinance, section 2A-29(B).

On January 16, 1979, plaintiffs filed a petition for writ of certiorari in Polk County District Court asserting illegality of defendant's decision. Following a hearing on September 26, 1980, the court sustained defendant's action. From this judgment, plaintiffs filed a timely appeal.

I. Scope of Review. Our review is on assigned error only. Weldon v. Zoning Board of City of Des Moines, 250 N.W.2d 396, 400 (Iowa 1977). District court's judgment has the effect of a jury verdict and will not be disturbed if supported by substantial evidence. Id.; Iowa R. App. P. 14(f)(1).

II. Unnecessary Hardship. Plaintiffs argue that pursuant to section 414.12(3), The Code, a party seeking a variance to a zoning ordinance is required to show that "owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship." Thus, plaintiffs contend that defendant's decision should be overturned because the record lacks any evidence of unnecessary hardship. Defendant and intervenor argue that the variance was

granted under the authority of the Des Moines City Code, not the Iowa Code, and that Des Moines City Ordinance, section 2A-29(B), does not require a showing of unnecessary hardship. They further argue that plaintiffs have failed to challenge the validity of the Des Moines City Ordinance in previous proceedings and thus may not challenge it on appeal for failure to include unnecessary hardship.

While we agree with the defendant and intervior "that the pertinent Des Moines zoning ordinances were the law of the forum before the board of adjustment and remain matters of law on appeal[,] " Weldon, 250 N.W.2d at 399, we conclude that plaintiffs sufficiently preserved error by challenging defendant's action on the basis of noncompliance with section 414.12(3), The Code. In this regard, we note that a municipal corporation, in exercising its power and authority, cannot enact ordinances inconsistent with the laws of the general assembly. Iowa Const. Art. III, § 38A (as added by amend. 25 in 1968) (municipal home rule); § 364.1, The Code. "An exercise of a municipal power is not inconsistent with a state law unless it is irreconcilable with the state law." § 364.2(3), The Code. We believe that section 2A-29(B) of the Des Moines City Ordinance is reconcilable with section 414.12(3) of the Code, and plaintiffs are not required specifically to challenge the validity of the ordinance.

The code provides in perinent part:

The board of adjustment shall have the following powers:

* * *

3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interests, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

§ 414.12, The Code. The relevant section of Des Moines City Ordinance provides:

The board of adjustment shall have the following powers and duties:

* * *

B) To grant a variation in the regulations when a property owner can show that his property was acquired in good faith and where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property, or where by reason of exceptional topographical conditions or other extraordinary or exceptional situations, the strict application of the terms of this ordinance actually prohibits the use of his property in a manner reasonably similar to that of other property in the district, and where the board is satisfied under the evidence before it that:

1. The land in question cannot yield a reasonable return if used only for a purpose allowed in the district in which it is located; and

2. The plight of the owner of the land in question is due to the unique circumstances shown to the Board and is not of his own making; and

3. The use to be authorized by the variation will not alter the essential character of the locality of the land in question.

Des Moines City Ordinance section 2A-29(B). Defendant cited "exceptional situations" as the sole reason for its decision. We conclude that "exceptional situations" is consistent with the Iowa Code and thus necessarily includes the requirement that "enforcement of the ordinance will result in unnecessary hardship." § 414.12(3), The Code.

The ordinance itself clearly establishes that "unnecessary hardship" is required before a variance will be granted for "exceptional situations" or any other reason provided by subsection (B). Subsections (1), (2) and (3) of subsection (B) are, verbatim, the elements of the definition of "unnecessary hardship" delineated in Deardorf v. Board of Adjustment, 254 Iowa 380, 386, 118 N.W.2d 78,

81 (1962). They are required as additional findings to any of the alternative reasons justifying a variance set forth in the first paragraph of subsection (B). Further, there is no merit to intervenor's argument that these elements only apply to "use" variances not "area" variances. The Iowa Supreme Court specifically rejected intervenor's contention in this regard. See Board of Adjustment v. Ruble, 193 N.W.2d 497, 505 (Iowa 1972).

III. Unnecessary Hardship. We thus consider whether or not there was substantial evidence of unnecessary hardship to support defendant's decision. We begin by stating the general principles which will guide our analysis of this issue. District court's findings of fact have the effect of a special verdict and are equivalent to a jury verdict; if supported by substantial evidence they are binding upon us and the judgment will not be disturbed on appeal. Iowa R. App. P. 14(8)(1). "A finding of fact is supported by substantial evidence if the finding may reasonably be inferred from the evidence." Briggs Trans. Co. v. Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978). The record is reviewed in the light most favorable to the judgment. Pillsbury Co. v. Ward, 215 N.W.2d 35, 38 (Iowa 1977). Ambiguities are construed to uphold rather than defeat the verdict. Id.

The burden is upon those applying for a variance to show that enforcement of the zoning ordinance or denial of the variance will result in unnecessary hardship. Deardorf, 254 Iowa at 384-85, 118 N.W.2d at 80-81 (1962). "[I]f there was no showing before the board of the requisite unnecessary hardship to the owners if the variance were denied, [the board's] order is illegal within the meaning of code section 414.15. . . and aggrieved parties such as plaintiffs are entitled to have it annulled in this action. . . ." Deardorff, 254 Iowa at 385, 118 N.W.2d at 81. "To justify the grant of a variance, the hardship [from application of the regulation] must be substantial, serious, real, and of compelling force as distinguished from

... reasons of convenience, profit, or caprice" Deardorf, 254 Iowa at 387, 118 N.W.2d at 82, quoting 101 C.J.S. Zoning § 290, pp. 1066-1068 (1958).

We conclude that there is substantial evidence of unnecessary hardship in this case. When intervenor built his house on his lot, Cummins Parkway did not even exist. He had no way of knowing that many years later the distance he chose to set his house back would make his backyard 4.15 feet too short to build a duplex on the other half of his lot. There is enough footage on intervenor's lot to meet the zoning requirements to build both a duplex and a single family residence. Intervenor would not need to seek a variance today except for the fact that years ago he set his house back 4.15 feet more than it turns out was advisable under the present zoning ordinance. Intervenor cannot move his house so as to comply with the zoning ordinance, so the only rational thing for him to do was to seek 4.15 foot variance. Granting the variance to him will not change the neighborhood character and will allow him to make a reasonable return on his property. Intervenor did not create the situation he was faced with and thus, the variance granted by the board should be affirmed.

AFFIRMED.

All judges concur except Johnson, J., and Carter, J., who dissent.

I dissent. From my review of this record, I conclude that there is no substantial evidence of unnecessary hardship. The sole reason for granting the variance was profit to intervenor. The district court merely found that the increased demand for multi-unit dwellings and the decreased demand for single-family dwellings resulted in the ordinance imposing "an obvious financial hardship." There was, however, no evidence that the land could not yield a reasonable return if used under the restrictions of the ordinance. Further, there was no showing of unique circumstances. It appears from the record that the condition existed due to the construction of the neighborhood between the two streets. It is apparent that the circumstances are due to the "general conditions in the neighborhood."

I also believe that the intervenor failed to comply with section 2A-29(B)(2) of the Des Moines Zoning Ordinance. That section requires, in substance, that before a variance may be granted an applicant must show, among other things, his plight is due to unique circumstances and is not of his own making. The record reveals that the variance is needed because intervenor failed to acquire additional land when given an opportunity to reclaim property from the city. Further, the variance is needed to allow construction of a specific type of dwelling selected by the intervenor over other possible uses.

I thus conclude the board's action was illegal because intervenor wholly failed to establish that enforcement of the ordinance would result in unnecessary hardship. I, therefore, would reverse district court's judgment, sustain the writ, and remand this case with directions to the defendant Board to vacate its order granting a variance to intervenor.

Carter, J., joins this dissent.