IN THE COURT OF APPEALS OF IOWA

No. 8-054 / 06-1524
Filed July 16, 2008

EARL BAUGH,
Plaintiff-Appellee,

vs.

WATERLOO BOARD OF ADJUSTMENT,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

The Waterloo Board of Adjustment appeals from the district court's order sustaining Earl Baugh's petition for writ of certiorari. **AFFIRMED.**

Timothy C. Boller of Dunakey & Klatt, P.C., Waterloo, for appellant.

Robert J. Hearity of Hearity Law Firm, Waterloo, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

The Waterloo Board of Adjustment (Board) appeals from the district court's order sustaining Earl Baugh's petition for writ of certiorari. We affirm.

I. Background Facts and Proceedings

Earl Baugh wanted to open a juice bar in an area of Waterloo zoned as a "Heavy Industrial District." The juice bar would also contain a small store selling adult books and videos. As described in this case, a juice bar is an establishment where customers pay a fee to watch nude dancing. The term "juice" refers to the fact that the establishment only sells non-alcoholic beverages. An adult bookstore and juice bar are accepted uses within a heavy industrial district so long as the property is located at least 600 feet from a "protected use"[1] and the owner obtains a special permit from the Board. As with all special permits, the Board is required to first refer the proposed application to the Waterloo City Planning, Programming, and Zoning Commission (Commission) so that it can prepare a report addressing "the effect of such proposed building or use upon the character of the neighborhood, traffic conditions, public utility facilities, and other matters pertaining to the general welfare." City of Waterloo Zoning Ordinance § 2A-48(H)(9) (2003).

[1] Neither party cites, and we are unable to find, any specific ordinance setting forth the 600 foot requirement for a heavy industrial district. Because Baugh does not contest the alleged requirement and his proposed use is not within 600 feet of a protected use, we will use this as the controlling law in this case. A protected use is defined as

> a building in which a majority of the floor space is used for residential purposes, a day care center where such day care center is a principal use, a house of worship; a public library; an elementary junior high or high school (public, parochial, or private); public park; public recreation center or public specialized recreation center facility as identified in the parks and recreation element of the Waterloo Comprehensive Plan; a civic/convention center; a community residential facility; a mission.

City of Waterloo Zoning Ordinance § 2A-3(5.1)(j).

Once Baugh submitted his application, the Board referred it to the Commission for a report. The Commission staff completed a report noting the proposed property satisfied the 600 foot requirement and that the proposed use would have no impact on traffic conditions in the area. The report did not list any public utility issues and noted that this proposed use was consistent with other similar uses—such as bars and nightclubs—which were allowed in the heavy industrial district. The Commission held a public hearing on the special permit.

At this hearing, several neighboring property owners objected to the proposed use citing their general concerns that a juice bar would decrease property values and adversely affect the character of the industrial district, traffic conditions, and general welfare. The Commission voted 6-2 to recommend to the Board that it deny the application because of the "impact" it would have on the neighborhood.

On July 26, 2005, the Board held its own public hearing on the matter. One individual, who owned "Airline Amusement Park," a qualifying protected use under the ordinance, objected because his property was only 652 feet away from the proposed site. He argued that his business, which provides recreational activities such as go-karts, miniature golf, driving range, and batting cages, to families, church groups, school groups, and corporate outings, would suffer negative consequences because many of his patrons would drive past the juice bar on their way to his business. Other property owners expressed similar concerns that the proposed use would (1) decrease property values, (2) have a negative impact on the image of local businesses, (3) not promote a healthy working environment for local employees, (4) increase crime in the

neighborhood, and (5) endanger children. Another business owner claimed the proposed use would adversely affect the character of the neighborhood because all businesses in the neighborhood operate during daytime hours while Baugh's juice bar would likely operate into the late evening and early morning hours. He claimed neighboring property owners would need to consider additional security measures to protect against crime during these late evening and early morning hours. Another property owner claimed the juice bar would adversely affect traffic conditions and increase drunk driving in the area.

Baugh responded to these general concerns by noting that he had agreed to not allow alcohol on the premises. He also pointed out that not all of the neighboring properties operated solely in the daytime; the Airline Amusement Park was open until 11:00 p.m. each evening.

The Board, by a 3-2 vote, denied the application "due to the negative impact on the surrounding properties, particularly the amusement park," and because the proposed use was "inappropriate for the site in question."

On August 12, 2005, Baugh filed a petition against the City of Waterloo (City) and the Board claiming they had, among other things, illegally denied him a special permit. The City and the Board filed a motion to dismiss/motion to recast the pleadings for failure to state a claim upon which relief may be granted. This motion also argued that the City was not a proper party in the proceeding. In response, the district court ordered Baugh to recast his pleadings as a certiorari petition under Iowa Code section 414.15 (2005).

Baugh filed a recast petition against the City and the Board requesting "certiorari" relief and monetary damages. The City and the Board responded with

a second motion to dismiss arguing Baugh had improperly recast his petition. After considering this new motion, the district court issued an order dismissing the City from the case. It also consolidated Baugh's certiorari claim for a hearing to the court and stayed his jury trial claim for monetary damages until final judgment on the certiorari claim.

At the hearing on the certiorari claim, the district court allowed the parties to submit additional evidence. Several neighboring business owners testified as to their strong opposition to the proposed use. Although each person testified as to why they thought the proposed use would affect their business and have a negative impact on the neighborhood, none of them presented expert testimony, a study, or any other type of data that supported their claims. Members of the Board also testified at the hearing. They said they denied the permit because they were persuaded by strong neighborhood opposition to the proposed use and the Commission's recommendation to deny the request. Baugh also testified as to how it had taken nearly five years to find this one property that satisfied the aforementioned 600-foot requirement.

On August 1, 2006, the district court entered an order sustaining the writ of certiorari. The court found the Board's actions were illegal because there was not substantial evidence in the record to support the Board's findings. The court pointed out that there were no statistics or studies to support any of the claims made by the neighbors opposing the establishment. The court concluded the neighbors' "speculative and conclusory" statements did not constitute substantial evidence to support the Board's finding that the proposed use would have a negative impact on the community or would be inappropriate for this property. As

a result, the court ordered the Board to issue Baugh a special permit subject to terms and conditions as the City may prescribe, "including, but not limited to restrictions relative to signage, existence of alcohol beverages on the premises, hours of operations, parking requirements, acceptable noise levels, and other terms and conditions impacting the neighborhood and the community."

On August 8, 2006, the Board filed a motion to amend or enlarge findings of fact and conclusions of law. The district court denied this motion and reaffirmed its original ruling. In doing so, it found the Board's decision to deny the special permit also violated Baugh's constitutional rights.

On appeal, the Board claims the district court erred in denying its motion to dismiss Baugh's recast petition. The Board also claims the court erred in granting the writ of certiorari because (1) substantial evidence supports its decision to deny the application and (2) its actions in denying the application did not violate Baugh's constitutional rights.

II. Merits

A. Motion to Dismiss

The Board contends the district court erred when it denied the Board's motion to dismiss Baugh's recast petition. The Board argues Baugh failed to assert a valid claim upon which relief could be granted as it was not truly a petition to seek certiorari relief. The Board also contends the court should have granted its motion to dismiss because the recast petition seeks injunctive relief and monetary damages and was filed in an untimely manner. Our review of the court's ruling on the Board's motion to dismiss is for correction of errors at law. *Rees v. City of Shenandoah*, 682 N.W.2d 77, 78 (Iowa 2004).

Pursuant to Iowa Code section 414.15, any person aggrieved by a board of adjustment's decision may file a petition for writ of certiorari "setting forth that such decision was illegal, in whole or in part, [and] specifying the grounds of the illegality." A petition for certiorari permits the district court to review the acts or proceedings of an inferior tribunal, board, or officer acting in a judicial or quasi-judicial capacity. *Aladdin, Inc. v. Black Hawk County*, 522 N.W.2d 604, 606 (Iowa 1994).

Baugh's recast "certiorari" petition alleged the Board acted illegally in violation of the United States Constitution, the Iowa Constitution, and local zoning ordinances when it prohibited him from engaging in legal commerce in Waterloo. Upon our review of the petition, we find Baugh clearly petitioned for writ of certiorari and asserted a claim upon which relief could be granted.

We also reject the Board's claim that the *entire* petition should be dismissed merely because it contains additional requests for monetary damages and injunctive relief. First, the court separated Baugh's request for monetary damages from this certiorari proceeding when it stayed his jury trial claim until after the resolution of the certiorari proceeding. Second, Baugh's requests for injunctive relief were directly correlated to his certiorari petition. Baugh asked the court to find that the permit denial was illegal, issue an order enjoining and restraining the City from barring the activities that are the subject of the requested special permit, and enter an order directing the Board to issue the special permit. In light of our supreme court's holding in *U.S. Cellular Corp. v. Board of Adjustment of City of Des Moines*, 589 N.W.2d 712 (Iowa 1999), where the court affirmed the district court's order sustaining the plaintiff's writ and

ordered the Board to issue the special permit for a telecommunications tower, we find Baugh's requests for relief were not outside the bounds of a proper certiorari petition.

Finally, because the Board cites no authority in support of its argument that the allegedly untimely recast petition should be dismissed, we deem this issue waived. *See* Iowa R. App. P. 6.14(1)(*c*) (stating "[f]ailure in the brief to . . . cite authority in support of an issue may be deemed waiver of that issue").

We find no error in the court's decision denying the Board's motion to dismiss.

B. Certiorari Claim

A special use permit "allows property to be put to a purpose which the zoning ordinance *conditionally* allows." *City of Okoboji v. Okoboji Barz, Inc.*, 717 N.W.2d 310, 315 (Iowa 2006) (quoting *Buchholz v. Board of Adjustment of Bremer County*, 199 N.W.2d 73, 75 (Iowa 1972)). Its purpose

> is to bring flexibility to the rigid restrictions of a zoning ordinance, while at the same time controlling troublesome or somewhat incompatible uses by establishing, in advance, standards that admit the use only under certain conditions and standards that must be met.

Willett v. Cerro Gordo County Zoning Bd. of Adjustment, 490 N.W.2d 556, 560 (Iowa 1992). An application for a special use permit must meet all the conditions of the ordinance; failure to satisfy one of the conditions is fatal. *Cyclone Sand & Gravel Co. v. Zoning Bd. of Adjustment*, 351 N.W.2d 778, 783 (Iowa 1984).

No one disputes that Baugh met all of the technical requirements for a special permit in this industrial district. However, the Board still denied the special permit because it concluded the proposed use was inappropriate and

would have a negative impact on the neighborhood. The district court sustained Baugh's subsequent certiorari petition, concluding the Board acted illegally when it denied the application.

Our review of certiorari actions is governed by 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.

In *Weldon v. Zoning Board*, 250 N.W.2d 396, 401 (Iowa 1977), our supreme court stated that this section, in the context of a zoning case, means:

> 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.

Recently, in *Bontrager Auto Service, Inc. v. Iowa City Board of Adjustment*, 748 N.W.2d 483, 495 (Iowa 2008), our supreme court overruled the *Weldon* case "to the extent it permitted the [district] court to make new factual findings on issues that were before the board for decision. Such fact-findings will be reviewed under the substantial-evidence test traditionally employed in certiorari reviews."

Accordingly, our review of this certiorari action is for correction of errors at law, *U.S. Cellular Corp.*, 589 N.W.2d at 716, and limited to deciding whether the

Board's decision was supported by substantial evidence. *Bontrager*, 748 N.W.2d at 495-96. "Evidence is substantial if a reasonable person would find it adequate to reach the given conclusion, even if a reviewing court might draw a contrary inference." *Bush v. Board of Trs.*, 522 N.W.2d 864, 866 (Iowa Ct. App. 1994).

In *Bontrager*, our supreme court affirmed a Board's decision to grant a special permit for transient housing, noting that a Board could rely on "commonsense inferences drawn from evidence related to other issues," to support its decision. 748 N.W.2d at 496-97. The court went on to note that the evidence from which the Board drew its "commonsense inferences" consisted of crime statistics, anecdotal evidence from numerous individuals living next to a piece of property already granted a permit for the proposed use, and testimony from an urban planner who relied on his knowledge of national research on the subject. *Id.*

In the present case, there is no expert testimony, statistics, or anecdotal evidence to substantiate the local business owners' allegations that there would be an increase in crime, a shortage of parking spaces, an increased traffic burden, or a general negative impact on their business if the Board granted the special permit. Beyond the general concerns raised by the testimony of neighboring business owners, the only true study of the impact of the proposed use comes from the report completed by Commission staff. This report indicates the proposed use would likely not have any impact upon traffic conditions in the area. It states that the current and future land use map zoning designation allows for industrial and other commercial uses similar to the proposed use, such as a bar or nightclub, and that the plan for the renovation of the existing building

provides for adequate parking spaces. The report also notes that all of the properties surrounding the proposed site are zoned industrial and the amusement park, which rests the equivalent distance of more than two football fields away, does not fall within the prohibited area for this proposed use.

In short, the Board's conclusion that the proposed use would have a negative impact on the surrounding properties rests solely on unsubstantiated claims of future harm made by a handful of neighboring property owners. We, like the district court, find that this does not constitute substantial evidence to support the Board's conclusion that this proposed use would have a negative impact or would be inappropriate for this industrial district. *See U.S. Cellular Corp.*, 589 N.W.2d at 718 n.4 ("It is questionable whether neighborhood opposition alone, even if considerable, could justify the denial of a permit for construction of a personal wireless facility."); *see, e.g.*, *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 745 (C.D. Ill. 1997) (holding "generalized concerns" about the proposed site expressed by local property owners were insufficient to support a denial of a special use permit); *C-Call Corp. v. Zoning Bd. of Appeals*, 700 N.E.2d 441, 443 (Ill. App. Ct. 1998) (holding generalized concerns expressed by local objectors "about safety, decreasing property values, and aesthetics" did not constitute substantial evidence to justify the denial of a special use permit).

Because there is not substantial evidence to support the Board's decision, we will not address the Board's remaining constitutional arguments. *See, e.g.*, *State v. Button*, 622 N.W.2d 480, 485 (Iowa 2001) ("Ordinarily we will not pass upon constitutional arguments if there are other grounds on which to resolve the

case."); *State v. Fratzke*, 446 N.W.2d 781, 783 (Iowa 1989) (noting courts have a duty to avoid constitutional questions if the merits of a case may be fairly decided without addressing them).

III. Conclusion

Baugh satisfied all of the technical requirements for a special permit in this industrial district. The Board's stated reason for denying the special permit was based solely on generalized concerns, not substantial evidence. Accordingly, the Board's decision to deny the permit was illegal. We affirm the district court's decision sustaining Baugh's petition for writ of certiorari.

AFFIRMED.