

IN THE COURT OF APPEALS OF IOWA

No. 3-027 / 12-0920
Filed March 13, 2013

**DANIEL R. OLLENBURG and
KRISTEN N. OLLENBURG,**
Plaintiffs-Appellants,

vs.

**BOARD OF ADJUSTMENT OF
THE CITY OF CLEAR LAKE, IOWA,**
Defendant-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Christopher Foy, Judge.

Landowners filed a petition for writ of certiorari challenging the grant of a conditional use permit by the Board of Adjustment of the City of Clear Lake.

AFFIRMED.

Kristen N. Ollenburg of Pappajohn, Shriver, Eide & Nielsen P.C., Mason City, for appellants.

John G. Sorensen of Sorensen Law Office and Charles H. Biebesheimer of Stillman Law Firm, Clear Lake, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Kristen and Daniel Ollenburg appeal the district court's denial of a writ of certiorari. They challenge the grant of a conditional use permit to LifeLine Resources, L.L.C. to operate a counseling center in a vacant elementary school. The Ollenburgs assert the district court erred in determining: (1) Clear Lake's zoning ordinance section 165.13(3)(M) is not unconstitutionally vague and overbroad;¹ (2) factors set out in Clear Lake's zoning ordinance section 165.52(5) were considerations rather than prerequisites; and (3) the Clear Lake Board of Adjustment's findings were supported by substantial evidence. We affirm.

I. Background Facts and Proceedings.

The City of Clear Lake published notice of a public hearing on October 26, 2010, to discuss LifeLine's proposed conditional use of the school. Additionally, notice was mailed to nearby property owners.

A LifeLine life-skills coach and a LifeLine co-owner spoke at the hearing. They stated the LifeLine activities would include small group counseling, individual counseling, and perhaps recreation. The activities would occur from approximately 4:00 p.m. to 7:00 p.m. for children ages ten to fourteen. Most attendees are voluntary participants, and they would be constantly supervised. Next, the Board gave community residents the opportunity to be heard. Nine residents addressed the Board, four spoke in favor and five spoke against the

¹ The Ollenburgs also argue the Board's action is unconstitutional as an illegal delegation of power. Because this argument was not addressed by the district court, we decline to consider it on appeal. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (ruling it is not a sensible exercise of appellate review to resolve an issue without the benefit of a lower court determination).

conditional use permit. In addition to speaking against the permit, Kristen Ollenburg presented a petition opposing the proposal signed by numerous citizens and an affidavit from an area realtor. At the conclusion of the meeting, the Board voted unanimously to approve LifeLine's application. The Board's written minutes of the meeting accurately summarize the speakers' statements.

The Board's findings of fact and notice of decision states:

Findings of Fact

. . . 2. [T]he proposed land use . . . is not inconsistent with the types of conditional land uses identified within the RM-12 Zoning District [Low-Density, Multi-Family Residential Zone].

3. . . . [Section 165.13(3)(M)] specifically permits the Board to grant approval to "other uses when there is clear evidence that such uses will not *seriously* affect the value and character of the surrounding neighborhood."²

4. [T]he utilization of the former Sunset School building and property by Lifeline Resources will not be detrimental to the value of the properties in the general area of the facility.

5. [T]he subject property abuts and is adjacent to properties of the same zoning district classification (RM-12).

6. [T]he evidence presented at the hearing does not adequately demonstrate that such use of the property would *seriously* affect the value and character of the surrounding neighborhood.

7. The use of the former Sunset School building and property by LifeLine Resources would be similar but less intrusive to the general character of the neighborhood in terms of traffic, noise, and parking than the building [and] property's previous use as an elementary school with faculty, staff, and students.

8. [T]he municipal infrastructure necessary . . . is currently in place.

9. [T]he building . . . is easily accessible to emergency response vehicles and personnel.

² Section 165.13(3), RM-12's Conditional Uses, states:

[A. to L: cemeteries and mausoleums, child daycare facilities, funeral home and mortuaries, group care facilities, neighborhood centers, public utilities, bed and breakfast homes, religious institutions, generalized and specialized private instruction schools, and transient housing]

M. Other uses when there is clear evidence that such uses will not seriously affect the value and character of the surrounding neighborhood.

10. [T]he request is NOT inconsistent with the City of Clear Lake Comprehensive Plan.

Notice of Decision

. . . You are hereby notified that the application . . . has been approved for the reasons listed below by unanimous vote

1. The use of the former Sunset School . . . will NOT be detrimental to the property values in the general vicinity or change the essential characteristics of the residential neighborhood on account of noise, location, parking, access, dust, odor, smoke, glare, heat, unsightly outdoor storage of equipment or other materials, or traffic.

2. There will be NO excessive demand on municipal services

3. The Conditional Use will NOT adversely affect the public's health, safety, welfare, and general morals.

The Ollenburgs petitioned the district court for a writ of certiorari. In a thorough and well-reasoned decision, the court rejected their arguments. The Ollenburgs argued section 165.13(3)(M) is unconstitutionally vague and overbroad. The court ruled when section 165.13(3)(M) and section 165.52(5)³ are read together, "these ordinances provide the Board and the public with sufficient guidance as to what an applicant for a permit must show to pass

³ Section 165.52(5), Conditional Use Permits, states:

A. . . . The Board may approve conditional use permits for any use that is in keeping with and appropriate to the uses authorized in that zone. The Board shall give due consideration to the following requirements in the approval or denial of any conditional use permit application.

(1) The conditional use approval would meet the general purpose of this chapter of promoting public health, safety, comfort, order, and the general welfare of the community.

(2) The conditional use approval would be in keeping with the general character of the surrounding area, the purpose as stated for that zone, and the Comprehensive Plan of the City.

(3) The conditional use approval would not result in any appreciable depreciation of adjacent property values or detract from the enjoyment and use of those adjacent properties.

(4) The conditional use approval would not create any amount or type of traffic that may be detrimental to others.

(5) The conditional use approval would not create objectionable noise, dust, smoke, or odor for nearby properties.

(6) The conditional use approval would provide adequate parking area so as not to create congestion of public streets and roadways.

constitutional muster.” See *Cyclone Sand & Gravel Co. v. Zoning Bd.*, 351 N.W.2d 778, 782 (Iowa 1984). During oral argument, petitioners’ counsel acknowledged section 165.13(3)(M) is to be read in conjunction with section 165.52(5).

Next, the Ollenburgs asserted the Board was without authority to grant the permit because LifeLine failed to establish all of the factors set out in section 165.52(5)(A). The court ruled: “While the Board was to give consideration to the matters described in section 165.52(5)(A) during its deliberations, nothing in the Clear Lake Code of Ordinances required the Board to make specific findings on any of these matters.”

Finally, The Ollenburgs challenged the sufficiency of the evidence to support the Board’s findings and the Board’s authority to issue the conditional use permit. The court ruled

. . . [T]he Court concludes that the findings of the Board are supported by substantial evidence and are sufficient to validate its grant of a conditional use permit The Board received conflicting evidence on the impact that the presence of LifeLine would have on neighboring property values and the general character of the neighborhood. It chose to believe and credit the evidence offered by the supporters of LifeLine [A] reasonable person would accept [that] evidence . . . as adequate to reach the same conclusion as the Board The evidence . . . [showed] the . . . LifeLine . . . operations would have no more impact on the neighborhood than when the Sunset View Elementary property was operated as a public school Mindful of the deference [the Board’s] findings are to be given under the *Bontrager Auto Service* case, the Court declines to disturb the decision of the Board

The Court also finds that the Board acted within its authority in granting the conditional use permit sought by LifeLine. Section 165.52(5)(A) allows the Board to issue a conditional use permit for “any use that is in keeping with and appropriate to the uses authorized in [the applicable] zone.” The use . . . as a counseling center is in keeping with and appropriate to the uses authorized in the RM-12 Zone The counseling center . . . would have many

of the same features and characteristics as a family care facility, a daycare facility, neighborhood center, or a private school, all of which are recognized as authorized uses in the RM-12 Zone The Board also addressed whether the proposed use was consistent with the Comprehensive Plan of Clear Lake and the impact of the proposed use on the health, safety, and welfare of the public.

The Ollenburgs appeal the district court ruling.

II. Scope and Standard of Review.

Zoning decisions are “an exercise of the police powers delegated by the State to municipalities.” *Shriver v. City of Okoboji*, 567 N.W.2d 397, 400 (Iowa 1997). A person aggrieved by the decision of a city board of adjustment may seek review in the district court by a petition for certiorari identifying the claimed illegality of the board’s action. Iowa Code § 414.15 (2009). A board “commits an illegality if the decision violates a statute, is not supported by substantial evidence, or is unreasonable, arbitrary, or capricious.” *Bowman v. City of Des Moines Mun. Housing Agency*, 805 N.W.2d 790, 796 (Iowa 2011).

We review the district court’s decision for correction of legal error. *Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483, 495 (Iowa 2008). “When a zoning ordinance is challenged on constitutional grounds, a presumption of constitutionality exists that can only be overcome by negating every reasonable basis upon which the ordinance could otherwise be sustained.” *Cyclone Sand*, 351 N.W.2d at 780.

We are bound by the board of adjustment’s fact findings if they are supported by substantial evidence. *Bontrager Auto*, 748 N.W.2d at 495. “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. Bd. of Trs., 522 N.W.2d 864, 866 (Iowa Ct. App. 1994). The decision reached by a board of adjustment enjoys a strong presumption of validity. *Ackman v. Bd. of Adjustment*, 596 N.W.2d 96, 106 (Iowa 1999). Where “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).

Expert testimony concerning the valuation of property is not required. *Bontrager Auto*, 748 N.W.2d at 496. A board is permitted to rely on anecdotal evidence. *Id.* “In addition, the board may rely on commonsense inferences drawn from evidence relating to other issues . . . to make a judgment as to whether the proposed use would substantially diminish or impair property values.” *Id.*

III. Merits.

Our role as a reviewing court on certiorari is not to exercise the Board’s underlying discretion ourselves. The district court provided a detailed summary of the record evidence, reviewed the evidence under the appropriate standard, and correctly applied the law. For the reasons stated by the district court, we affirm.

AFFIRMED.