

IN THE NEBRASKA COURT OF APPEALS

U.S.S. Hazard, Inc. a Nebraska)
corporation, and)
John Portera, its President,)
)
Appellees,)
)
v.)
)
City of Omaha Zoning Board)
of Appeals,)
)
Appellant.)

No. A-13-337.

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

JUN 27 2014

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

The City of Omaha Zoning Board of Appeals (Board) denied U.S.S. Hazard, Inc. and John Portera (collectively Hazard) the building permits they needed to reconstruct certain commercial property that had been damaged by flooding. The district court for Douglas County overruled the Board's decision, finding it was not supported by the evidence. The Board appeals the decision of the district court. Based on the reasons that follow, we affirm the district court's decision.

BACKGROUND

Hazard leases property from the City of Omaha, which is commonly known as Freedom Park. Freedom Park is adjacent to the Missouri River and is zoned as a heavy industrial district and a



floodway overlay district. In 2011, two structures located on the property and owned by Hazard, the Anchor Inn, and the Sandpiper Cove Repair Center, were damaged by the Missouri River flood waters. The Anchor Inn was a restaurant and bar establishment, and the Repair Center was a boat service and repair business. Both structures were inundated with flood water to a depth of four to six feet throughout the summer 2011.

After the flood waters receded, Hazard sought to obtain the permits required to reconstruct the Anchor Inn and Repair Center. The City of Omaha denied Hazard's request for permits for the reason that the structures constituting the Anchor Inn and the Repair Center could not be reconstructed at a cost less than 50 percent of the structures' pre-flood fair market value, as required by Omaha Municipal Code § 55-661(b).

Hazard filed an appeal of the City's denial of building permits to the Board. A hearing was held and evidence was presented by both Hazard and the City on the issue of whether the cost to restore the structures was more than 50 percent of their market value before the flooding occurred.

The City's evidence showed that the City is the designated Federal Emergency Management Agency (FEMA) administrator for natural disasters, including the 2011 Missouri River flood. As the administrator, the City uses the FEMA Substantial Damage Estimator computer program to calculate the extent of damage to

a structure. Kurt Holmstrom, from the City Planning Department, was the FEMA-trained damage estimator for the City and his job included assessing structures that have been damaged to determine whether or not they are replaceable under FEMA standards.

Holmstrom stated that he inspected the structures at issue and found that various components had been removed from inside the structures. He described the structures as mere "shells," because there was no electrical, plumbing, heating, or air conditioning systems. In regard to the Anchor Inn, he said that anything related to a kitchen or a restaurant had been removed. After Holmstrom inspected the structures, he used the FEMA damage estimator program to calculate the amount of damage to Hazard's structures and a report was prepared on both structures. Based on information Holmstrom entered, the program computed total replacement costs and actual cash value (which can be used as market value) prior to flooding, and total estimated damages. The "substantial damage estimator" reports are in the record before us.

Based on the FEMA calculations, the total replacement cost of the Anchor Inn building prior to the flood of 2011 was \$801,968.20. A depreciation percentage of 40 percent was used, making the actual cash value or market value \$481,181. The total estimated damage to the Anchor Inn building was \$490,002.58,

resulting in a repair/reconstruction percentage of 101.8 percent. Similarly, the Repair Center was determined to have a pre-flood total replacement cost of \$86,231.20. After a 71 percent depreciated rate was used, the actual cash or fair market value was \$25,007. The total estimated damages were calculated to be \$47,039.12, resulting in a repair/reconstruction percentage of 188.1 percent.

Holmstrom stated that based on the extent of damage to the structures, they were considered 100 percent damaged. Holmstrom explained that when components have been removed from a structure, making it a mere shell, FEMA considers the structure to be 100 percent damaged. Holmstrom further explained that the FEMA estimator program mandates that once a structure has become 100 percent damaged, the value becomes zero and it is considered a 100 percent loss. He stated therefore, that because the structures at issue had been stripped of their components, they were a total loss, regardless of what the replacement value was.

Michael Carter, from the City's Planning Department, stated that the two structures at issue are continually at risk for flooding because they are located on the river side of the levy. Carter stated that there was a danger to life and property due to flooding now and in the future of any buildings that are built in the area. He stated that the property where the structures are located is designated as a floodway and that the

Anchor Inn and the Repair Center's uses were not allowed uses within the floodway district. Carter stated that because the FEMA damage estimator determined that both structures had been 100 percent damaged, reconstruction was required within regulations of the floodplain code. He also noted that if the City grants any unwarranted variances, FEMA could place the City on probation or suspension in the National Floodway Insurance Program which would have potential long-term consequences beyond the property at issue.

Hazard presented evidence of the costs to restore the structures in an effort to show that they could be reconstructed for less than 50 percent of their value prior to the flooding. Hazard had hired Thomas Cullinane, from Global Contracting Services, Inc., to estimate what it would cost to perform structural, and separately non-structural, remediation on the Anchor Inn and the Repair Center. The evidence shows that Cullinane estimated that the structural repair cost of the Anchor Inn would be \$3,348, and the non-structural repair cost would be \$67,378, for a total cost of \$70,726. He also estimated that the structural repair cost of the Repair Center would be \$1,175.89, and other repair costs would be \$5,456.01, for a total cost of \$6,631.90. Hazard contended that the structural repair costs were the costs necessary to return the buildings to

leasable use, and that the buildings would need additional tenant improvements.

Hazard also argued that because the FEMA calculations did not calculate the cost of remediation, the only evidence in regard to the cost of remediation was that presented by Hazard. It contended that the \$70,000 estimated by Cullinane for the cost of structural and non-structural repairs on the Anchor Inn is much less than 50 percent of the City's pre-flood value of \$481,000. Similarly, the \$6,631.90 estimated by Cullinane for the repairs on the Repair Center is less than 50 percent of the City's pre-flood value of \$25,007.

At the conclusion of the hearing, the Board denied Hazard's request to require the City to issue building permits for the restoration of Hazard's commercial property.

Hazard filed a petition with the district court, appealing the Board's denial of building permits. Following a hearing, the district court overruled the Board's decision finding it was not supported by the evidence. The district court concluded that Hazard presented evidence to the Board that it was able to restore the structures in question at a cost of less than 50 percent of the pre-flood market value of the structures. The court found that Hazard's evidence was unrebutted and unchallenged by any competent evidence presented by the City and as a result, Hazard carried its burden of proof. It concluded

that under the City's ordinances, Hazard was entitled to the building permits for the structures in question as a matter of right.

ASSIGNMENT OF ERROR

Restated, the Board assigns that the district court erred in concluding that its decision to deny Hazard's request for building permits was not supported by the evidence and was arbitrary, unreasonable, or clearly wrong.

STANDARD OF REVIEW

On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. *Rousseau v. Zoning Bd. of Appeals of Omaha*, 17 Neb. App. 469, 764 N.W.2d 130 (2009). In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law. *Id.* Where competent evidence supports the district court's factual findings, an appellate court will not substitute its factual findings for those of the district court. *Id.*

ANALYSIS

The Board assigns that the district court erred in overruling its decision to deny Hazard's request for building permits, finding that the decision was not supported by the

evidence. The Board argues that based on the FEMA damage estimator calculations and relevant City floodway ordinances, there was sufficient evidence presented to support the Board's denial of building permits.

Omaha Municipal Code § 55-661(b), part of the zoning ordinances pertaining to overlay districts, permits reconstruction of any nonconforming use or structure destroyed by any means, including flood, if reconstruction cost is less than 50 percent of the market value of the structure before the damage occurred. If reconstruction is more than 50 percent of the market value, any reconstruction must be in conformity with the provisions of the ordinance. The Anchor Inn and Repair Center structures were, at the time of the flood, nonconforming structures under the zoning scheme, making § 55-661(b) a relevant ordinance for determining whether Hazard should be permitted to rebuild the Anchor Inn and Repair Center.

Hazard presented evidence to show that both structures could be reconstructed at a cost less than 50 percent of their market value before the flooding. Hazard relied on the City's fair market values of the structures prior to the flooding as calculated by the FEMA damage estimator program, and on the estimates provided by Cullinane for the costs to restore the structures. The district court concluded that Hazard presented evidence to show that reconstruction was permitted under § 55-

661(b) and that it was entitled to the necessary building permits. The court found that Hazard's evidence was unchallenged by any competent evidence.

The Board argues that the district court failed to consider the FEMA damage estimator calculations presented by the City and the fact that the structures are located in a floodway overlay district. The City presented evidence which showed that based on Holmstrom's inspections and the resulting FEMA damage estimator calculations, both structures were 100 percent damaged and a total loss. Holmstrom explained that even if Hazard could rebuild the structures at a cost less than 50 percent of the value before the flood, the FEMA estimator deemed the structures to be 100 percent damaged, regardless of what the replacement value was.

However, the determining factor under § 55-661(b) is whether the reconstruction cost is less than 50 percent of the market value before the damage occurred. The FEMA damage estimator program computed total estimated damages, not reconstruction costs. Therefore, the evidence presented in regard to calculations produced by the FEMA damage estimator program was not evidence of reconstruction costs, and did not rebut Hazard's evidence of reconstruction costs.

Based on our review of the record, we conclude that Hazard presented evidence to show that the reconstruction costs for the

two structures at issue were less than 50 percent of their pre-flood market value. The City failed to present evidence to rebut Hazard's evidence of reconstruction costs. Therefore, under § 55-661(b), the building permits for reconstruction of the nonconforming structures should have been granted by the Board. The district court did not abuse its discretion in overruling the Board's decision.

CONCLUSION

We conclude that the district court did not err in concluding that based on the evidence presented to the Board, Hazard was entitled to the building permits necessary to reconstruct the structures at issue. Accordingly, the order of the district court overruling the Board's decision is affirmed.

AFFIRMED.

THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln.




Clerk/Deputy Clerk

COURT OF APPEALS NO.	A-13-0337
TRIAL TRIBUNAL NO.	CI12-6227
DATE OPINION FILED	June 27, 2014
DATE OPINION CERTIFIED	June 27, 2014

