

IN THE IOWA DISTRICT COURT FOR WARREN COUNTY

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<b>CITY OF INDIANOLA, IOWA,</b> <b>Petitioner,</b>	)	<b>Case No.: CVCV037789</b>
	)	
	)	
<b>v.</b>	)	
	)	<b>DEFENDANT'S BRIEF</b>
<b>THE BOARD OF ADJUSTMENT OF</b> <b>WARREN COUNTY, IOWA,</b> <b>Defendant.</b>	)	
	)	
	)	
	)	

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COMES NOW, Douglas A. Eichholz, Warren County Attorney, and Dawn M. Bowman, Assistant Warren County Attorney, and hereby submit Defendant's Brief in the above-captioned case.

Respectfully Submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
STATEMENT OF ISSUES PRESENTED FOR REVIEW	4
STATEMENT OF THE CASE	5
STATEMENT OF FACTS	6
ARGUMENT	15

## TABLE OF AUTHORITIES

### Cases

*A-Line Iron & Metals, Inc. v. Cedar Rapids Board of Adjustment*, 791 N.W.2d 710 (Iowa Ct. App. 2010).

*City of Ames, Iowa v. Story County, Iowa*, 392 N.W.2d 145 (Iowa 1986).

### Code of Iowa (2017)

Code of Iowa, Section 335.10 (2017).

Code of Iowa, Section 335.11 (2017).

Code of Iowa, Section 335.15(2) (2017).

Code of Iowa, Section 335.21 (2017).

### Warren County Code of Ordinances (2018)

Warren County Code of Ordinances, Chapter 41, Sections 41.02, 41.02(2), 41.02(2)(H), 41.02(3), 41.02(4), 41.02(2-41.02(4)),

Warren County Code of Ordinances, Chapter 43, Sections 43.06, 43.08, 43.09(3).

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I. THE WARREN COUNTY BOARD OF ADJUSTMENT'S DECISION TO DENY THE CITY OF INDIANOLA'S APPLICATION FOR A SPECIAL USE PERMIT FOR THE CITY'S WASTEWATER TREATMENT PLANT WAS LEGAL AND NOT CONTRARY TO WARREN COUNTY CODE OF ORDINANCES.
- II. THE WARREN COUNTY BOARD OF ADJUSTMENT'S DECISION WAS NOT UNREASONABLE, ARBITRARY, NOR CAPRICIOUS AND WAS BASED ON SUBSTANTIAL EVIDENCE.
- III. THE COUNTY'S ORDINANCES SHOULD APPLY TO THE CITY, AND WHEN TWO GOVERNMENTAL AGENCIES ARE UNABLE TO REACH AN AGREEMENT AND ACCOMODATIONS, THE COURT WILL USE A BALANCING OF INTEREST TEST TO DECIDE THE MATTER.

**STATEMENT OF THE CASE**

This case began on August 10, 2018, when the City of Indianola (“City”) applied for a Special Use Permit, pursuant to Warren County Code of Ordinances, Chapter 41, Section 41.02(2) (Respondent’s Ex. 1), for construction and operation of a wastewater treatment plant the City plans to build on more than 300 acres of real property that the City has owned since the property was purchased in 2002. (Respondent’s Ex. 2.) The City’s property is located near the 10700 block of Grimes Street in Warren County, north of the City. The plant will be built on Parcel Nos. 05000039880 and 05000039820. The legal descriptions for the parcels are as follows:

The Southeast quarter of the Southeast quarter of Section 3, Township 76 North, Range 24 West of the 5<sup>th</sup> P.M., Warren County, Iowa; and  
The Northeast quarter of the Southeast quarter of Section 3, Township 76 North, Range 24 West of the 5<sup>th</sup> P.M., Warren County, Iowa.

The property is zoned A-1 Agricultural, and the Warren County Code of Ordinances Chapter 41, allows public sewage treatment facilities (or wastewater treatment plants), such as the Wastewater Treatment Plant for the City, to be built on A-1 zoned property, provided a Special Use Permit is granted by the Warren County Zoning Board of Adjustment. (Respondent’s Ex. 1.)

The Board of Adjustment denied the City’s Application for a Special Use Permit, and the City has appealed the Board’s decision to District Court. (Warren County Code of Ordinances, Chapter 43, Zoning—Enforcement and Administration, Section 43.09(3)) (Respondent’s Ex. 3).

## STATEMENT OF THE FACTS

### Applications for Special Use Permits

The City requested a Special Use Permit from Warren County allowing the construction and operation of a wastewater treatment plant on City owned property. The request for a Special Use Permit goes before the Warren County Board of Adjustment.

Section 43.08 of the Warren County Code of Ordinances enumerates the Powers and Duties of the Board. Section 43.08(1)(B) states: “The Board of Adjustment shall have the following powers and it shall be its duty: To hear and permit special exceptions to the terms of the Zoning Ordinance upon which the Board of Adjustment is required to pass under the Zoning Ordinance.” (Respondent’s Ex. 3.) The powers of the Board of Adjustment regarding special exceptions to the terms of the ordinance are also enumerated in Iowa Code Section 335.15(2) (2019).

The specific details required in Applications for Special Use Permits is addressed in Section 41.02(4). (Respondent’s Ex 1.)

Applications for Special Use Permits. Applications for a Special Use Permit under the terms of this section shall be accompanied by evidence concerning the feasibility of the proposed request and its effect on surrounding property and shall include a site plan defining areas to be developed for buildings and structures, the areas to be developed for parking, the locations of driveways and the points of ingress and egress, including access roads where required, the location and height of walls, the location and type of landscaping, the location, size and number of signs and the manner of providing water supply and sewage treatment facilities. Before issuance of a Special Use Permit for any of the above buildings or uses, the Board of Adjustment shall review the conformity of the proposal and site plan with the standards of the Comprehensive Land Use Plan, and with recognized principles of engineering design, land use planning and landscape architecture. The Board may approve or disapprove the Special Use Permit as submitted or, before approval, may require that the applicant modify, alter, or amend the proposal as the Board deems necessary to the end that it preserve the intent and purpose of the Zoning Ordinance to promote public health, safety, and the general welfare. In the event a Special Use Permit is granted under the terms of this section any change thereafter

in the approved use or site plan shall be resubmitted and considered in the same manner as the original proposal.

Iowa Code section 335.10 (2018) also addresses the conditions that the Board of Adjustment will consider when reviewing an application for a Special Use Permit.

### **Board of Adjustment Meetings**

Applications for Special Use Permits are presented to the Warren County Board of Adjustment, which holds regular meetings on the second Thursday of the month (occasional scheduling conflicts may require meetings to be held on Wednesdays). (Respondent's Ex. 2.)

Notice of the meetings and the hearings to be heard at those meetings are published in the three newspapers of record for the County, the *Carlisle Citizen*, the *North Warren Town and County News*, and the *Record Herald and Indianola Tribune*. The meetings are held in the Board Room of the Administration Building, located at 301 N. Buxton, Indianola, Iowa 50125. Board of Adjustment meetings are open to the public, and public comment is encouraged for each hearing before the Board.

In addition to publishing the notices of meetings and hearings, when a citizen or governmental entity makes application for a variance or a Special Use Permit, the Zoning Administrator and/or the Assistant Zoning Administrator mail notices to the property owners within 500 feet of the property for which the variance is sought.

Meetings are held at 6:30 p.m. All hearings during the meeting are recorded, and those who wish to address the five-member Board of Adjustment are required to speak to the Board from a podium located in front of the Board members, which assures the speaker's comments are recorded. The recorded minutes are maintained by the Zoning Administrator, and once approved by the Board of Adjustment, the minutes are published in the newspapers of record. Resolutions,

either approving or denying applications for variances or Special Use Permits, also are published in the newspapers of record.

Applicants are entitled to a hearing before the full Board of five members. This is announced when fewer than five Board members are present for a meeting. A quorum is three members. A quorum is required to conduct business meetings. (Warren County Code of Ordinances, Chapter 43.06, Board of Adjustment-Appointment and Terms (Respondent's Ex. 3); Iowa Code Section 335.11 Membership of board (2017)). If one or two Board members are absent, the applicant may ask to have the matter continued to the next meeting.

**Presentation of Applications for Special Use Permits**

The procedure for presentation of an application is as follows: The Zoning Administrator or the Assistant Zoning Administrator presents the application to the Board of Adjustment, by presenting Findings of Fact and Recommendation. The Findings of Fact include the details of the application, including the applicant's name and address, the property, the variance or Special Use Permit sought, and the applicable sections of the Warren County Code of Ordinances. Staff recommendation(s) are based on findings of fact, Chapters 43.08 & 41.02(2)-41.02(4) of the 2018 Warren County Code of Ordinances (Respondent's Exs. 1, 3). Said Chapters govern the issuance of Special Use Permits by the Board of Adjustment and state that certain uses may be permitted in the A-1 (Agricultural District) subject to approval by the Board of Adjustment." (Respondent's Ex. 2.)

Thirteen different conditions are considered in the Administrator's Finding of Fact/Recommendations for Special Use Permits (Respondent's Ex. 4).

"In its consideration of any particular Special Use Permit the Board shall consider all of the following conditions.

- a. Has the petitioner submitted evidence concerning the proposed special use as required by Chapter 41.02(4) of the Zoning Ordinances?
- b. Is the special use listed in the Zoning Ordinance for the zoning district under consideration?
- c. Is the petition for a Special Use Permit in accord with the general purpose and intent of the Land Use Plan and Policies and the Zoning Ordinance?
- d. Does the proposed location, design, construction and operation of the particular use adequately safeguard the health, safety, and general welfare of persons residing or working in adjoining or surrounding property?
- e. Will the special use maintain an adequate supply of light and air to adjoining properties?
- f. Will the special use maintain the same or increase the value of the adjoining properties?
- g. Will the special use provide adequate protection from fire and other danger to said property and adjoining properties?
- h. Will special use provide adequate screening of the use if visually detrimental to adjoining properties?
- i. Will the special use maintain safe traffic movements on adjacent public streets?
- j. Will the special use provide adequate parking as required by the Zoning Ordinance?
- k. Will the special use provide adequate sewage treatment facilities and water supply in accordance with the regulations of the County?
- l. Will the special use abate or prohibit the disposal of refuse matter, water-carried waste, obnoxious or offensive odor, smoke, dust, gas, noise or similar nuisance detrimental to adjoining properties and general health?
- m. Has the applicant proved his case for a Special Use Permit? Just applying isn't enough."

(Respondent's Ex. 4.)

The Zoning Administrator checks “yes” or “no” on each of the questions, and then reaches a conclusion and makes Staff Recommendation(s).

Once the Zoning Administrator/Assistant Zoning Administrator finishes the presentation of the application and delivers the Staff Recommendation, the Board goes into public hearing, by motion and second from the Board members. During the public hearing, the applicant presents information and evidence regarding his or her request for the Special Use Permit. The Board members may ask questions during this presentation. After the applicant is finished, the Board invites those members of the public who wish to speak in favor of the application to address the Board. When all those in support of the application have spoken, the Board invites those in opposition to speak. After those in opposition speak, the applicant addresses or redresses any concerns expressed by those in favor or opposed to the application and may reiterate the request for the application. The Board members may address the applicant again for clarification if necessary. By motion and second, the Board moves from public hearing to meeting, during which they can talk about and consider the application. The Chairman will ask for a motion for approval of the application. Motion will be made and seconded, and the Chair will call for roll call. Board members will vote aye or nay. Occasionally a member will abstain during the vote.

Warren County Code of Ordinances Section 41.02(2) (2018) addresses Special Use Permits in A-1 District. (Respondent’s Ex. 1.)

Special Use Permits A-1. The following uses may be permitted in the A-1 District subject to approval by the Board of Adjustment after notice and public hearing and subject to the conditions in subsection 3 of this section:

H. Public water supply and sewage treatment facilities.

Section 41.02(2)(3) of the Warren County Code of Ordinances addresses “Conditions for Special Use Permits.” (Respondent’s Ex. 1.)

Conditions for Special Use Permits. In its determination upon the particular use at the location requested, the Board of Adjustment shall consider all of the following conditions:

- A. That the proposed location, design, construction and operation of the particular use adequately safeguards the health, safety and general welfare of person residing or working in adjoining or surrounding property;
- B. That such use shall not impair an adequate supply of light and air to surrounding property;
- C. That such use shall not unduly increase congestion in the streets or public danger of fire and safety;
- D. That such use shall not diminish or impair established property values in adjoining or surrounding property; and
- E. That such use shall be in accord with the intent, purpose, and spirit of the Zoning Ordinance and Comprehensive Land Use Plan of the County.

The five conditions for Special Use Permits in the Warren County Code of Ordinances are encompassed in the 13 conditions addressed in the Application for Special Use Permits.

In each of the documents, the Application for a Special Use Permit and the Warren County Code of Ordinances, the Board of Adjustment is required to *consider* the 13 conditions in the application and the five conditions in the Zoning Code. Neither document states that each of the conditions must be met for the Board of Adjustment to approve an application for a Special Use Permit.

**Presentation of the City's Application for Special Use Permit**

Public Notice for the Board of Adjustment meeting on September 13, 2018, was published in the newspapers of record for the County, the Carlisle Citizen, the North Warren Town and County News, and the Record Herald and Indianola Tribune. On August 28, 2018, neighbor notices were mailed to property owners within 500 feet of the property owned by the City of Indianola (see described above).

At the September 13, 2018, meeting, Assistant Zoning Administrator Karie Ellwanger presented the City's application for a Special Use Permit to four of the five members of the Board of Adjustment. One member of the Board, David Churchill, recused himself due to a conflict. In her presentation, Ms. Ellwanger presented the Findings of Fact/Recommendation. (Respondent's Ex. 4). The staff recommendation was that the Board of Adjustment approve the application and grant a Special Use Permit to the City. Of the 13 conditions set forth in the application, Ms. Ellwanger noted that the Zoning Administrator had answered "no" to one condition: Condition f: Will the special use maintain the same or increase the value adjoining properties? She noted that the sewer plant is to/for the City, not rural [residents' benefit]. (Respondent's Ex. 4.)

Ms. Ellwanger read the Recommendation: "Staff recommends approval of this special use application. Land Use Plan calls for A-1. The Zoning Ordinance lists the proposed use as an allowed use with a Special Use Permit. Therefore, we recommend approval."

After hearing evidence from the City, through a presentation made by Jim Rasmussen, HR Green, one of the Board members asked if the County Engineer could be present to address concerns the Board members had regarding the location of the driveway into the City's property. The board also heard testimony from 10 citizens and one attorney who represented two of the

citizens who spoke, all of whom spoke against the Board approving a Special Use Permit. The Board of Adjustment tabled the matter until the October 11, 2018, meeting. The presentation made by Jim Rasmussen, HR Green, was added to the City's Application for Special Use Permit.

Public Notice for the Board of Adjustment meeting on October 11, 2018, was published in the newspapers of record for the County, the Carlisle Citizen, the North Warren Town and County News, and the Record Herald and Indianola Tribune. On October 2, 2018, neighbor notices were mailed to property owners within 500 feet of the property owned by the City of Indianola.

On October 11, 2018, at the Board of Adjustment meeting, Mr. Churchill recused himself from the meeting due conflict, and the City, through a presentation made by Jim Rasmussen of HR Green, presented additional evidence in support of its application for a Special Use Permit to use its property for the City's wastewater treatment plant. The Board also heard testimony from 15 citizens, speaking against the approval of the Special Use Permit. Ryan Waller, City Manager for the City of Indianola, also presented information before the Board of Adjustment, speaking in favor of the City's application for a Special Use Permit. After discussion, the Board tabled the hearing until November 14, 2018, to allow the City time to host a meeting with interested citizens to discuss possible amendments to the application that would specify measures the City was willing to take regarding construction and operation of the plant, and document the measures by adding an amendment to the application. The presentation made by Jim Rasmussen, HR Green, was added to the City's Application for Special Use Permit

On October 15, 2018, the City mailed or emailed a letter to 16 persons or entities, including citizens who had provided their names and addresses at the October 11, 2018, Board of

Adjustment meeting. (Respondent's Ex. 5.) The meeting was held on October 25, 2018, in City Council Chambers.

On November 5, 2018, the Indianola City Council approved Resolution 2018-195, documenting the City's commitment to the citizens regarding the construction and operation of the wastewater treatment plant. (Respondent's Ex. 6.)

On November 14, 2018, during the Board of Adjustment's meeting, David Churchill recused himself from the hearing due to conflict. The City presented additional witnesses and documentary evidence, including a memo, "Evaluation of Property Values Near the Indianola WWTP," authored by Jim Rasmussen, HR Green, supporting the use of the proposed site for the City's wastewater treatment plant. (Respondent's Ex. 7.) The City also presented Resolution 2018-195, which was added as an amendment to the City's Application for a Special Use Permit. (Respondent's Ex. 6.) County Engineer David Carroll spoke in favor of the City's plan to build the wastewater treatment plant on the City's property. Two citizens spoke in opposition to the Special Use Permit.

It was moved by Board member Dan Smith to grant the City's Application for a Special Use Permit. In his motion, Mr. Smith detailed the reasons for granting the permit, and stipulated conditions the City would need to meet in and during construction, and during operation of the plant.

Having diligently, as a Board, reviewed the Findings of Fact, all of the fact-based information, the evidence provided through these three hearings, with some specific conditions, I would move to approve the application. Those conditions would be the site as proposed be completely screened within one-year, year-round, from view, naturally, in addition to any brick or concrete construction that blended with the environment. I say naturally but that's going to require a lot of evergreen trees. Iowa doesn't have those I believe, naturally. If this is approved, I would want it to be invisible within one year after completion. I would like for the City to provide to the County, the Zoning Administrator and the Director of Environmental Health, an annual letter showing compliance with all regulations. If something isn't in

compliance, a letter with a plan of action on how they are planning to remedy that situation. Further, if there is an emergency declared at the plant, that within one hour our Disaster Director be notified as well as Environmental Health and the Zoning Administrator. I don't think we can ever address at any location all of the property value issues. I firmly believe the City is in need, very soon, of a new wastewater treatment plant.

Minutes of the Meeting, November 14, 2018. (Respondent's Ex. 10.)

The motion was seconded by Board member Marilyn Halterman.

By a vote of three to one, the Board denied the City's application for a Special Use Permit allowing the City to construct and operate a wastewater treatment plant for the City of Indianola on city-owned property. (Respondent's Ex. 10.)

The City of Indianola has appealed the Board of Adjustment's decision, pursuant to Chapter 43, Zoning—Enforcement and Administration of the Warren County Code of Ordinances, specifically Section 43.09(3), which states

Any taxpayer, or any officer, department, board or bureau of Warren County, or any person or persons jointly or severally aggrieved by any decision of the Board may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty (30) days after the filing of the decision in the office of the Board.

Warren County Code of Ordinances, Chapter 43.09(3). (Respondent's Ex. 3.)

The City filed a timely appeal.

## **ARGUMENT**

### **ISSUE I**

THE WARREN COUNTY BOARD OF ADJUSTMENT'S DECISION TO DENY THE CITY OF INDIANOLA'S APPLICATION FOR A SPECIAL USE PERMIT FOR THE CITY'S WASTEWATER TREATMENT PLANT WAS LEGAL AND NOT CONTRARY TO WARREN COUNTY CODE OF ORDINANCES.

A. **Statement as to how the Issue was Preserved for Appellate Review.**

The Appellee preserved the issue for appellate review by addressing the issue during the Warren County Board of Adjustment hearings on September 13, 2018, October 11, 2018, and November 14, 2018, and in its timely filed Answer.

B. **Scope and Standard of Appellate Review.**

The scope of review by the District Court is de novo. Code of Iowa, Section 335.21 (2018).

C. **Argument.**

This action concerns the City of Indianola's application for a Special Use Permit to construct and operate a wastewater treatment plant on property owned by the City of Indianola, and the Warren County Board of Adjustment's denial of the application for a Special Use Permit. The City contends that the Board of Adjustment failed "to provide a full reason for its decision, and that the decision should have been supported by written testimony or evidence submitted in connection therewith." (City's Petition, filed December 14, 2018.)

In *A-Line Iron & Metals, Inc., v. Cedar Rapids Board of Adjustment*, 791 N.W.2d 710 (Iowa Ct. of App. 2010), the Iowa Court of Appeals stated

"The Iowa Supreme Court has established a rule that 'boards of adjustment shall make written findings of fact on all issues presented in any adjudicatory proceeding.' *Citizens Against the Lewis & Clark (Mowery) Landfill v. Pottawattamie County Bd. of Adjustment*, 277 N.W.2d 921, 925 (Iowa 1979). It is sufficient if a board substantially complies with this requirement. *Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483, 488 (Iowa 2008). There is substantial compliance if the rule 'has been followed sufficiently so as to carry out the intent for which it was adopted. *Id.* (citation omitted). The intent of the rule requiring written findings is 'to enable a reviewing court to determine with reasonable certainty the factual basis and legal principles upon which the board acted.' *Citizens Against*, 277 N.W.2d at 925."

The Warren County Board of Adjustment recorded the *Resolution Denying Issuance of a Special Use Permit* in the Warren County Recorder's Office on November 21, 2018.

(Respondent's Ex. 11.) In the Resolution, which is three pages long, it was clearly stated that the Board of Adjustment held three hearings regarding the City's Application for Special Use Permit; that multiple speakers presented evidence and views for and against the application, with the majority (16 to 4) speaking against the application; that multiple letters and emails written in opposition to the application were received by the Zoning Administrator and the Assistant Zoning Administrator and were submitted into the record and provided to the all Board of Adjustment members; that multiple letters and emails written in support of the application were received by the Zoning Administrator and the Assistant Zoning Administrator and were submitted into the record and provided to the all Board of Adjustment members; that the Iowa Department of Natural Resources (DNR) had received the appropriate documentation and the City's application to the DNR was in review, but a final decision from the DNR had not been received by the City; that the County Engineer had reviewed the site plans and discussed with Mr. Rasmussen of HR Green the changes he would like to see in the plan regarding the entrances and roads, and that the County Engineer voiced his support of the location from his perspective.

The motion to approve the application, made by Dan Smith, set forth additional conditions with which the City would comply (the site, as proposed, and the brick of the building be completely naturally screened within one year; that the City of Indianola provide an annual letter of compliance to Warren County; that the Zoning Administrator be notified within one hour of a disaster at the plant. The motion was seconded by Marilyn Halterman. Roll call vote of the members was as follows: Vice Chair Christine Walker, nay; Member Marilyn Halterman, nay; Member Dick McPherson, nay; Member Dan Smith, aye. The City's application for the

Special Use Permit was denied. Chair David Churchill recused himself from the meetings and voting, due to a conflict.

Each of the three meetings was recorded and the minutes were transcribed and approved by the Board of Adjustment in a timely manner. The recordings and the minutes are available for any person who requests them.

Although the Board of Adjustment did not include written findings of facts or conclusions of law in the Resolution, the facts of this matter were discussed at length by the Board of Adjustment members during the open meetings. During the discussions, the Board members stated their concerns as follows:

1. Meeting on September 13, 2018.
  - a. **Member Dick McPherson:** What is the source of water for the plant, city water or rural water? Is the soil type on that hill going to present any issues? ...it is basically sand. I want to hear from the County Engineer [who was unable to present at the September 13, 2018, meeting] about his concerns. The wooden bridge on Grimes Street is not conducive to semi-truck traffic...if this is approved, there would be a lot of heavy equipment, concrete trucks, semi-trucks, and everything else that's got to get in there some way or another. I can also appreciate that the city has not been the best neighbor with the way they have dealt with some of the sludge in the past. I wonder if any other locations on this farm have ever been looked at as a possible site other than the one that was presented here this evening. That's a question I have and I think it's a question I heard from several other folks in the neighborhood out there tonight.
  - b. **Member Dan Smith:** You're saying the elevation of the final grade is going to be above the level of the flood plain?
  - c. **Vice Chair Christine Walker:** You said it outlets into the Middle River? How is that accomplished? [Rasmussen from HR Green addressed her question.]
  - d. **Member Halterman:** I have a question in regard to your bio-solids and you're wanting to dispose of those in a pipe? [Rasmussen explained the storage tank and umbilical system for knifing the biosolids into the soil.] I think we just need more time to evaluate what has been brought forth by the public. I'm very uncomfortable

without the Engineer and the road conditions. I want more input before I vote.

Minutes of the Meeting, September 13, 2018. (Respondent's Ex. 8.)

2. Meeting on October 11, 2018.

- a. **McPherson:** Not sure that the application meets all the requirements. Our criteria has been noted by several speakers tonight. Property values. I can't imagine too many real estate agents receiving calls from perspective buyers asking for listings located near a sewage treatment plant...I don't support this Special Use Permit because I don't believe it fulfills the criteria required that it must in order for to approve it.
- b. **Walker:** Agree. I don't know it's possible for them to build a sewer treatment plant in the county and not affect nearby property values.
- c. **Smith:** Agree with Walker and McPherson...As a board we are trying to determine how neighbors can work together...I want to hear solutions...before they [City] can go anywhere with anything, they have to show they are in complete compliance with DNR requirements.
- d. **Halterman:** One of my concerns is the City has not been a good neighbor...As a Board we can't set all of these parameters to be addressed...Comes back on county taxpayers to maintain roads and bridges.

Minutes of the Meeting, October 11, 2018. (Respondent's Ex. 9.)

3. Meeting on November 14, 2018.

- a. **Smith:** In the meeting the County Engineer says, "Safety. Where possible separate local traffic from construction. Do you know what that entails? [HR Green provided answer.] I have a real concern about the discharge to Middle river. Are there safety precautions built into this so nothing could ever be considered a hazard or a problem? Having listened to all these folks [neighbors to the project] we gain insight, you included. I thought the major concern would be odor and that type of thing but it's the view. Your [City] comments, "the project will provide additional berms and landscape screening where necessary." That leaves it up to you, doesn't.
- b. **Walker:** Is there testing done on a regular basis?
- c. **Halterman:** Can you give an idea of how much it will cost to maintain this plant after it's built, personnel, testing, etc.?
- d. **Smith:** I went back to the original Findings of Fact. I support the City of Indianola and this treatment plant. I also support the people sitting out there that are opposed to it...Findings of Fact, (d.)

location, design, construction and operation of the particular use adequately safeguard the health, safety and general welfare of persons residing and working in adjoining or surrounding property...letter (h) will the special use provide adequate screening of the use if visually detrimental to adjoining properties, that needs to be addressed specifically. Under (i.) will the special use maintain safe traffic movements on adjacent public streets, that's difficult to do in a construction area...Middle River is a resource, not just in our county, so if anything impacts that water it impacts hundreds of thousands of people if it goes down stream. That is a concern of mine...I agree that property values are an issue.

- e. **Walker:** I would add to your review of the application, letter (f.) that was already marked no, which is maintain the same or increase the values of the properties. It was noted the plant is for the City, not the rural area.
- f. **Halterman:** I feel it will lower property values there.
- g. **McPherson:**...Hang up for me on this application is what it would do to surrounding property values...I believe there is a stigma attached to a property located near a wastewater treatment plant and I believe that would adversely affect property values of surrounding properties. The main reason I can't support the application is I fear what it will do to surrounding property values.

Minutes of the Meeting, November 14, 2018. (Respondent's Ex. 10.)

It is clear from the minutes of the meetings that Board members considered each of the conditions set forth in the City's application and the Warren County Zoning Ordinance, regarding Special Use Permits. The Iowa Court of Appeals held the following in *A-Line Iron & Metals v. Cedar Rapids Board of Adjustment*, 791 N.W.2d 710 (Ct. of App. 2010).

In *Bontrager*, 748 N.W.2d at 489, our supreme court also determined that a board of adjustment did not literally comply with the rule that findings of facts and conclusions of law be in writing. The supreme court also found, however, that there was substantial compliance by considering the board's decision in context of the meeting where the vote was taken as well as the views expressed by board members during the meeting. Here, several questions were asked by the Board members including whether the conditional use was consistent with the future land use map. ...Lodge commented that "in my opinion we don't have consistency with the land use...are out of character for the neighborhood, and...it lacks compatibility." The Board then proceeded to vote to deny A-Line's conditional use application. Thus, the minutes of the meeting and the transcript from the meeting clearly show the Board denied the petition because the intended use of the property was not consistent with the use of nearby property, did not match the character of the

neighborhood, and was not compatible with surrounding property. We conclude the Board's findings were sufficiently recorded so as to permit us to review those findings.

*A-Line Iron & Metals v. Cedar Rapids Board of Adjustment*, 791 N.W.2d 710 (Ct. of App. 2010).

As the court found in *A-Line Iron*, Id., the Warren County Board of Adjustment made a sufficient record of its Findings of Fact of the issues presented, throughout the three hearings, and just prior to the Board's vote denial of the City's application for a Special Use Permit. (Respondent's Ex. 11.)

The Board's decision to deny the City of Indianola's application for a Special Use Permit for the City's wastewater treatment plant should not be overturned on the grounds that the Board did not adequately make findings of fact, that the decision was illegal, or that the Board's decision was contrary to the Warren County Code of Ordinances.

## **ISSUE II**

THE WARREN COUNTY BOARD OF ADJUSTMENT'S DECISION WAS NOT UNREASONABLE, ARBITRARY, NOR CAPRICIOUS AND WAS BASED ON SUBSTANTIAL EVIDENCE.

A. **Statement as to how the Issue was Preserved for Appellate Review.**

The Appellee preserved the issue for appellate review by addressing the issue during the Warren County Board of Adjustment hearings on September 13, 2018, October 11, 2018, and November 14, 2018, and in its timely filed Answer.

B. **Scope and Standard of Appellate Review.**

The scope of review by the District Court is de novo. Code of Iowa, Section 335.21 (2018).

C. **Argument.**

The Warren County Board of Adjustment held three hearings regarding the City of Indianola's application for a Special Use Permit. During each of the hearings, the City presented evidence as to why the City should be granted a Special Use Permit for the wastewater treatment plant, and the citizens, many of whom owned property near or next to the City's property, expressed their opinions about the disturbance the construction of the plant would cause in their neighborhood. The citizens also spoke about their fears that property values in the neighborhood would decline if they wastewater treatment plant was built on the City's property. They also spoke about how much they enjoyed the views that they have from their residences and their fears that the wastewater treatment plant would disturb their view.

The Board of Adjustment's mission is to listen to evidence presented by the applicant and others who wish to address the Board with their concerns regarding applications for Special Use Permits. The Board's mission is not to gather evidence to refute the City's application. The Board's mission is to weigh the evidence presented and determine whether the applicant has met the conditions set forth in the application and the Warren County Code of Ordinances, specifically Chapter 41.02(3). (Respondent's Ex. 1.) All of the Board members expressed their concerns that the property values of the neighboring properties would decline, which would be contrary to Chapter 41.02(3)(D). (Respondent's Ex. 1.) McPherson expressed his concern about the congestion in the streets due to the construction of the project. Walker and Smith stated their concerns about how the wastewater discharged from the plant could damage the Middle River. Smith, Walker, and Halterman noted that application of the biosolids on the surrounding fields, owned by the City of Indianola, could affect the health and safety of the persons residing in adjoining property. (Respondent's Exs. 8, 9, 10.)

The City of Indianola stated that the Iowa Department of Natural Resources had not approved the project as of the date of the application or by the date of the last hearing, November 14, 2018. This, too, was noted by the Board.

The City claims that the Board of Adjustment did not have substantial evidence on which to base its decision. The Board of Adjustment held hearings on three nights over several hours. The Board listened to hours of presentation and testimony from the City and Warren County residents, clearly demonstrating that the Board was methodical, patient and reasoned in hearing and evaluating the evidence presented by all parties. The City was provided with the opportunity to present additional evidence at each hearing, and time to meet with the residents to come to some resolution regarding the residents' concerns about the wastewater plant being located in their neighborhood, and then present the City's resolution to the Board of Adjustment. The City states that the objectors, the citizens who live on property adjacent to or near the location of the proposed wastewater treatment plant, presented no competent evidence to refute the City's evidence, and therefore, the Board decision should be overruled.

The Iowa Court of Appeals held otherwise in *A-Line Iron*:

A-Line claims the Board's decision is not supported by substantial evidence. A-Line contends the objectors raised only generalized, unsubstantiated, and speculative concerns that could not rise to the level of substantial evidence. It points out that the objectors did not present expert testimony, a study, or any other type of data to support their claims.

We review the Board's factual findings to determine whether they are supported by substantial evidence. See *Bontrager*, 748 N.W.2d at 495. Evidence is substantial "when a reasonable mind could accept it as adequate to reach the same findings." *Id.* (citations omitted). Expert testimony is not generally required; a board may rely on anecdotal reports. *Id.* at 496. "In addition, the board may rely on commonsense inferences drawn from evidence relating to other issues, such as use and enjoyment, crime, safety, welfare, and aesthetics, to make a judgment..." *Id.*...The Board could properly rely on anecdotal reports and testimony to support its decision. See *Bontrager*, 748 N.W.2d at 496.

*A-Line Iron & Metals, Inc., v. Cedar Rapids Board of Adjustment*, 791 N.W.2d 710 (Iowa Ct. of App. 2010).

The Board's decision should not be overturned based on the City's belief that the denial of the Special Use Permit was unreasonable, arbitrary, and capricious. Nor should the Board's decision be overturned based on the City's belief that the objectors presented no substantial evidence. (Respondent's Exs. 8, 9, 10, 11.)

### **ISSUE III**

THE COUNTY'S ORDINANCES SHOULD APPLY TO THE CITY. IF TWO GOVERNMENTAL AGENCIES ARE UNABLE TO REACH AN AGREEMENT AND ACCOMODATIONS THAT SATISFY BOTH GOVERNMENTAL AGENCIES, THE COURT WILL USE A BALANCING OF INTEREST TEST TO DECIDE THE MATTER.

A. **Statement as to how the Issue was Preserved for Appellate Review.**

The Appellee preserved the issue for appellate review by addressing the issue during the Warren County Board of Adjustment hearings on September 13, 2018, October 11, 2018, and November 14, 2018, and in its timely filed Answer.

B. **Scope and Standard of Appellate Review.**

The scope of review by the District Court is de novo. Code of Iowa, Section 335.21 (2018).

C. **Argument.**

In August 1986, the Iowa Supreme Court considered the case, *City of Ames, Iowa v. Story County, Iowa*. *City of Ames, Iowa v. Story County, Iowa*, 392 N.W.2d 145 (Iowa 1986). The city of Ames wanted to construct a waste disposal plant outside the city limits, on property within Story County, governed by Story County ordinances, but owned by the city of Ames. The

County refused to grant the permits needed by the city of Ames. The presented question in *City of Ames, Iowa v. Story County, Iowa* is remarkably similar to the case presented today, *City of Indianola v. Warren County Board Adjustment*: Is city-owned property subject to county zoning regulations? The Iowa Supreme Court, in its ruling in *City of Ames, Iowa v. Story County, Iowa*, ruled that the Court would adopt the balancing of interest test to resolve zoning disputes between local governments. *City of Ames*, 392 N.W.2d 145, 149 (Iowa 1986).

The Court stated:

Resolution under the balancing of interests test we have adopted will be more complex. The legitimate public interests of both the city and the county must be recognized and weighed in the balance. The county can have no absolute veto over the construction or placement of the plant. On the other hand the city cannot proceed oblivious of the county's authority to zone all county lands outside corporate boundaries. To whatever extent they can be, all conflicting governmental interests must be accommodated. Where they cannot be accommodated the court is to resolve the dispute, after weighing the interests, on the basis of the greater public good.

*Id.*

### **CONCLUSION**

The City of Indianola clearly needs a new wastewater treatment plant. The evidence presented by the City, including the presentations made by Mr. Rasmussen of HR Green and City Manager Ryan Waller, was a thorough explanation of why the plant is needed, where the plant would be located on the City-owned property, what the plant would look like, how it would be landscaped and the efforts the City would make to cause as little disruption as possible to the neighbors. The City recognized that construction of the plant would be disruptive and had discussed transportation issues, dust and road use with the County Engineer. Both the City and the Engineer noted steps that could be taken to work through these issues. The City also held a meeting with the residents to explain measures it would take to assuage their concerns. The City

also noted that the plan to locate the plant on the City's property, purchased in 2002, had long been considered. The City purchased more than 300 acres so that the plant could be located as inconspicuously as possible on the 300-plus acres, to meet flood plain requirements, and to have sufficient land for disposal of the biosolids. The City also noted it is employing state-of-the-art technology for the disposal of the biosolids that will hopefully minimize odor.

The members of the Warren County Board of Adjustment invested considerable effort attempting to secure as much information about the City's newly proposed wastewater treatment plant as possible, holding three meetings where the applicant spoke, and the concerned citizens spoke. The Board listened intently to the concerns of citizens who live adjacent to the City's property. The Board asked whether the City could connect to the Wastewater Reclamation Authority and the cost the City would incur to do so, and was told the cost was prohibitive; whether the City could upgrade the City's current wastewater treatment plant; whether the City could expand if necessary on the new site, whether the City was willing to address the neighbors' concerns about the design, location, and screening of the plant; what impact the new plant would have on the Middle River valley; and whether the Iowa Department of Natural Resources had approved the project. The County also asked the City to address the citizens' concerns with a meeting and documentation regarding how the City would address their concerns in a concrete manner.

The Warren County Zoning Ordinance allows for wastewater treatment facilities to be located on land zoned A-1 Agricultural, with a Special Use Permit granted by the Board of Adjustment. Neither side will be perfectly happy with the outcome of this matter. However, the City was willing to make accommodations that would benefit the plant's neighbors, and the neighbors' concerns seemed to matter most to the members of the Board.

When two governmental entities cannot reach an agreement, and accommodate both, then the Court steps in and decides the matter on the basis of the greater good. In this case, the Court must consider whether the needs of the many, the citizens of Indianola, outweigh the needs of the few, the residents adjacent to the plant site, and make a determination about the greater good.