IN THE COURT OF APPEALS OF IOWA

No. 6-554 / 05-1637
Filed August 9, 2006

THE BRICK HAUS, INC.,
Plaintiff-Appellant,

vs.

BOARD OF ADJUSTMENT, AMANA COLONIES LAND USE DISTRICT,
Defendant-Appellee.

Appeal from the Iowa District Court for Iowa County, David M. Remley, Judge.

The Brick Haus, Inc. appeals the district court's order affirming the decision of the Amana Colonies Land Use District Board of Adjustment, which denied The Brick Haus's request for a special exception under Amana's sign ordinance. **AFFIRMED.**

John C. Wagner of John C. Wagner Law Offices, P.C., Marengo, for appellant.

John W. Hayek and Alison Werner Smith of Hayek, Hayek, Brown, Moreland & Hayek, L.L.P., Iowa City, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

EISENHAUER, J.

The Brick Haus, Inc. (the Brick Haus) appeals the order of the district court affirming the decision of the Amana Land Use District Board of Adjustment to deny its request for a "Nonconforming Sign Permit." The Brick Haus contends the district court erred in finding the board followed the correct legal procedure in denying its permit request. It further asserts the district court erred in finding the board's decision was supported by competent and substantial evidence; was not arbitrary, capricious and unreasonable; and did not violate the right to just compensation for the taking of property under the United States and Iowa Constitutions.

In 1982, Walter Schuerer built the Brick Haus restaurant in Amana for his daughter to operate. The restaurant's sign, the subject of this dispute, designed by Walter's grandfather approximately thirty years prior, was erected when the restaurant was built. In 1990, Walter left his position operating the Colony Inn restaurant and joined his daughter in operating the Brick Haus. He had operated the Colony Inn, located just across the street from the Brick Haus, since 1946. Upon Walter's move to the Brick Haus, his picture and text, which read, "Join Walt and his gang here," were added to the sign because "everybody wanted to know where Walter was."

The Amana Colonies are unincorporated villages in Iowa County. The Brick Haus is located in the village of Amana. On January 31, 1996, a zoning ordinance described as Phase II Division 3.0, Article 1.0 became effective in

Amana. This zoning ordinance includes a sign ordinance, which restricts the size, appearance, and placement of signs. The objective of the ordinance is to achieve uniformity in shape, size, color and the location of signs. When the sign ordinance became effective, the Brick Haus's sign was non-conforming in several respects, so it applied for a "Nonconforming Sign Permit," which was issued on June 30, 1996. Pursuant to section 31.37.140(B) of the ordinance, the permit allowed the sign to remain in place for seven years from the date of issue.

In 2002, as part of the Amana Colonies historic restoration project, which was a multi-phase project to install new fencing, bridges, walks, and streets in Amana, the area around the sign was torn up and a retaining wall was installed.

On June 18, 2003, the Brick Haus filed a Special Exception Request Form with the board requesting to "keep" the Brick Haus's sign because it was designed by Walter's grandfather and has "become a historical landmark." As to the Brick Haus's request, the minutes from the June 22, 2004 board meeting state in full:

> **The Brick Haus**, 728 47th Ave, Amana, requests the retention of the over-size sign. Mr. Mark Rettig, attorney, represented the Schuerers in presenting their case. He cited th[e] iconic nature of the sign and its landmark nature for identifying the location of the restaurant as well as representing the culture and history of the Colonies in which the restaurants have played a significant part. After much discussion on the meaning of culture and history, the purpose of signs versus the services provided, and the need to keep things as simple and basic as possible, T. Berger moved to deny the request saying that the main concerns of the applicant could be accomplished in a conforming sign. RC Eichacker seconded the motion. A roll call vote showed:
> T. Berger Aye
> W. Lock Aye
> RC Eichacker Aye
> Motion carried, exception was denied.

The Brick Haus then filed a petition for review in the Iowa County District Court alleging that the board's decision was "illegal" because the board failed to preserve the historical and cultural quality, authorize a variance from the land use plan, abide by the intent of the sign ordinance, follow the criteria for granting a special exception, and find that the sign is a historical exception. The Brick Haus also alleged the board's denial was arbitrary and capricious, as well as a taking in violation of the United States and Iowa Constitutions. Following a trial on the matter, the district court found there was substantial evidence to support the board's decision, and that the Brick Haus failed to prove any of the above-alleged particulars. The district court affirmed the decision of the board denying the Brick Haus's request for a special exception. The Brick Haus timely appeals.

Our review on appeal from rulings of certiorari is at law. *Ackman v. Bd. of Adjustment*, 596 N.W.2d 96, 101 (Iowa 1999); *Chrischilles v. Arnolds Park Zoning Bd. of Adjustment*, 505 N.W.2d 491, 493 (Iowa 1993). We are bound by the findings of the district court if they are supported by substantial evidence. *Chrischilles*, 505 N.W.2d at 493. We are not bound by erroneous legal rulings that materially affect the court's decision. *Danish Book World, Inc. v. Bd. of Adjustment*, 447 N.W.2d 558, 560 (Iowa Ct. App. 1989). However, to the extent the Brick Haus raises a constitutional right, our review is de novo. *Huisman v. Medema*, 644 N.W.2d 321, 324 (Iowa 2002).

Legal Procedures. The Brick Haus argues the board failed to follow the correct legal procedures because its minutes were inadequate. Boards of

adjustment are required to make written findings of fact on all issues presented, and such findings must be sufficient to enable a reviewing court to determine with reasonable certainty the factual basis and legal principles upon which the board acted. *Citizens, Etc. v. Pottawattamie County Bd. of Adjustment*, 277 N.W.2d 921, 925 (Iowa 1979). The minutes from the meeting provide the board recognized the sign was non-conforming and considered the alleged historical nature of the sign. And, the board's findings conclude that a conforming sign would be able to convey the concerns raised by Brick Haus's request for a special exception. Such findings are sufficient for our review.

The Brick Haus also asserts the board's decision failed to serve the purpose of the land use district pursuant to Iowa Code section 303.41 (2005), and that due to unnecessary hardship, the board should have allowed a variance under section 303.58. The district court found that the cost of a new sign and removal of the old sign would not be a serious financial hardship, and that the Brick Haus failed to prove these claims by a preponderance of the evidence. The decision of the board is not contrary to the legislative purpose of section 303.41, which is to conserve the distinctive historical and cultural character of the area. Moreover, other than the cost to remove and replace the sign, there was no evidence of any hardship that would be inflicted by compliance. There was substantial evidence to support the district court's findings.

The Board's Decision. The Brick Haus contends the board's decision is not supported by competent and substantial evidence; is arbitrary, capricious and

unreasonable; and violates the right to just compensation for the taking of property under the United States and Iowa Constitutions.

The district court found the sign was clearly nonconforming, as it is "50 percent taller than permitted; approximately two-and-one-half times larger than the maximum square footage permitted; contains more than two-and-one-half times the items of information permitted[;] and contains colors other than black and white." The court also determined the reasonableness of the board in finding this was not a historic sign is open to a fair difference of opinion, so the court would not substitute its decision for that of the board.

A board of adjustment's decision enjoys a strong presumption of validity. *Ackman*, 596 N.W.2d at 106. If the reasonableness of the board's action is "open to a fair difference of opinion, the court may not substitute its decision for that of the board." *Id*. (citation omitted).

The Brick Haus argues the board erred in not finding the sign was "historic" pursuant to the sign ordinance. At the time of the board's decision, the sign ordinance provided that signs built before 1932 shall be considered historic, and the test for historic value was based upon the sign's age and its success in reflecting Amana culture. The district court found that although the sign was built in 1982, it was designed thirty years earlier by Walter's grandfather and its reflection of Amana culture was premised upon its design history and Walter's history in the restaurant business. The court stated, "The reasonableness of the Board of Adjustment's decision in finding the sign not to be a historic sign is open

to a fair difference of opinion. Therefore, the court may not substitute its decision for that of the Board." There is substantial evidence to support the finding of the district court.

A decision is "arbitrary" or "capricious" when it is made without regard to the law or underlying facts. *Riley v. Boxa*, 542 N.W.2d 519, 523 (Iowa 1996). A decision is "unreasonable" if it is against reason and evidence "as to which there is no room for difference of opinion among reasonable minds." *Id*. The Brick Haus argues the board's reasoning for denying the exception—the Brick Haus's concerns could be addressed in a conforming sign—is contradicted by the record. We disagree. The district court found and there is evidence in the record that the Brick Haus's concerns were using Walter's grandfather's design to preserve the historic nature of the sign and using Walter's name and picture on the sign for recognition of "where Walter was." There is no evidence that compliance with the ordinance would defeat these objectives. Therefore, substantial evidence supports the district court's finding that the board's decision was not arbitrary, capricious or unreasonable.

Constitutional Taking. A person may not be "deprived of property, without due process of law; nor shall private property be taken for public use without just compensation" under the Fifth Amendment to the federal Constitution. U.S. Const. amend. V.; *Molo Oil Co. v. City Of Dubuque*, 692 N.W.2d 686, 692 (Iowa 2005). The Fifth Amendment prohibition of taking private property for public use without just compensation applies to the states through

the Fourteenth Amendment. *Molo Oil Co.*, 692 N.W.2d at 692 (citing *Chi., Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 239, 17 S. Ct. 581, 585-86, 41 L. Ed. 979, 985 (1897)). The Iowa Constitution has a similar provision providing that "[p]rivate property shall not be taken for public use without just compensation first being made. . . ." Iowa Const. art. I, §18; *Molo Oil Co.*, 692 N.W.2d at 692.

Under the federal and Iowa constitutions, a government action that does not intrude upon or occupy the property, but affects and limits the use of the property, can be a taking. *Molo Oil Co.*, 692 N.W.2d at 692 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322, 326 (1922)). "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id*. The point at which police power becomes so oppressive that it results in a taking is determined on a case-by-case basis. *Kelley v. Story County Sheriff*, 611 N.W.2d 475, 480 (Iowa 2000).

The underlying framework for analyzing a takings claim is: (1) Is there a constitutionally protected private property interest at stake? (2) Has the government taken this private property interest for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner? *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 571 (Iowa 2000).

Assuming the Brick Haus had a vested interest, we turn to whether the ordinance constituted a "taking." Zoning decisions are "an exercise of the police powers delegated by the State to municipalities." *Molo Oil Co.*, 692 N.W.2d at 691. A zoning ordinance is valid if it has any real, substantial relation to the

public health, comfort, safety, and welfare, including the maintenance of property values. *Id.* (quoting *Shriver v. City of Okoboji*, 567 N.W.2d 397, 401 (Iowa 1997)). Zoning ordinances carry with them a strong presumption of validity. *Molo Oil Co.*, 692 N.W.2d at 691 (citing *Perkins v. Bd. of Sup'rs*, 636 N.W.2d 58, 67 (Iowa 2001)). The party asserting the invalidity of the zoning regulation has the burden of proving the zoning regulation is unreasonable, arbitrary, capricious, or discriminatory. *Id*.

If the reasonableness of a zoning ordinance is fairly debatable, we will not substitute our judgment for that of the legislative body. *Id*. The reasonableness of a zoning ordinance is fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction, and where reasonable minds may differ, or where the evidence provides a basis for a fair difference of opinion as to its application to a particular property. *Molo Oil Co.*, 692 N.W.2d at 691.

The sign ordinance was clearly an exercise of police power pursuant to Iowa Code section 303.52(2), which allows the board of trustees for a land use district such as the Amana Colonies to

> formulate and administer a land use plan which includes all ordinances, resolutions, rules and regulations necessary for the proper administration of the land use district. The land use plan shall be created for the primary purpose of regulating and restricting, where deemed necessary, the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land in a manner which would maintain or enhance the distinctive historical and cultural character of the district.

And, the sign ordinance was part of Amana's "land use plan."

However, the issue is whether or not the ordinance was an unreasonable or arbitrary exercise of such police power, which we determine by analyzing whether the ordinance has any real, substantial relation to the health, comfort, safety, morals or general welfare of the community. *See Plaza Recreational Center v. City of Sioux City*, 253 Iowa 246, 253, 111 N.W.2d 758, 763 (1961); *Bd. of Sup'rs of Cerro Gordo County v. Miller*, 170 N.W.2d 358, 360 (Iowa 1969). In reviewing an ordinance, we are predominantly concerned about the general purpose of the ordinance, not any hardship that may result in an individual case. *Molo Oil Co.*, 692 N.W.2d at 692.

The sign ordinance states its purposes as:

> [T]o preserve the Amana built environment and the conservation of Amana culture; to use the signage system as another tool to help the Amana Land Use Trustees, the Historic Preservation Commission, and village residents deal with development and growth; to facilitate movement of people and vehicles; to recognize the pedestrian as the primary measure of scale; to preserve historic signs; to recognize that most buildings in the District are residential and signage should demonstrate respect for the houses; to minimize the possible adverse effect of signs on nearby public and private property; and to enable fair and consistent enforcement of these sign restrictions.

Land Use Plan, § 31.37.010.

"Preservation of the character of the neighborhood is a valid reason for zoning regulations." *Plaza Recreational Center*, 253 Iowa at 254, 111 N.W.2d at 763; *see also Millerf*, 170 N.W.2d at 362. "[Z]oning regulations promote the general welfare and are valid where they stabilize the value of property, promote the permanency of desirable home surroundings and add to the happiness and comfort of citizens." *Plaza Recreational Center*, 253 Iowa at 254, 111 N.W.2d at

763 (quoting 8 Eugene McQuillan, *The Law of Municipal Corporations*, § 25.60 at 59 (3rd ed. revised)). The sign ordinance was a valid exercise of police power and did not constitute a taking. The Brick Haus's argument is without merit.

AFFIRMED.