

IN THE IOWA DISTRICT COURT FOR WARREN COUNTY

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| <p>CITY OF INDIANOLA, IOWA,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>THE BOARD OF ADJUSTMENT OF WARREN COUNTY, IOWA,</p> <p style="text-align: center;">Defendant.</p> | <p style="text-align: right;">CASE NO.: CVCV037789</p> <p style="text-align: center;">BRIEF AND ARGUMENT IN SUPPORT OF WRIT OF CERTIORARI</p> |
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COMES NOW the City of Indianola, Iowa by and through its attorneys and by way of its Brief and Argument in Support of an Issuance of a Writ of Certiorari states to the Court the following:

FACTS

The City of Indianola (hereinafter “**City**”) is an Iowa municipality organized and existing under the laws of the State of Iowa and located in Warren County, Iowa. Warren County (hereinafter “**County**”) is a duly constituted county in the State of Iowa.

Since 2001, the City has owned a 360-acre parcel of property located in the County northwest of Indianola in Section 3, Township 76 North, Range 24 West. This property is known as the “Farm Site”. The City purchased the Farm Site for the distinct purpose of relocating the City’s wastewater treatment plant (hereinafter “**WWTP**”) because the parcel site was large enough to provide adequate separation from the surrounding landowners. The Farm Site has been at all times material hereto, zoned A-1 Agricultural under the Warren County Zoning Ordinance (hereinafter “**Zoning Ordinance**”). The Zoning Ordinance is attached hereto as Exhibit “A” and incorporated herein by this reference.

On or about August 10, 2018, the City made application for a Special Use Permit in accordance with the Zoning Ordinance. (Item #10 of Defendant’s Response to Writ of Certiorari which will hereafter be referred to as the “**Response to Writ**”). The application sought a Special Use Permit for the construction of a municipal wastewater treatment facility on the Farm Site. The application also provided documentation regarding the property, site plan, and other information necessary under the Zoning Ordinance.

The zoning regulations for A-1 Agricultural property are found at §41.02(2) of the Zoning Ordinance. Pursuant to § 41.02(2), property zoned A-1 has wastewater treatment plant as

a permitted use, subject to the issuance of a Special Use Permit. Under Iowa law, a Special Use Permit means that a particular use is permitted under the Zoning Ordinances under special circumstances and conditions which conditions are evaluated by the Board of Adjustment created under Chapter 335 of the Iowa Code.

The specific language of §41.02(2) pertaining to this type of use is as follows:

“2. 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 of Public Hearing and subject to the conditions and subsection 3 of this section:

- A. Mink and chinchilla farms and ranches.
- B. Private aircraft landing fields.
- C. Mining and extraction of minerals and raw materials, including sand and gravel pits; subject to approval of the Iowa Department of Natural Resources.
- D. Public or private sanitary landfills, solid waste disposal facilities, and yard waste composting facilities.
- E. Private gun clubs, skeet shooting ranges, commercial swimming pools and similar uses.
- F. Private campgrounds and travel trailer parks.
- G. Automobile race tracks and/or drag strips and snowmobile tracks.
- H. **Public water supply and sewage treatment facilities. [emphasis added]**
- I. Electrical and natural gas transmission, regulating and storage facilities.
- J. Any public building erected and used by any department of the township, county, state or federal government, not previously allowed as a principal permitted use.
- K. Temporary establishments or enterprises involving large assemblages of people or automobiles including, but not limited to:
 - 1. Carnivals and circuses.

2. Rodeo grounds, show rings, music festivals and sports festivals.
- L. One mobile home for use as a non-farm dwelling unit for the care of parents or other family members, i.e., immediate blood relatives, of owners of the property who require care and assistance.
- M. Livestock feed lots and poultry farms, as provided in subsection 41.02(1)(2) of this section.
- N. Publicly owned parks, playgrounds, golf courses, and recreation areas.
- O. Private non-commercial recreational areas and centers, including country clubs, swimming pools and golf courses; but not including automotive race tracks, miniature golf courses, drive-in theaters and similar commercial uses.
- P. Publicly owned airports and landing fields.
- Q. Home Business. Subject to the limitations of the Zoning Ordinance of Warren County and this section, home businesses may be permitted, provided such business is neither noxious, offensive, nor hazardous by reason of vehicular traffic, generation or emission of smoke, dust, or other particulate matter, odorous matter, humidity, radiation, or other objectionable emissions. Further, that new or used car and/or truck sales are not to be construed to be included in this section.
- R. One mobile home utilized as living quarters for persons employed on a farm.
- S. Towers under 100 feet must be stealthed. No fall area on monopoles or silos.
- T. Electrical Substations, provided that the fence surrounding the substation equipment shall be built no closer than 200 feet from any then existing residential dwelling house with 100 feet of the required separation being on the utility property and that the substation satisfies one of the following bufferyard requirements of the utilities' choice:
- U. Public or private temporary use asphalt or concrete plats with reclamation piles of asphalt or concrete and new material piles associated with paving projects.

Under §41.02(3), the conditions under which Special Use Permit may be issued are as follows:

3. Conditions for Special Use Permits. In its determination upon the particular use at the location requested, the Board 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 the persons residing or working in adjoining or surrounding property.
- B. That such use shall not impair an adequate supply of fresh air and light 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.
- E. That such use shall be in accord with the intent, purpose and spirit of the Zoning Ordinance and the Comprehensive Land Use Plan of the County.

From a plain read of the Zoning Ordinance, it is apparent that many uses, some of which, such as landfills, may be quite onerous, are acceptable within the A-1 District. It is under this framework that the application filed by the City of Indianola for a wastewater treatment plant was filed and must be evaluated.

September 13, 2018 Hearing:

The initial Board of Adjustment hearing on the WWTP was conducted on September 13, 2018. (Response to Writ #7). The minutes of the meeting are set forth in Response to Writ #4 and incorporated herein by this reference. The 4th item on the agenda was the application to the City of Indianola for a Special Use Permit for a WWTP.

In the application filed by the City, significant information regarding the WWTP was provided regarding the facility itself, its location and the property upon which it would be located as well as information concerning the surrounding area. That information is provided to allow staff to evaluate the application pursuant to the zoning ordinance.

At the start of the public hearing, the staff of the Warren County Zoning Department presented its report concerning its evaluation of the application. In that presentation, the staff went through each of the requirements of Zoning Ordinance and found that the application and the project met the requirements and conditions set forth in §41.02(2)(H) and §41.03 for issuance of a Special Use Permit. (September Tr. pg. 39-42). The staff recommended that the application be approved. (September Tr. pg. 39-42).

After the Staff Report, the City made its presentation through Mr. Jim Rasmussen of HR Green, Project Manager for the WWPT. Mr. Rasmussen pointed out that the property was purchased by the City for a WWPT in 2001. (Tr. pg. 43). Mr. Rasmussen also submitted a PowerPoint presentation which is item #17 in the Response to Writ and which is attached hereto, marked Exhibit "A", and incorporated herein by this reference, setting forth a summary of the application and the specifics of the project. In his presentation he pointed out that the site plan as presented to the Board of Adjustment incorporated input from the neighbors. The City had conducted neighborhood meetings to get input from the neighbors on the location of the plant, how the plant would be designed, how the plant would be screened, steps taken to place the plant on 20 out of 360 acres and also, at the request of neighbors pushed back an entrance to the plant. He also pointed out that there would be significant screening. (September Tr. Pg. 43-49)

Mr. Rasmussen then went through the specific standards of the Zoning Ordinance as follows:

A. The proposed location, design, construction and operation of the particular use adequately safeguards the health, safety and general welfare of the persons residing or working in adjoining or surrounding property.

Mr. Rasmussen pointed out that the facility was intentionally being built into a hill to shield the facility from surrounding neighbors. He also stated that most of the existing trees

would remain, the property would be fenced and there would be no hazardous waste generated from the property. (September Tr. pgs. 45-49). He also pointed out the plant was moved to accommodate neighbor requests. (September Tr. pg. 45).

B. That such use shall not impair an adequate supply of light and air to surrounding property.

Mr. Rasmussen pointed out that the buildings would be a single story built within the hillside. He indicated that there would be a use of low-level lighting at night so as not to interfere with the neighbors. He also pointed out that the design of the plant is an aerobic design versus an anaerobic design. He pointed out that under an aerobic design any odors from the plant would be significantly reduced and would be mostly contained with the property itself. (September Tr. pg. 48).

C. Shall not increase congestion in streets or danger from fire or public safety.

Mr. Rasmussen stated that there would only be six employees who would be employed at the plant. None would be working at night. He said that the only traffic after construction would be traffic from employees. He pointed out that there would be no combustible materials used and fire hydrants would be on site. He indicated that during construction, construction traffic and parking would be controlled. He also pointed out that there would be only one point of entry and that point of entry had moved based upon surrounding residents' input.

Mr. Rasmussen was also asked about the application of biosolids. (September Tr. pg. 47-48). The current wastewater treatment plant in the City of Indianola land currently applies the biosolids it generates on the Farm Site, pursuant to a DNR permit. Mr. Rasmussen pointed out that because this plant would be more efficient, the amount of biosolids would be reduced by roughly 60% and while it still would be applied via the injection method at the Farm Site, there would be much less biosolids applied and far less truck traffic because the facility would use an

umbilical cord system transferring biosolids directly to the field so that trucks would not have to bring loads of material on to the property as is done at the current time. (September Tr. pg. 48-49).

D. Shall not diminish surrounding property values.

Mr. Rasmussen pointed out that the site will remain mostly agricultural, only 20 acres of 360 acres would be developed (less than 6% of the land). He also pointed out that the WWTP is hidden into an existing hillside and the only direction from which it would be even conceivably viewed would be from the north. He stated that there is no evidence that such a plant, tucked back into such a large parcel of land, would adversely impact property values. He stated that the facility meets the DNR setback requirements of 1,000 feet. (September Tr. pg. 47)

E. Consistent with intent of Zoning Ordinance and Comp Plan Use Plan.

Mr. Rasmussen highlighted the fact that the WWTP is a permitted use under the Zoning Ordinance. (September Tr. pg. 53) He reiterated that the site would be mostly agricultural and that only 20 acres would be utilized which is less than 6% of the total acres of the parcel. (September Tr. pg. 50) He stated that this would meet the agricultural land preservation priority for future land use found in the Warren County Comprehensive Plan. (September Tr. pg. 53) He pointed out that there is nothing about this use that is inconsistent with the Zoning Ordinances, in fact, this is a permitted use. Mr. Rasmussen also pointed out this would be a state-of-the-art facility.

After the City's presentation, several property owners appeared to question how the City would apply sewage sludge. As stated above, Mr. Rasmussen had already answered that question. In addition, issues were raised regarding spoiling the agricultural views, truck traffic and whether the facility would affect property values. No evidence, other than an expression of

concern was provided regarding any of these matters and the discussion was more of a question and answer session.

At the hearing the Board members questioned why the Warren County Engineer not at the meeting. (September Tr. pg. 83). Staff indicated that he had wanted to come but was not able to be present for the meeting. (September Tr. pg. 85) Because of this, the Board determined that the hearing should be continued to allow the County Engineer to be present at a hearing so questions could be directed toward him concerning his evaluation of the appellant. (September Tr. pg. 86). The hearing was continued until the next scheduled Board of Adjustment meeting on October 11, 2018.

October 11, 2018 hearing:

The second hearing was held on October 11, 2018 pursuant to a public notice and the minutes of that meeting are item #5 of the Response to Writ and incorporated herein by this reference. That meeting was a continuation of the previous meeting.

The hearing began with the Staff Report. (October Tr. pgs. 1-4). In that report, City staff again reviewed the requirements for the issuance of a Special Use Permit, and, having heard the City's presentation made in September, made the following determination:

“Has the applicant proved his case for a Special Use Permit, just applying isn't enough. Yes. In conclusion, the City of Indianola owns over 300 acres at this location. Parcels 05000039880 and 05000039820 are the proposed parcels to be used for this wastewater treatment facility for a total of approximately 80 acres. Staff recommended approval of this app, or this Special Use Application. The Land Use Plan calls for A-1. The Zoning Ordinance lists a proposed use as an allowed use with a Special Use Permit, therefore we recommend approval.”

This is notable in that the City had made its presentation and the citizens had been able to voice their concerns over the application. It is apparent the standards were met.

Despite the fact that they had made a full presentation in September, the City of Indianola made its presentation through Mr. Jim Rasmussen of HR Green. Mr. Rasmussen presented an additional PowerPoint presentation dealing with some of the issues raised at the September hearing and the City's response to those issues. That PowerPoint presentation is listed as Item #16 in their Response to Writ, and is attached hereto, marked Exhibit "B" and incorporated herein by this reference. (October Tr. pg. 5).

In that presentation Mr. Rasmussen pointed out the following:

1. The City had met with David Carroll, Warren County Engineer. (October Tr. pg. 5) In that meeting there was a request to relocate the plant entrance and the City agreed to move that entrance. (October Tr. pg. 7);
2. In response to questions from the previous hearing regarding traffic, plan for construction traffic, the City met with Mr. Carroll to develop a construction traffic route during construction and to control dust. Those plans were set forth in the PowerPoint, Exhibit "B". (October Tr. pg. 7);
3. Mr. Rasmussen pointed out that the facility was subject to Iowa Department of Natural Resources review of facility plans and construction documents and that construction would not proceed until the DNR issues were met. (October Tr. pg. 9). Mr. Rasmussen pointed out that this helps facilitate a review of the plant to make sure it is following all requirements and state law, including not being located in a floodplain, an issue raised in September. (October Tr. pgs. 9-12);
4. Mr. Rasmussen discussed the biosolids production and land application concerns that had arisen in 2015 when there had been a problem with application created by weather. Mr. Rasmussen pointed out that this occurred with a city contractor but the real positive of the new plant was that the amount of biosolids would be 60% less with the new wastewater treatment plant than are currently generated and applied. He pointed out that the umbilical system that allows the biosolids to go directly to the plant to the field to be applied upon and it is incorporated immediately. (October Tr. pgs. 13-14). He also pointed out again the elimination of 400 semitrucks annually. (October Tr. pgs. 13-15).
5. Mr. Rasmussen also addressed the property value issue by pointing out the property will remain mostly agricultural for the next 50 years, that there is enough property for proper separation, that the "rural character of the countryside will be maintained, that odors will be minimized and that there is a potential for property owners to connect to the trunk sewer and other facilities as a result of the plant." (October Tr. pgs. 16-21). In response to a direct question, Mr. Rasmussen reiterated that in his

opinion the plant would not diminish nor impair established property values. (October Tr. pg. 24).

6. In response to questions why the WWTP was not moved, Mr. Rasmussen pointed out that it had been moved once at a cost of \$500,000.00 to the City. *Exhibit B*;

7. Mr. Rasmussen responded to issues that the screening would not be enough in the winter when trees lose their leaves by pointing out that additional berms and landscape would be provided and that the City was willing to talk about the kinds of materials and colors that could be used to design the plant. *Exhibit B*;

8. Mr. Rasmussen also discussed why the current facility could not be upgraded pointing out that the facility had long since passed its useful life as it was constructed in 1978 and that it could not be updated efficiently and effectively. (October Tr. pg. 29);

9. Mr. Rasmussen testified that the location of the facility was discussed with the County Engineer and the County Engineer agreed with the site planned. (October Tr. Pg. 20).

Ryan Waller, Indianola City Manager also presented information to the Board. Mr. Waller told the Board about the commitments made by the City and that the commitments were on the record of the hearing. (Tr. pgs. 70-72). This was in response to a Board member's question and concern that the City had not put anything in writing and might not be trusted. (October Tr. pg. 62). Mr. Waller pointed out that the City had continually met with neighbors, had moved the plant at a cost of \$500,000.00 to alleviate neighbors' concerns and made a commitment as far as landscaping and the roof of the plant. (October Tr. pgs. 70-71). He reiterated the willingness of the City to commit itself to these standards.

As noted earlier, Mr. David Carroll, Warren County, Iowa Engineer, whose presence some Board members felt was needed to make a determination, appeared in person at the hearing. (Tr. pg. 37). Mr. Carroll confirmed he had approved the site for the WWTP. He also responded to an objector's questioning of his qualifications to make such a determination by pointing out that he has had extensive experience in the area. (October Tr. Pg. 370).

Nevertheless, even though a hearing was continued because his input was deemed vital, he was not questioned by the Board.

Several neighbors presented criticisms of the plant bringing up issues such as whether the City could use other alternatives, property value issues, issues that the property is in a flood plain, the fact that the facility is a municipal facility put in the county and whether the facility could be seen. (Tr. pgs. 31-58). No evidence other than statements of property owners was presented, other than articles dealing in general terms with effects on property values (which analyzed values in Greece) and other general items generated off the internet. This which at least one Board member stated “. . . And so we’ve heard all this, but its fear based” (October Tr. pg. 61). That Board member also pointed out the fact that neighbors were making typical responses to an application of “don’t put it in my neighborhood.” (October Tr. pg. 61)

At the conclusion of the meeting, the Board of Adjustment tabled the hearing and requested that the City meet with residents and provide information and to make clear that the City of Indianola had committed to the items set forth on the PowerPoint presented at the hearing. (Tr. pg. 82) The meeting was so continued without action being taken.

November 14, 2018 Meeting:

The Warren County Board of Adjustment reconvened on November 14, 2018 for the purpose of again considering the City of Indianola’s application. It should be noted that the Board of Adjustment is a five-member Board; however, the Chair of the Board, Mr. David Churchill was at that time working of the City of Indianola on an interim basis and as such recused himself from all hearings.

At the November meeting, County Engineer David Carroll appeared in favor of the application (November Tr. Pg. 5). Mr. Carroll had approved the site for the WWTP as reflected by the transcript of the October meeting.

City staff informed the Board that the City had met with the neighboring residents as requested on October 25, 2018. (November Tr. pg. 2). Ryan Waller, the City Manager for the City of Indianola presented a Resolution to the Board of Adjustment approved by the City Council which confirmed the commitments that had been discussed previously. Those commitments were as follows:

1. The City agreed to restrict the use of the remaining property to agricultural uses, not including livestock;
2. The City committed to work with the neighbors on selection of earth tone colors for the facility to lessen an aesthetic impact (the City also placed a truck on the property just to allow persons to see what could be seen. (November Tr. pg. 4);
3. The City committed to provide extra screening.

(See, Indianola City Council Resolution, attached hereto, marked Exhibit "C" and incorporated by this reference)

In addition, Mr. Waller pointed out that he also provided a report concerning the effect on property values by the WWPT showing that property values would not be negatively impacted. (November Tr. Pg. 5). This was in response to the property value concerns raised by neighboring land owners. This was evidence in the form of a study done by HR Green looking at properties near the current Indianola plant and other properties near other wastewater treatment plants in central Iowa. That report, attached hereto as Exhibit "D" and incorporated by this reference, found that there was no effect on property values. The property owners provided no competent evidence that this was untrue, simply unsubstantiated statements that "property values have to go down".

Several neighbors spoke in opposition to the WWTP but presented no experts or substantive evidence. The issues that were presented at this hearing were:

1. Mr. Paul of West Des Moines commented that he believed that the appointments of Chapter 43.08 were not met. This is a misapplication of the law in that Chapter 43.08 of the Warren County Zoning Ordinances applies to variances rather than Special Use Permits. (November Tr. pgs. 9-11).
2. A neighbor would see the facility (November Tr. Pg. 6)

In the portion of the hearing when the members of the Board questioned the City, the issue of traffic during construction was brought up. (November Tr. pg. 10). Mr. Rasmussen from HR Green indicated that the construction route would be designated and monitored. (November Tr. pg. 11). He also indicated that dust control would be included in the contracted bids and would be monitored. (November Tr. pg. 11).

The Board also had questions regarding application of the sewer sludge. (November Tr. pg. 12). Mr. Rasmussen pointed out that the amount of sludge generated by the WWTP would be reduced by 60% over the old plant, and Mr. Waller pointed out the umbilical system designed as a part of the facility, which transports the sludge directly from the plant to the field, allows much more flexibility and allows application to be more timely. (November Tr. pgs. 13-14).

The Board also questioned why the City did not connect to the WRA (Wastewater Reclamation Authority) rather than build a new WWTP, an issue raised by an objector in the October meeting. Mr. Waller pointed out that the additional cost to the City to construct infrastructure and join the WRA would be in the neighborhood of \$64,000,000.00 and prohibitively expensive for the City. (November Tr. pg. 14)

Board members also brought up concerns about discharging treated water into the Middle River. (November Tr. pg. 14). Mr. Rasmussen pointed out that the permit obtained from the DNR to discharge would be much more stringent than what is currently discharged so the water

would be much cleaner and would have less chance of any pollutants being put into a waterway. (November Tr. pg. 15). Mr. Waller also pointed out that the plant will employ state-of-the-art technology, requiring that the discharged water go through a disinfectant system and conform to the latest standards for discharges. (November Tr. pgs. 15-16).

The last concern from the Board was whether the neighbors view would be obstructed. While the City does not believe that the fact that facility can be seen or not seen is a requirement of the Ordinance, the City did point out that the Resolution submitted by the Indianola City Council committed the City to using landscaping berms and other brush to screen the facility from surrounding property owners. (November Tr. pgs. 18-20). The City has taken extensive efforts to screen the facility from view.

All of those questions were answered by the City and addressed according to the law and good practice. At the hearing a Motion was made to approve the application. The moving member Smith indicated that the evidence showed the conditions set forth in 41.03 had been met by the City. The motion was denied by a vote of 3 to 1 without further comment.

ARGUMENT

I. GENERAL PRINCIPLES

IOWA CODE CHAPTER 335 PERTAINS TO COUNTY ZONING. A ZONING BOARD OF ADJUSTMENT EXISTS PURSUANT TO IOWA CODE §335.18

County zoning is governed by Iowa Code Chapter 335. Iowa Code §335.18 provides, with regard to County Zoning, that any person aggrieved by any decision of the Board of Adjustment under Iowa Code Chapter 335 may “present to the Court of record a Petition duly verified, setting forth that such decision is illegal in whole or in part, justifying the grounds of the illegality”. Iowa Code §335.18. Once a petition is presented, “the Court may allow a Writ of Certiorari directed to the Board of Adjustment to review such a decision of the Board of

Adjustment and shall prescribe therein the times in which a return must be made and served upon the relator's attorney". Iowa Code §335.19.

The Board must then "return certified or sworn copies of the original papers upon which the Board acted and, they returned precisely set forth the facts as may be permitted and material to show the grounds of the decision appealed from and shall be verified." Iowa Code §335.20. The method of trial of a certiorari action is set forth in Iowa Code §335.21 which states that "if upon the hearing which shall be tried de novo shall appear to the Court that testimony is necessary for the proper disposition of the matter. The Court may reverse or affirm, wholly or partly, or may modify the decision brought up for a review". Iowa Code §335.21.

II. THE DECISION OF THE WARREN COUNTY ZONING BOARD OF ADJUSTMENT MUST BE OVERTURNED BECAUSE OF THE FAILURE OF THAT BOARD TO SET FORTH WRITTEN FINDINGS OF FACT.

Section 43.09(1) of the Warren County Zoning Ordinances is entitled "Decisions of the Board of Adjustment". That section requires, in relevant part:

"...exercising the above-mentioned powers A concurring vote of three of the members of the Board shall be necessary to reverse any order, requirement, decision or determination of the Zoning Administrator or to decide in favor of the applicant on any matter upon which it is required to pass under the Zoning Ordinance, provided, however, that the action of the Board shall not become effective until after the resolution of the Board, **setting for [sic.] the full reason for its decision and the vote of each member participating thereon**, has been filed. ..." [Emphasis Added]

In this case, the Board filed a Resolution that was four pages in length. That resolution is attached hereto, marked Exhibit "E" and incorporated herein by this reference. That decision sets forth a general description of the documents filed, evidence presented and what occurred at the meetings but contains no recitation of any findings of fact by the Board setting forth its view of the evidence or how it resolved the differing facts, documents and opinions presented. In fact, that Resolution is merely a description

of the meeting rather than any proposed findings. This does not comply with the Zoning Board's rules nor does it comport with Iowa law.

While there is no statutory requirement under Chapter 335 that a Zoning Board of Adjustment make written findings, the Iowa Supreme Court has found:

“... there is no doubt such findings would be of great benefit, both to the trial court and to this court on certiorari or appeal from the Board's decisions. They would provide a ready basis for determining the reasons for the Board's actions and would help immeasurably in determining whether the result was reasonable or was, or as is frequently claimed, arbitrary and capricious. It would also serve the additional purpose of sharpening the issue the parties should raise on appeal.

Citizens Against Lewis & Clark (Mower) Landfill v. Pottawattamie Board of Adjustment, 277 N.W.2d 921, 925 (Iowa 1979).

The Court went on to say that it strongly relied on a statement in *K. Davis, Administrative Law Treatise*, §16.05, (2d Ed. 1978) which said “a practical reason for acquiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity and virtually all federal and state courts, irrespective of the statutory requirement. The reasons have to do with the facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties claim their cases for re-hearings and judicial review, and keeping agencies within their jurisdiction. *See also E. McQuillin*, 8A *Municipal Corporation*, §25.272 (3d Ed. 1976).

The Court, in that case, stated “[t]hese are compelling considerations which has persuaded us to adopt a rule that Boards of Adjustment shall make the written findings of fact on all issues presented in any adjudicatory proceeding. Such a finding must be sufficient to enable a review in Court to determine with reasonable certainty the factual basis and legal principles upon which the Board acted. The rule shall apply to Board of Adjustment proceedings after the date

this opinion is filed. *Citizens Against Lewis & Clark (Mower) Landfill*, 277 N.W.2d at 925.

This position of the Court was slightly modified in the case of *Bontrager Auto Service, Inc. v. Iowa City Board of Adjustment* 748 N.W.2d 483, 489 (Iowa 2008). Bontrager involved the granting of a special exception to a zoning ordinance allowing transient housing to be built in a commercial district. The party appealing the decision, neighboring property owners, claimed that although the Board had made written findings of fact and conclusions of law, a finding that the use would not affect property values was mandatory under the applicable ordinance, but the decision failed to specifically discuss that issue. The District Court found there was no expert evidence presented as to property values presented by the applicant before the Board other than an apartment manager stating that it was difficult to rent property already. Bontrager @ 496. The Supreme Court examined the record and found that it was a close call but that there was evidence, including from an urban planner that such facilities do not affect property values which allowed an inference that the use would not affect values. Based on that review of the record, the Court found that there was substantial compliance by the Board of Adjustment regarding the written decision requirement to allow a review in Court to determine whether a particular matter had been addressed. *Bontrager Auto Service, Inc. v. Iowa City Board of Adjustment* 748 N.W.2d 483, 489 (Iowa 2008).

In this case, a reviewing Court is left in the dark as far as what the actual reasons were for the Board of Adjustment's findings of fact. Under the Zoning Ordinance, the Board was instructed to consider five general perimeters set forth in the Warren County Zoning Code. Unlike in *Bontrager* where the applicant was required to prove 5 different facts, the criteria set forth in the Zoning Ordinance are not mandatory and each does not need to be met. The Warren County Zoning staff members evaluating the information that has been provided to the Board

found that all of the requirements in the Zoning Ordinances had been met and that adequate protections were in place for all of the property owners. They found this first in September based on the application, and then again in October based upon the information from the City and the points raised by the objectors. Although the Board discussed many issues prior to the vote, there is no decision as to what facts were being used to ultimately deny the application which would allow the City or a reviewing court to discern what was the basis of the decision. This is fatal to the Board's action.

The Board has not satisfied its duty of making a findings of fact and its decision may not stand. In addition, because the Board failed to make its appropriate findings, this court should determine the issue for itself since to allow the Board a "second bit of the apple" only allows a back filling of findings to support a denial. *See U.S. Cellular Corp. v. Board of Adjustment of the City of Des Moines, 589 N.W.2d 712, 719 (Iowa 1999)*. The decision should be overturned.

III. THE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY AND ITS DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Even if this court feels it can determine what findings of fact were made by the Board, the record in this case shows that there was not substantial evidence that could be relied on to reject the application. In fact, the overwhelming weight of the evidence supports a finding that the City is entitled to the Special Use Permit.

A District Court reviewing the actions of a Board of Adjustment has some constraints put upon it. The Iowa Supreme Court has stated that in a certiorari proceeding involving zoning matters, the District Court finds the facts anew on the record made on the proceeding. That record includes 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. The illegality of the challenged Board action is established if the facts do not provide substantial support for the

Board's decision. If the District Court's Findings of Fact leave the reasonableness of the Board's decision open to a fair difference of opinion; the Court may not substitute its decision for that of the Board. *Baker v. Board of Adjustment of the City of Johnston*, 671 N.W.2d, 405, 413 (Iowa 2003).

It is the City's burden to show that that Board's action was illegal or unsupported by substantial evidence. *Bontrager Auto Service, Inc. v. Iowa City Board of Adjustment*, 748 N.W.2d 483, 495 (Iowa 2008). Substantial evidence is evidence which is "substantial and a reasonable mind accepted as adequate to reach the same findings". *City of Cedar Rapids v. Municipal Fire & Police Retirement System of Iowa* 526 N.W.2d 284, 287 (Iowa 1995).

In this case, the Board was presented with substantial information from the City of Indianola regarding its compliance with all the rules and regulations pertaining to the granting of a Special Use Permit at three separate hearings. The Board was then provided with the property owners' claims on various issues regarding the use of the property and property values but no competent, legitimate evidence to establish any of those claims. The City submits the Board had no substantial evidence before it to sustain a denial of a Special Use Permit. As importantly, the City and this Court are denied the opportunity to know the rationale for the Board's decision because it failed to submit any type of findings, facts, or conclusions of law to explain its decision.

Nevertheless, the Court must make a determination as to whether the Board acted illegally from the record made before the agency. *Bontrager Auto Service, Inc. v. Iowa City Board of Adjustment*, 748 N.W.2d 483, 495 (Iowa 2008). It is difficult to exactly determine what evidence the Board relied on in this case because the Board failed to make any written findings of fact setting forth any detail as to how it made the decision; nevertheless, based on the record

developed in this matter, there is no rational basis upon which the Board could take the actions it did.

The objections to the construction of the WWTP seemed to follow in the following areas:

1. Increase the amount of smell or odor;
2. Increase travel or truck traffic;
3. Diminished esthetics as far site; and
4. Decrease property values.

In response to claims raised by property owners that the establishment of the WWTP would decrease their property values, the City of Indianola pointed out that the property was purchased by the City in 2001 and was designated as the future site of the WWTP for the City of Indianola at that time. (September Tr. pg. 43). This fact is relevant because no neighbor can claim surprise that the facility was contemplated and that they were unaware of this fact. It is also relevant because there was no evidence whatsoever to show that the fact the residences were located so close to what was known as the future site of the Indianola WWTP diminished values over the years.

Not resting on the fact that the property owners were well aware that a WWTP would be built on the site, the City of Indianola provided additional expert testimony. HR Green, the Consulting Engineers for the WWTP provided evidence of other homes in and around the WWTP's both in Indianola and in other communities which showed that the increase in the value of the homes near wastewater treatment plants is as good if not better than other homes in the general vicinity. This analysis was not an anecdote but identified and evaluated properties within close proximity to other wastewater treatment plants and valuations of comparable properties away from those plants. The results of that investigation are that there will be no

measurable effect on those properties not only based on the empirical evidence showing there is no such effect, but also because the WWTP site is a 360-acre parcel designed to provide as much distance as possible between the plant and the property owner. (September Trans. Pg. 44).

In response to this information, the objectors provided one article entitled "Impact on Quality of Life When Close to a Municipal Waste Water Treatment Plant" which evaluated a wastewater treatment plant in Greece but failed to identify the age of the facility, any difference in wastewater treatment in Greece and in the United States. No evidence was presented regarding an actual decrease in property values for the WWPT other than to say "they must decrease" simply because the WWTP was being placed on the property. This article is not evidence. In the Board's findings, there is no determination as to property values. In fact, the only finding of fact was a motion for approval which found that there was no impact on the property values. (November Tr. pgs. 30-32)

The Board failed to make any findings or to discuss any of the evidence concerning these matters. There was scarce evidence that countered the City's proofs and the citizen objectors presented a "moving target" as far as their complaints making it impossible for the City to satisfy any legitimate concerns as those concerns kept changing throughout the process. As one Board member correctly stated, the objectors brought forth nothing but "fears" and an attitude that the facility should not be built "in my backyard". The Board required the City to appear at three different hearings purportedly so that they could answer all questions presented; which they did, so they could get input from the County Engineer; which they did (and the County Engineer was in favor of the WWTP application), and they wanted the City to meet with neighbors to put down on paper the commitments made by the city; which they did. Despite all of this, the Board ignored the evidence and facts and voted inappropriately. The decision cannot stand.

IV. The City of Indianola is not subject to the Zoning Ordinance of Warren County, Iowa.

The City also alleges, by way of a Declaratory Judgment action, that the Warren County Zoning Ordinance does not apply to the City based upon a balancing of the interests of the City and the County. Upon the record, the balance of factors must be resolved in favor of the City.

As a general proposition the state, its agencies, counties and other subordinate governments need not comply with municipal zoning regulations. School districts, too, in performance of state functions, are not subject to a municipal zoning amendment excluding the erection of schools within the municipality. 101 C.J.S. Zoning, Section 135 says, “Ordinarily, a governmental body is not subject to zoning restrictions in its use of property for governmental purposes.” *City of Bloomfield v. Davis County Community School Dist.*, 254 Iowa 900, 119 N.W.2d 909, 911 (1963). The crux of this argument is that when a governmental entity is exercising functions that are imposed upon it by the legislature, it cannot be thwarted in that effort by zoning ordinances of another governmental entity. *Id.*

Depending on the circumstances, governmental entities may be immune from compliance with zoning regulations. *Id.* at 911–13. Where there is a dispute between county and city governments as to whether the zoning ordinance of one applies to the activities of the other, the Iowa Supreme Court has rejected the traditional governmental proprietary test in favor of a balancing of interest test, in which the legitimate public interests of both the city and county must be recognized and weighed by the court. *City of Ames v. Story County*, 392 N.W.2d 145, 149 (Iowa 1986), a case involving exactly the same issue as was presented here, a municipality owning property in the county and seeking a special use permit from the county. In *City of Ames*, the Iowa Supreme Court addressed the question of whether a city was immune from a

county's zoning ordinance. The conclusion reached by the court was that "it might or might not be, the determination to be made upon balancing the conflicting interests of the two local governments." *Id.* at 146.

The Iowa Supreme Court described the balancing of the interests test as follows:

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.* at 149.

Although Iowa Courts have not enumerated factors to be considered in applying the "balancing of interest" test, many courts and commentators have. Specifically, "the origin of the [balancing of interest] test appears to be a 1971 Harvard Law Review Note in which the author urged courts to jettison the three traditional tests, and to 'examine the composite factual context of a political unit's attempt to violate a zoning ordinance to determine whether the violation should be tolerated.'" See Gary D. Taylor & Mark A. Wyckoff, *Intergovernmental Zoning Conflicts over Public Facilities Siting: A Model Framework for Standard State Acts*, 41 Urb. Law. 653, 665 (2009) (quoting Note, *Governmental Immunity from Local Zoning Ordinances*, 84 Harv. L. Rev. 869, 883 (1971)). This originating law review listed the following nine "fundamental considerations" to be addressed in the balancing analysis:

1. Is there any statutory guidance as to which interest should prevail? Does the statute explicitly authorize immunity, or does it merely direct a particular governmental unit to perform a certain function without mentioning any possible exemption from local zoning regulation?
2. Do the zoning ordinance and any other manifestation of the local planning process comprehend alternative locations for the particular facility?

3. Did the governmental unit consider alternative locations for the facility?
4. What is the scope of the political authority of the governmental unit performing the function relative to the body instituting the zoning ordinance?
5. Has there been any independent supervisory review of the proposed facility by a governmental unit of “higher” authority such as a state-wide planning commission? Was this review designed by statute to be exclusive?
6. How essential is the facility to the local community? To the broader community?
7. How detrimental is the proposed facility to the surrounding property?
8. Has the governmental unit made reasonable attempts to minimize the detriment to the adjacent landowners’ use and enjoyment of their property?
9. Has there been any attempt to comply with the zoning procedure for obtaining an amendment or a variance? Have the adversely affected landowners been given an opportunity to present their objections to the proper nonjudicial authorities?

Governmental Immunity from Local Zoning Ordinances, 84 Harv. L. Rev. at 883–84; see also Rutgers, State Univ. v. Philuso, 286 A.2d 697, 702-03 (N.J. 1972) (setting forth the following five factors: (1) the nature and scope of the instrumentality seeking immunity; (2) the kind of function or land use involved; (3) the extent of the public interest to be served thereby; (4) the effect local land-use regulation would have upon the enterprise concerned; and (5) the impact upon legitimate local interests).

A review of the relative positions of the governmental entities in this matter shows that the balance of interests clearly is weighted in the favor of the City. This is not only based on the nature of the proposed use, but also upon the evidence presented.

At the outset, it is clear that the WWTP is of paramount importance to the City and that a review of statutory obligations as powers illustrate this position. As presented to the Board, the

current City plant, which is 40 years old, is insufficient to meet state requirements and to serve the citizens of the City. (September Tr. Pg.). It is also clear that the construction of a plant to dispose of sewage and industrial waste in a sanitary manner is declared by state statute to be an essential corporate purpose. *Iowa Code* §384.24(3)(d)(2019). As a part of that duty, the legislature has authorized a city, by statute, to execute any essential corporate purpose “within or without its corporate limits”. *Iowa Code* §384.25 (2019). Thus, a city is authorized to construct a sewage treatment plant and extension without its corporate limits and it is clear the legislature intended for the important purpose to be exercised outside of the city limits.

It is also important to note that the City cannot simply place a facility wherever it might desire. There is state agency review of site selection for municipal waste treatment plants. *Iowa Code* §455B.173(3), 455B.174(2); 900 I.A.C. §64.2(2), 64.2(3), and 64.2(9)(c). Additionally, the State is directly involved in the funding of sewage treatment plants. *Iowa Code* §455B.241-246(2019).

It is also clear that the City’s options were limited. The City made clear that they purchased this large parcel of property specifically for the WWTP and specifically so that there would be adequate separation between the facility and any neighboring property owners. It is also clear from the undisputed testimony that the City did explore alternate options such as joining the WRA and constructing infrastructure to do so. That alternative was prohibitively expensive. (November Tr. Pg. 21).

The City took extraordinary steps to attempt to alleviate neighboring property owner issues. Before the first Board of Adjustment meeting in September of 2018, the City had already conducted multiple meetings with neighbors and even made changes to the WWTP plans to accommodate concerns. When the September meeting was continued to get input from the

County Engineer, the City met with the Engineer and alleviated any issues the Engineer had with the plan and the Warren County Engineer was in support of the application. (November Tr. Pg. 5). When the October meeting was continued the City, at the request of the Board, again met with neighbors, and the City took the extraordinary step of enacting a Resolution outlining the City's commitment to conditions sought by property owners. (November Tr. Pg. 4). The City even had their project manager do a market analysis to show that properties in the vicinity of wastewater treatment plants do not suffer a loss of value. (November Tr. Pg. 4). Despite the City's efforts, it is clear that neighboring property owners would not be satisfied with any outcome other than a denial of the application. In essence, this group of 20 or less individuals would stop the construction of a new WWTP that is more efficient, produces 60% less biosolids, uses a process that negates smells, complies with state environmental regulations in all respects and which has been planned for almost 20 years. This despite the thousands of people who will benefit from it.

The City honored the County's process by providing all information requested, multiple times and in multiple ways, by responding to all questions presented, by making detailed presentations at three meetings of the Board, all in an effort to avoid litigation of the type now necessary. It must be noted that this use is appropriate and permitted in the A-1 district subject to a Special Use Permit. These are important factors since a court may scrutinize the reasonableness of a municipality's actions if a zoning permit was not sought and litigation ensued. *See, City of Bloomfield v. Davis County Community School District, 254 Iowa 900, 905-906, 119 N.W.2d 909, 912-913 (1963).*

The balance of interests clearly favors the City in this case. Using the principles set forth in *City of Ames v. Story County, 392 N.W.2d 145, 149 (Iowa 1986)*, and other commentators, it

is apparent that the City's interests are important, the City has shown that it has acted nobly to protect neighbors from negative impacts of the WWTP, real or perceived and that this important facility must be built.

IV. CONCLUSION

City has shown that the Board violated its own rules and case law in failing to set forth clear written finds of fact to support its decision in this matter and the court should overturn their decision. Even if the court wishes to look beyond this significant failure, a review of the evidence clearly establishes that the Board of Adjustment decision is not supported by substantial evidence. The City provided voluminous evidence that this permitted use was appropriate and answered every concern with concrete, competent evidence dispelling unsupported claims of issues with the plant and "evidence" in the form of articles detailing a study conducted in Greece purporting to study property values, and other documents without foundation or authentication. The decision must be overturned.

Notwithstanding the foregoing, this is exactly the type of situation where the municipality is immune from the application of the Warren County Zoning Ordinance. The nature of the facility to be built, the responsibilities placed on that municipality by state law, the statutory authority given to the City and the efforts of the City to protect neighbors and alleviate any concerns they might have requires a finding that the ordinance does not apply to this facility and that the court should issue an order as such.

Respectfully submitted

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By: */s/ Cindy S. Juhl* _____