

FILED

FEB 23 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**JAMES F. RONAN,**

)

Plaintiff-Appellant,

)

Filed February 23, 1983

vs.

)

**BOARD OF ADJUSTMENT OF THE CITY)
OF DECORAH, IOWA,**

)

2-4562-68291

Defendant-Appellee.

)

Appeal from Winneshiek District Court - C. W. Antes, Judge.

Plaintiff appeals from the judgment of the district court in this certiorari action sustaining the action of defendant Board in granting a variance from certain rear yard set back requirements. **AFFIRMED.**

Calvin R. Anderson of Strand & Anderson, Decorah, Iowa, for plaintiff-appellant.

Donald H. Gloe and Marion L. Beatty of Miller, Pearson, Gloe, Burns & Beatty, Decorah, Iowa, and Richard D. Zahasky, Decorah, Iowa, for defendant-appellee.

Heard en banc.

PER CURIAM

Plaintiff appeals from the judgment of the district court in this certiorari action sustaining the action of defendant Board in granting a variance from certain rear yard set back requirements. Plaintiff claims the Board's action was illegal because the applicant for the variance did not make the requisite showing of unnecessary hardship if the variance was not granted. We affirm.

Plaintiff owns those portions of Lots 11, 12 and 13 lying south of Lot X2, part of former railroad right of way land in Decorah. Lot X2 is adjacent to plaintiff's land and was acquired by Alfred Kvammen by quit claim deed in 1981. This lot was located in a section of land zoned C-1 (highway commercial) which had front yard set back requirements of twenty-five feet and rear yard set back requirements of twenty feet. Kvammen applied to the city for a permit to build a commercial building on Lot X2; his request was denied for failure to meet the set back requirements. He then applied to defendant Board for a variance so that he could build within five feet of the rear lot border instead of the required twenty feet. The Board made findings of fact, including a finding that the lot in question was sixty feet wide at most and, consequently, the zoning ordinance would allow Kvammen to build a building only fifteen feet wide which would be impractical for most uses in a commercial district. The Board further found that the size of the lot here is a special circumstance not present in other areas of this C-1 district and that no development would be practical on this lot unless a variance would be granted due to its narrow width. The Board, therefore, granted the requested variance on November 3, 1981. Kvammen then acquired a building permit and began construction.

Plaintiff filed a petition for a writ of certiorari on November 17, 1981, alleging the illegality of the Board's action on a number of grounds, including: 1) the grant of the variance was arbitrary, unreasonable and unjust; 2) the Board exceeded its powers under Iowa Code § 414.12(3) in that the variance is contrary to

public interest and that the literal enforcement of the zoning ordinance would cause no unnecessary hardship to Kvammen; 3) there are no "special conditions or circumstances" in this case as required by the city ordinance to justify the variance and that any such conditions which do exist arose because of Kvammen's actions; and 4) the Board violated the city ordinance by failing to make sufficient findings of fact. The petition concluded with a request to set aside the Board's grant of the variance. Plaintiff was later granted permission to amend his petition by alleging two further grounds in support thereof; 1) the variance was illegal because the Board's alleged findings of fact were in fact only legal conclusions and 2) the Board did not find that literal enforcement of the city zoning ordinance would result in unnecessary hardship to Kvammen.

After a hearing, the court issued its findings, conclusions and decree on March 2, 1982. It adopted the Board's findings of fact, concluding that they were supported by substantial evidence presented to the Board. The court also found that Lot X2 could not yield a reasonable return if Kvammen could erect a building only fifteen feet wide as would be required by the ordinance due to the unique circumstance of the lot being old railroad right of way land with a width of sixty feet. Finally, the court concluded that plaintiff did not sustain his burden of proving the illegality of the Board's action in granting the variance and consequently annulled plaintiff's writ. He then brought this appeal.

The principles of judicial review in a case such as this were set forth in Weldon v. Zoning Board of City of Des Moines, 250 N.W.2d 396, 401 (Iowa 1977):

... 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.

See also Iowa Code § 414.18. We may not substitute our judgment for that of the district court if its determination is supported by substantial evidence. Johnson v. Board of Adjustment, 239 N.W.2d 873, 888-89 (Iowa 1976). Plaintiff has the burden in this certiorari proceeding of proving the illegality of the Board's action in granting the variance. Board of Adjustment of City of Des Moines v. Ruble, 193 N.W.2d 497, 503 (Iowa 1972).

Plaintiff does not question the inherent ability of the Board to grant the variance. Such authority is granted in Iowa Code § 414.12:

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 interest, 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.

Nearly identical language is found in Decorah, Ia. Municipal Code § 17.76.070.

Plaintiff's appeal focuses on the "unnecessary hardship" language of § 414.12(3). The supreme court has identified three conditions which must be present before a variance may be legally granted:

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.

Graziano v. Board of Adjustment, 323 N.W.2d 233, 235-36 (Iowa 1982). Plaintiff claims the district court erred in applying these factors and in finding an unnecessary hardship in this case in three particulars: 1) the Board used "incorrect elements" of unnecessary hardship in reaching its decision; 2) the variance granted

does not promote the orderly development of commercial property in the zone involved; and 3) the court should not have considered an increased tax basis as a reason for justifying the variance.

Keeping in mind our limited standard of review as defined above, we again examine the record made before the Board. Before Kvammen acquired Lot X2, he had leased it for the purpose of parking automobiles in connection with his automobile dealership. He acquired the lot before applying for the variance which he knew he would have to obtain before beginning construction. Before he obtained the variance, Kvammen gave notice to the automobile manufacturer that he was terminating his dealership. Loren Behm, chairman of the Board of Adjustment, testified at the hearing that it was the usual practice of the Board members to visually examine the property involved in a request for a variance and that this practice was followed in this case. With regard to the Board's rationale for granting the variance, Behm testified:

Q. * * * Can you give us in a nutshell what your basic or what you feel was the Board's reason for feeling that Mr. Kvammen would have an unnecessary hardship?

A. Well, given the dimensions of the lot, being 60 foot, with the front-yard requirement of 25-foot and the rear-lot requirement of 15, there would be no usable or practical building to be put on that kind of a lot, unless we could grant a variance, so that they could have a wider building.

Q. And that wouldn't necessarily pertain to the use that Mr. Kvammen proposed? It could have been any use?

A. Well, it would have to fit the C-1.

Q. Any use within the C-1?

A. Right.

Q. Would have had the same problem?

A. Right.

In addition to the findings of fact referred to above, the Board also found that "literal interpretation of the provisions of [the zoning] Ordinance would

deprive the applicant of rights commonly enjoyed by other properties in this same C-1 district under the terms of this Ordinance;" "[t]hat at the present time, there is only one building which would be near the proposed building's rear exterior and would not be harmed by the proposed building," and "[t]hat the granting of the proposed variance . . . will be in harmony with the general purpose and intent of the Zoning Ordinance and will not be injurious to the neighborhood or otherwise detrimental to the public welfare."

The district court concluded that the Board's decision to grant the variance was supported by substantial evidence. We agree with that decision. With regard to plaintiff's claim that the court did not apply the proper elements of "unnecessary hardship," we conclude that the court correctly applied the criteria set forth in Graziano, 323 N.W.2d at 235-36. Specifically, the court found that Kvammen would not be able to obtain any reasonably economical or practical use of Lot X2 because of its narrowness if he was not granted the variance. As a result of the combination of the size of Lot X2 and the minimum set back requirements of the city's zoning ordinance, Kvammen would be left with only the possibility of erecting a building with a maximum width of fifteen feet. Such a building would not yield a reasonable return for any of the commercial uses for which that area is zoned. The lower court's finding to this effect distinguishes the present case from Graziano where the trial court did not make this required finding. Graziano, 323 N.W.2d at 237.

The court also concluded that this unique circumstance was not of Kvammen's own making. Plaintiff asserts that the opposite is true in that Kvammen bought the lot knowing it was only 60 feet wide and that he knew a variance would be required before he could begin construction. We do not believe that Kvammen can be considered responsible for creating the problem here such that his variance request should have been denied. Once he acquired Lot X2, he did nothing to change the size of the lot. For example, he did not subdivide it and

only then attempt to obtain a variance. It is this circumstance which distinguishes this case from cases such as Board of Adjustment of City of Des Moines v. Ruble, 193 N.W.2d 497 (Iowa 1972), where the property owner subdivided his lot and then tried to obtain a variance from the minimum lot size requirements. The supreme court affirmed the decision of the trial court which disallowed the variance on grounds that the property owner, in subdividing his lot, created his problem and thus did not suffer the requisite "unnecessary hardship." Were we to accept plaintiff's argument, no one who ever purchased or acquired any property could ever obtain a variance because, by making such purchase or acquisition, the plight requiring a variance would always be of their own making. Kvammen's plight was not of his own making since Lot X2 was only 60 feet wide when he acquired it. The trial court did not err in so finding.

Finally, we agree with the trial court's conclusion that the use to be authorized by the variation (Kvammen apparently wants to build a tavern on his lot) will not alter the essential character of the area in question. Plaintiff does not claim that the proposed use is in any way in conflict with the uses which are permissible in that area; i.e. highway commercial. In addition, we believe the record supports the court's finding that:

... the Plaintiff is the owner of a building, himself, that is not within the yard-size requirements of the zoning requirements, and the owner Kvammen formerly owned a garage across the street from the property itself, which was not in compliance with the zoning ordinances, as to setback requirements of the building from the property-line, because they were nonconforming uses.

Plaintiff's other two issues are likewise without merit. Regarding his claim that the variance granted does not promote the orderly development of commercial property in the area involved, we believe that here again there is substantial evidence in the record to support the trial court's conclusion to the contrary. Plaintiff also claims that the court erred in relying on the increased tax basis resulting from the variance as a justification for granting it. We agree that

is an irrelevant factor; see Deardorf v. Board of Adjustment of Planning and Zoning Commission, 254 Iowa 380, 389, 118 N.W.2d 78, 83 (1962). We do not believe, however, that the trial court's reliance on this factor was to any degree significant, and it was surely not enough to taint the court's proper conclusion that Kvammen had established the necessary elements to justify the grant of his requested variance. No reversible error occurred in this regard.

In conclusion, the record before the Board contains substantial evidence to support the trial court's conclusions that plaintiff failed to sustain his burden of proving the illegality of the Board's action in granting the variance and that the variance was properly granted. We affirm the annulment of plaintiff's writ of certiorari.

AFFIRMED.