

IN THE COURT OF APPEALS OF IOWA

No. 6-533 / 05-1058
Filed October 25, 2006

**GARY NEWT and KAREN NEWT, NEWT MARINE, INC.,
DUBUQUE BARGE & FLEETING SERVICE, INC.
d/b/a NEWT MARINE and DUBUQUE TERMINALS, INC.,**
Plaintiffs-Appellants,

vs.

**THE CITY OF DUBUQUE, IOWA, and
THE BOARD OF ADJUSTMENT OF THE CITY OF DUBUQUE, IOWA,**
Defendants-Appellees.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

Plaintiffs appeal a district court decision finding the Board of Adjustment properly denied their requests for variances from City zoning ordinances.

AFFIRMED.

David J. Dutton and Carolyn A. Rafferty of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellants.

Barry A. Lindahl, City Attorney, and James A. O'Brien, Assistant City Attorney, for appellees.

Heard by Miller, P.J., and Eisenhauer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

ROBINSON, S.J.**I. Background Facts & Proceedings**

Gary and Karen Newt own Newt Marine, Inc., and Dubuque Barge & Fleeting Service, Inc.¹ We will refer to all of these entities together as “Newt Marine.” Newt Marine is located in the south part of the Ice Harbor area in the City of Dubuque. The companies perform a variety of industrial, manufacturing, and commercial activity. Newt Marine also leases land from the City of Dubuque for the same purpose.²

On April 15, 2002, the City of Dubuque enacted an ordinance which changed the zoning of Newt Marine’s property from heavy industrial to planned unit development (PUD). The City’s master plan envisioned “changing the character of the area south of the Ice Harbor away from industrial uses to a pedestrian-oriented environment with places for employment and residential uses above office spaces.” See *Molo Oil Co. v. City of Dubuque*, 692 N.W.2d 686, 689 (Iowa 2005). The PUD ordinance has been upheld as a valid exercise of the City’s police power. *Id.* at 694.

The ordinances provided that prior nonconforming uses could continue to operate, “but may not expand in gross floor area nor change in use from one nonconforming use to another nonconforming use.” Ordinance No. 31-02 § 5(D)(1). A party may request a variance from the PUD ordinance by filing a request for a variance with the City of Dubuque Board of Adjustment.

¹ Dubuque Barge does business as Newt Marine and Dubuque Terminals, Inc.

² One lease is due to expire in 2010, and another in 2012.

In October 2003, Newt Marine filed a request for a variance to build a new storage and distribution building. The company stated it had been informed by the Iowa Department of Transportation (DOT) that it intended to condemn the land containing Newt Marine's current warehouse, and so the company sought authority to build a warehouse in a new location. Newt Marine also filed requests for variances seeking to build four new storage tanks. It claimed the storage tanks would be used to replace tanks which had previously been removed because they were obsolete. In addition, New Marine filed a request for a variance from the screening requirements of the PUD ordinance. The Board of Adjustment denied these requests for variances.

Newt Marine filed a petition for writ of certiorari in district court, contesting the decisions of the Board of Adjustment. See Iowa Code § 414.15 (2003). The district court determined the warehouse building and storage tanks would be an expansion of the current use of the property, and would be contrary to the PUD ordinance. The court found Newt Marine could still continue its business if the variances were not granted. The court affirmed the decisions of the Board of Adjustment. Newt Marine appeals.

II. Standard of Review

Under Iowa Code section 414.18, the district court reviews a decision of a board of adjustment de novo. The district court makes its own findings of fact. *Weldon v. Zoning Bd. of Adjustment*, 250 N.W.2d 396, 401 (Iowa 1977). If the court's factual findings 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. *U.S. Cellular Corp. v. Bd. of Adjustment*, 589 N.W.2d 712, 716 (Iowa 1999). We review the district court's decision for the correction of errors at law. *Chrischilles v. Arnolds Park Zoning Bd. of Adjustment*, 505 N.W.2d 491, 493 (Iowa 1993). The district court's decision is binding on appeal if supported by substantial evidence. *Weldon*, 250 N.W.2d at 401.

III. Merits

Newt Marine is engaged in a prior nonconforming use of its land. A nonconforming use is a use that was lawful when a zoning restriction was enacted, and has continued to exist under a "grandfather" clause. See *Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264, 270 (Iowa 2000). Property may lose its protection as a permissible nonconforming use if the use of the property is enlarged or extended. *City of Jewell Junction v. Cunningham*, 439 N.W.2d 183, 186 (Iowa 1989). The supreme court has stated:

The prohibition against expanding or enlarging a non-conforming use defends against the growth of a pre-existing aggravation. That pre-existing aggravation, the non-conforming use, survives as a matter of grace. The public is not required to expand upon that grace to its increasing aggravation.

Stan Moore Motors, Inc. v. Polk County Bd. of Adjustment, 209 N.W.2d 50, 53 (Iowa 1973).

On the other hand, "an intensification of a non-conforming use is permissible so long as the nature and character of the use is unchanged and substantially the same facilities are used." *City of Central City v. Knowlton*, 265 N.W.2d 749, 754 (Iowa 1978) (citation omitted). An increase in business, standing alone, does not constitute an illegal expansion of a nonconforming use.

City of Jewell Junction, 439 N.W.2d at 186. “Reasonable and normal accessory uses are usually permitted in connection with nonconforming uses.” *City of Okoboji v. Okoboji Barz, Inc.*, 717 N.W.2d 310, 315 (Iowa 2006).

If a proposed change or expansion to the use of property is not permitted by the city’s ordinances, a land owner may request a zoning variance from the city’s board of adjustment. Iowa Code section 414.12(3) permits boards of adjustment to grant variances as follows:

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.

An applicant for a zoning variance must show: (1) the land in question cannot yield a reasonable rate of return if used only for the purpose allowed in that zone; (2) the plight of the owner is due to unique circumstances; and (3) the use to be authorized by the variance will not alter the essential character of the locality. *City of Des Moines v. Bd. of Adjustment*, 448 N.W.2d 696, 698 (Iowa 1989). A failure to show any one of these elements requires the board to deny the request for a variance. *Id.*

A. Newt Marine contends it should have been permitted to relocate and reconstruct its storage building. Newt Marine states it has been informed by the DOT that the area of the current storage building will be condemned for expansion of a bridge. It claims that it is not expanding its use of the property, but only wants to build a new storage building to replace the one which it will lose. Carter Newt of Newt Marine stated the company would lose a substantial

part of its revenue if it could not have a storage building. He acknowledged the company did not have any evidence that it could not earn a reasonable rate of return on the property.

We conclude relocating the storage building would be an expansion of a nonconforming use under the PUD ordinance. The ordinance provides:

Reconstruction of Existing Uses: In Zone B, the Design Standards adopted on March 4, 2002, as part of the Port of Dubuque Master Plan for the Ice Harbor Urban Renewal District shall apply in the event of reconstruction of an existing use after destruction by more than fifty percent (50%) of the replacement cost at the time of destruction. In the event of reconstruction of an existing use by less than fifty percent (50%) of the replacement cost at the time of destruction, it may only be reconstructed if such reconstruction does not increase the degree of nonconformity that existed prior to destruction.

Ordinance 31-02 § 5(C)(2). Thus, under the ordinance, if the storage building were totally destroyed, as it would be by the construction of a bridge on that area, any new construction would be required to meet the new zoning requirements.

The general Dubuque zoning ordinance regarding lawful nonconformities provides:

Further, no such lawful nonconforming use of land shall be moved or relocated in whole or in part to any other portion of the zoning lot on which it is located than that portion occupied at the time of the adoption of this ordinance.

Zoning Ordinances § 4-6.2(C)(1). The zoning ordinances prohibit the relocation of the storage building to another portion of Newt Marine's property.

We then consider whether the board of adjustment should have granted Newt Marine's request for a variance to build the storage building. The board determined the request would adversely impact future development of adjacent

property, and the subject property did not suffer a singular disadvantage under the PUD ordinance.

In its de novo review, the district court found:

The property owner can still utilize the property in the manner which the business had been operating. No showing of unnecessary hardship was made.

The Plaintiffs were unable to produce any evidence indicating that the property could not be developed for uses permitted under the PUD ordinance. In fact, the current use under the Plaintiffs' existing business operation can continue without any variance being granted with regard to additional storage tanks and a storage building. Additionally, Plaintiffs were unable to produce evidence indicating that the business could not continue to earn a reasonable rate of return utilizing the remaining properties and functions of those properties.

We determine there is substantial evidence in the record to support the district court's findings. Newt Marine failed to show the unnecessary hardship which would be necessary for the board to grant a variance. Carter Newt admitted the company did not have any evidence that it could not earn a reasonable rate of return on the property. We affirm the district court on this issue.

B. Newt Marine sought variances to build four storage tanks. Newt Marine had removed four storage tanks on its land in 2001 because they were obsolete. Thus, at the time the PUD ordinance was enacted in April 2002, the company did not have these storage tanks. Newt Marine claimed it now had the need for the tanks, and sought to replace them. Carter Newt testified a substantial portion of the company's business came from selling lignin, which it stored in the tanks. He acknowledged the company was financially productive during the years after the storage tanks were removed.

“The use made of the land at the time the ordinance became effective is the standard we use to determine whether there is an unlawful enlargement of a nonconforming use.” *City of Okoboji*, 717 N.W.2d at 315. A permissible nonconforming use was in existence when the zoning restriction became effective, and continued to exist since that time. *Perkins*, 613 N.W.2d at 270. The storage tanks were not in existence at the time the PUD ordinance became effective. The storage tanks could not be considered to come within the prior nonconforming use of the property.

Also, section 5(D)(1) provides that a nonconforming use “may not expand in gross floor area nor change in use from one nonconforming use to another nonconforming use.” At this point, building four new storage tanks would be an increase in the area of nonconforming use of the property.

We turn next to the question of whether a variance should have been granted. The board of adjustment determined Newt Marine did not meet the requirements to obtain a variance to build the storage tanks. The board noted Newt Marine had not provided any information regarding economic hardship. The board also noted that the condition of being without four storage tanks had been caused by Newt Marine. The district court determined Newt Marine had failed to show an unnecessary hardship based on the same reasoning in its discussion of the storage building.

We conclude the district court’s decision is supported by substantial evidence. The evidence showed Newt Marine had not endured an unnecessary hardship during the years it was without the four additional storage tanks. Newt

Marine can continue its existing business without the four additional storage tanks. We affirm the district court on this issue as well.

C. Finally, Newt Marine contends it should be exempt from the screening requirements of the PUD ordinance. The PUD ordinance restricts outdoor storage, and provides, “[m]aterial stored must be screened from view from adjacent rights-of-way and properties. Screening must be opaque and a minimum of six (6) feet in height.” Ordinance 31-02 § 5(D)(4)(a).

Newt Marine stores large steel beams and steel coils outdoors. Carter Newt testified that requiring the company to screen its outdoor storage areas would greatly inhibit the company’s mobility in those areas. He stated a six-foot high fence would not effectively screen the company’s goods stored outdoors. He stated the cost to effectively screen the company’s outdoor goods would be prohibitive.

The board of adjustment found that application of the PUD ordinance would not present a singular disadvantage to Newt Marine. It also found that exempting Newt Marine from the screening requirements would grant the company a singular privilege, which is not conferred on other land owners in the area. The district court found Newt Marine had not shown an unnecessary hardship.

We determine there is substantial evidence in the record to support the district court’s findings on this issue. Newt Marine did not show sufficient reasons why it should be treated differently than other property owners in the area. The evidence showed Newt Marine would continue to earn a reasonable

rate of return, even if it were required to follow the screening requirements of the PUD ordinance.

We affirm the decision of the district court.

AFFIRMED.