

IN THE SUPREME COURT OF IOWA

No.:15-1413

DUBUQUE COUNTY CASE NO.: 01311CVCV057723

DUBUQUE COUNTY CASE NO.: 01311CVCV101023

RESIDENTIAL AND AGRICULTURAL)
ADVISORY COMMITTEE, LLC., an Iowa)
Limited Liability Company,)
MATT MESCHER, ALLAN R. DEMMER,)
CATHERINE DEMMER, WAYNE)
AMESKAMP, SHARON AMESKAMP,)
VERNON BOGE, DONALD BOGE,)
MARY ANN RUBLY, JOHN R. RUBLY,)
DOLORES THIER, LARRY THIER,)
GARY BURKLE, CINDY BURKLE,)
WAYNE VORWALD, LINDA VORWALD,)
JEFF PAPE,)
GERALD WOLF, JOANNE WOLF,)
LORRAINE M. BURKLE and BERNARD R.)
BURKLE, Petitioners/Appellants,)
vs.)
DYERSVILLE CITY COUNCIL,)
MAYOR, JAMES A. HEAVENS,)
MIKE ENGLISH, MARK BREITBACH,)
ROBERT PLATZ, MOLLY EVERS, and)
DAN WILLENBORG,)
Respondents/Appellees.)

APPEAL FROM THE DISTRICT COURT
FOR DUBUQUE COUNTY
THE HONORABLE THOMAS A. BITTER

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APPELLANTS/PETITIONERS' FINAL BRIEF

CERTIFICATE OF FILING

I hereby certify that on the 15th day of February, 2016 I, the undersigned did file the within Petitioners/Appellants' Brief with the Supreme Court by EDMS:

/s/ Susan M. Hess

HAMMER, SIMON & JENSEN, P.C.
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

CERTIFICATE OF FILING	ii
TABLE OF CONTENTS	iii
TABLE OF CASES & OTHER AUTHORITIES	v
STATEMENT OF ISSUES PRESENTED FOR REVIEW	viii
ROUTING STATEMENT	1
STATEMENT OF CASE.....	1
STATEMENT OF THE FACTS.....	6
ARGUMENT	18
I. THE TRIAL COURT APPLIED THE INCORRECT STANDARD OF REVIEW AS THE CITY COUNCIL’S ACTIONS WERE QUASI-JUDICIAL RATHER THAN LEGISLATIVE, AS MANDATED BY SUTTON	18
A. Preservation of Error and Standard Review	18
B. Sutton Applies.....	18
II. ORDINANCE 770 IS INVALID.....	24
A. Preservation of Error and Standard of Review.....	24
B. The Ordinance is Invalid Because The City Council Failed to Remain Impartial and Violated the Requirements of a Quasi-Judicial Proceeding	25
C. Ordinance 770 is Invalid Because it is Arbitrary, Capricious, and Unreasonable.....	33
D. The Ordinance is Invalid Because it is Contrary to the City's Comprehensive Plan.....	39
1. The Trial Court failed to Include Certain Key Findings and Conclusions Regarding Petitioners’ Unrebutted Expert Testimony and Opinion.....	42

E. The Ordinance is Illegal Spot Zoning.....	46
1. First prong	48
2. Second prong	48
a. The Size of Spot Zone and Uses of the Surrounding Property	48
b. The Changing Conditions of the Area	49
c. The Uses to Which the Subject Property Has Been Put	49
d. Its Sustainability and Adaptability for Various Uses	51
3. Third prong	51
F. Ordinance 77 is Invalid Because it Violated Due Process and Equal Protection.....	52
III.THERE WAS SUFFICIENT PROTEST TO INVOKE THE PROVISIONS OF DYERSVILLE CITY ORDINANCE 163.39(5)	55
A. Preservation of Error and Standard of Review	55
IV. ORDINANCE 777 IS INVALID AS IT PURPORTED TO REZONE PROPERTY WITHOUT THE APPROPRIATE NOTICE, PUBLIC HEARING AND ATTENDANT REQUIREMENTS OF DUE PROCESS UNDER THE <i>GORMAN</i> CASE.....	58
A. Preservation of Error Standard of Review	58
B. Gorman Applies	58
CONCLUSION	65
REQUEST FOR ORAL ARGUMENT	65
CERTIFICATE OF COMPLIANCE.....	65

TABLE OF CASES AND OTHER AUTHORITIES

Cases:

<i>Anderson v. City of Cedar Rapids</i> , 168 N.W.2d 739,744 (Iowa 1969).....	47
<i>Anderson v. City Development Board</i> , 631 N.W.2d 671, 676-677 (Iowa 2001).....	47, 64
<i>Bowers</i> , 638 N.W.2d at 689	53, 54
<i>Buechele v. Ray</i> , 219 N.W.2d 679, 681 (Iowa 1974)	19, 20
<i>Carstensen v. Board of Trustees</i> , 253 N.W.2d 560, 562 (Iowa 1977).....	23
<i>Dawson v. Iowa Bd. of Med. Exam'rs</i> , 654 N.W.2d 514, 519-20 (Iowa 2002).....	34
<i>Exira Cmty. Sch. Dist. v. State</i> , 512 N.W.2d 787, 792-93 (Iowa 1994)	53
<i>Fleming v. Tacoma</i> , 502 P.2d 327, 331(Washington 1972)	20, 21
<i>Gorman v. City Development Board</i> , 565 N.W.2d 607, 608, (Iowa 1997)	59, 60, 61,62,63,64
<i>Heintz v. City of Fairfax</i> , 730 N.W.2d 210 (Iowa App. Ct. 2007)	63, 64
<i>Herman v. City of Des Moines</i> , 253 Iowa at 1284, 1288, 97 N.W.2d at 895, 897	47
<i>Holland v. City Council of Decorah</i> , 662 N.W.2d 681, 686 (Iowa 2003).	40
<i>Jaffe v. City of Davenport</i> , 179 N.W.2d 554, 556 (Iowa 1970).....	34, 47, 48
<i>Jarrott v. Scriviner</i> , 225 F.Supp. 827, 833 (D.D.C. 1964)	23
<i>Keller v. City of Council Bluffs</i> , 66 N.W.2d 113 (Iowa 1954)	34, 47
<i>Keppy v. Ehlers</i> , 253 Iowa at 1023, 115 N.W.2d at 200.....	47
<i>Little v. Winborn</i> , 518 N.W.2d 384, 386, 387 (Iowa 1994).....	48

<i>Marianne Craft Norton Trust v. City Council of Hudson</i> , 776 N.W.2d (Iowa Ct. App. 2009).....	23
<i>Martin Marietta Materials, Inc. v. Dallas County</i> , 675 N.W.2d 544, 554 (Iowa 2004).....	23, 26
<i>Miller v. Boone County Hosp.</i> , 394 N.W.2d 776, 778 (Iowa 1986)	53
<i>Montgomery v. Bremer County Board of Supervisors</i> , 299 N.W.2d 687, 692, 694 (Iowa 1980).....	19, 23
<i>Morrow</i> , 616 N.W.2d at 547, 548.....	53
<i>Norton Trust</i> , No. 9-450/08-1704 at 6-10.....	23, 24
<i>Perkins v. Bd. of Supervisors of Madison County</i> , 636 N.W.2d 58, 64, 67, 68 (Iowa 2001).....	18, 25, 46, 47, 55, 58
<i>Plaza Recreation Ctr v. Sioux City</i> , 111 N.W.2d 758, 765 (Iowa 1961)....	41
<i>Rodine v. Zoning Board of Adjustment of Polk County</i> , 434 N.W.2d 124, 127 (Iowa App. 1988)	26
<i>Sutton v. Dubuque City Council</i> , 729 N.W.2d 796,798 (Iowa 2006)	18, 19, 20, 21, 22, 23, 24, 26
<i>Webb v. Giltner</i> , 468 N.W.2d 838, 841 (Ia. Ct. App. 1991).....	40
<i>Wolf v. City of Ely</i> , 493 N.W.2d 846,849 (Iowa 1992).....	40
<i>Woodward v. Monona County Board of Supervisors</i> , 2-577/11-2102, Iowa Court of Appeals November, 2012	48
<u>Statutes and Rules</u>	
BLACK’S LAW DICTIONARY p. 866, Abridged (6 th ed).....	31
Dyersville City Ordinance Chapter 165, 165.02, 165.10, 165.39, 165.39(1), 165.39(4), 165.39(5)	25, 35, 40, 53, 55, 56, 57, 63
Equal Protection Clause	53, 54

Fourteenth Amendment to the Federal Constitution.....	53
Iowa Code Chapter 368.....	59, 63
Iowa Code Chapter 414.....	25, 35, 59
Iowa Code Section 165.02	35, 40
Iowa Code Section 18B.2.....	39
Iowa Code Section 352	48
Iowa Code Section 414.3	34, 39
Iowa Rule of Civil Procedure 1.1412	18,24,55,58
Iowa Rule of Evidence 5.702.....	42
Iowa Const. Art. I, § 6, 9	52, 54
<i>McQuillin</i> , Vol. 8 Section 25.83, pp. 223-227	47

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE TRIAL COURT APPLIED THE INCORRECT STANDARD OF REVIEW AS THE CITY COUNCIL’S ACTIONS WERE QUASI-JUDICIAL RATHER THAN LEGISLATIVE, AS MANDATED BY SUTTON

A. Preservation of Error and Standard of Review.

Iowa Rule of Civil Procedure 1.1412

Perkins v. Bd. of Supervisors of Madison County, 636 N.W.2d 58, 64 (Iowa 2001)

B. Sutton Applies.

Montgomery v. Bremer County Board of Supervisors, 299 N.W.2d 687, 692,694 (Iowa 1980)

Sutton v. Dubuque City Council, 729 N.W.2d 796,798 (Iowa 2006)

Buechele v. Ray, 219 N.W.2d 679,681 (Iowa 1974)

Fleming v. Tacoma, 502 P.2d 327, 331 (Washington 1972)

Martin Marietta Materials, Inc. v. Dallas County, 675 N.W.2d 544, 554 (Iowa 2004)

Jarrott v. Scriviner, 225 F.Supp. 827, 833 (D.D.C. 1964)

Carstensen v. Board of Trustees, 253 N.W.2d 560, 562 (Iowa 1977)

Marianne Craft Norton Trust v. City Council of Hudson, 776 N.W.2d (Iowa Ct. App. 2009)

Norton Trust, No. 9-450/08-1704 at 6-10

II. ORDINANCE 770 IS INVALID

A. Preservation of Error and Standard of Review.

Iowa Rule of Civil Procedure 1.1412

Perkins v. Bd. of Supervisors of Madison County, 636 N.W.2d 58, 64 (Iowa 2001)

B. The Ordinance is Invalid Because The City Council Failed to Remain Impartial and Violated the Requirements of a Quasi-Judicial Proceeding.

Iowa Code Chapter 414

Dyersville City Ordinance Chapter 165, 165.39

Rodine v. Zoning Board of Adjustment of Polk County, 434 N.W.2d 124, 127 (Iowa App. 1988)

Martin Marietta Materials, Inc. v. Dallas County, 675 N.W.2d 544, 554 (Iowa 2004)

BLACK'S LAW DICTIONARY p. 866, Abridged (6th ed)

C. Ordinance 770 is Invalid Because it is Arbitrary, Capricious, and Unreasonable.

Jaffe v. City of Davenport, 179 N.W.2d 554, 556 (Iowa 1970)

Dawson v. Iowa Bd. of Med. Exam'rs, 654 N.W.2d 514, 519-20 (Iowa 2002)

Keller v. City of Council Bluffs, 66 N.W.2d 113 (Iowa 1954)

Iowa Code Chapter 414, 414.3

Dyersville City Ordinance Chapter 165.02

D. The Ordinance is Invalid Because it is Contrary to the City’s Comprehensive Plan.

Iowa Code Section 18B.2, 414.3

Dyersville City Ordinance Chapter 165.02

Wolf v. City of Ely, 493 N.W.2d 846,849 (Iowa 1992)

Holland v. City Council of Decorah, 662 N.W.2d 681, 686 (Iowa 2003)

Webb v. Giltner, 468 N.W.2d 838, 841 (Ia. Ct. App. 1991)

Wolf v. City of Ely, 493 N.W.2d 846,849 (Iowa 1992)

Plaza Recreation Ctr v. Sioux City, 111 N.W.2d 758, 765 (Iowa 1961)

1. The Trial Court failed to Include Certain Key Findings and Conclusions Regarding Petitioners’ Unrebutted Expert Testimony and Opinion.

Iowa Rule of Evidence 5.702

E. The Ordinance is Illegal Spot Zoning.

Perkins v. Bd. of Supervisors of Madison County, 636 N.W.2d 58, 64 (Iowa 2001)

Jaffe v. City of Davenport, 179 N.W.2d 554, 556 (Iowa 1970)

Anderson v. City of Cedar Rapids, 168 N.W.2d 739,744 (Iowa 1969)

Keppy v. Ehlers, 253 Iowa at 1023, 115 N.W.2d at 200

Herman v. City of Des Moines, 253 Iowa at 1284, 1288, 97 N.W.2d at 895, 897

Keller v. City of Council Bluffs, 246 Iowa at 206, 66 N.W.2d 116

McQuillin, Vol. 8 Section 25.83, pp. 223-227

Iowa Code Section 352

Woodward v. Monona County Board of Supervisors, 2-577/11-2102, Iowa Court of Appeals November, 2012

Little v. Winborn, 518 N.W.2d 384, 386, 387 (Iowa 1994)

F. Ordinance 770 is Invalid Because it Violated Due Process and Equal Protection.

Bowers v. Polk County Bd. of Supervisors, 638 N.W.2d 682, 689

(Iowa, 2002)

Exira Cmty. Sch. Dist. v. State, [512 N.W.2d 787](#), 792-93 (Iowa 1994)

Fourteenth Amendment of the Federal Constitution

Morrow, 616 N.W.2d at 547;

Miller v. Boone County Hosp., 394 N.W.2d 776, 778

Equal Protection Clause

Dyersville City Ordinance 165.39(5)

Iowa Const. Art. I, § 6.

Callender v. Skiles, 591 N.W.2d 182, 189 (Iowa, 1999)

III. THERE WAS SUFFICIENT PROTEST TO INVOKE THE PROVISIONS OF DYERSVILLE CITY ORDINANCE 163.3(5).

A. Preservation of Error and Standard of Review.

Iowa Rule of Civil Procedure 1.1412

Perkins v. Bd. of Supervisors of Madison County, 636 N.W.2d 58, 64 (Iowa 2001)

Dyersville City Ordinance 165.39(5)

IV. ORDINANCE 777 IS INVALID AS IT PURPORTED TO REZONE PROPERTY WITHOUT THE APPROPRIATE NOTICE, PUBLIC HEARING AND ATTENDANT REQUIREMENTS OF DUE PROCESS UNDER THE GORMAN CASE.

A. Preservation of Error and Standard of Review.

Iowa Rule of Civil Procedure 1.1412

Perkins v. Bd. of Supervisors of Madison County, 636 N.W.2d 58, 64 (Iowa 2001)

B. Gorman Applies.

Gorman v. City Development Board, 565 N.W.2d 607, 608, (Iowa 1997)

Iowa Code Section 414

Iowa Code Chapter 368

Heintz v. City of Fairfax, 730 N.W.2d 210 (Iowa App. Ct. 2007)

Dyersville City Ordinance 165.39(1)

Anderson v. City Development Board, 631 N.W.2d 671, 676-677 (Iowa 2001)

ROUTING STATEMENT

It is respectfully submitted that this case should be retained by the Supreme Court, because: 1) it presents substantial constitutional questions as to the validity of a statute, ordinance or court administrative rule; 2) it is a case that presents substantial questions of enunciating legal principles; 3) it is a case that presents substantial issues of first impression; and 4) it is a case involving fundamental and urgent issues of broad public importance requiring ultimate determinations by the Supreme Court.

STATEMENT OF THE CASE

A Petition for Writ of Certiorari and Request for Stay and Injunction was commenced on September 4, 2012, as a result of the Dyersville City Council's rezoning of 193 acres of Iowa farmland from A-1 Agricultural to C-2 Commercial. (App. pp. 1-20) Petitioners include twenty-three (23) individuals who are residents of Dyersville and/or areas surrounding the Dyersville community in rural Dubuque County, Iowa, as well as the Residential and Agricultural Advisory Committee, LLC, an Iowa Limited Liability Corporation (hereinafter collectively referred to as "Petitioners"). (App. pp. 1-20) Respondents are the Dyersville City Council and its five individual Council Members. Petitioners alleged that the rezoning was "in

violation of Iowa law, in violation of Dyersville City Ordinances, in excess of [Respondents'] authority, arbitrary, capricious, and in contravention of public safety, health, morals and general welfare.” (App. pp. 1-20) Hearing was set for September 25, 2012, for the District Court to “consider whether or not to order the Writ, stay and auxiliary injunction.” (App. p. 21) On September 24, 2012, Petitioners filed a Motion for Hearing, Additional Testimony and Discovery for matters that appeared outside the record. (App. pp. 34-36)

Separate Petitions of Intervention were filed in on behalf of Go the Distance Baseball, LLC and F.O.D. Real Estate, LLC and Donald and Rebecca Lansing. At the time of the rezoning, Lansing’s owned the property that was at issue in the rezoning. (App. pp. 22-30) The property was subject to a Purchase Agreement entered into on September 11, 2011 between the Lansing’s and Go the Distance Baseball, LLC. (App. pp. 22-30) Go the Distance Baseball, LLC subsequently withdrew its Petition. (App. pp. 116-117)

At the hearing on September 25, 2012, the Honorable Judge Thomas A. Bitter presided. (App. pp. 37-43) On October 9, 2012, Judge Bitter issued an Order denying the Petition for Writ of Certiorari. (App. pp. 37-43) Petitioners timely filed a 1.904 Motion to Enlarge, Amend or Modify and

Request for Oral Argument on October 23, 2012. (App. pp. 44-52)

Respondents filed a Resistance on November 2, 2012. (App. pp. 53-65)

Petitioners further responded by filing a Reply to Respondents' Resistance. (App. pp. 66-68)

On December 7, 2012, the Court issued an Order denying Petitioners' 1.904 Motion for Reconsideration. (App. pp. 69-70) Subsequent thereto, Petitioners timely filed a Notice of Appeal. (App. pp. 71-72) The case proceeded to the Iowa Court of Appeals. (App. pp. 73-74)

During the pendency of the appeal on Writ #1, a second Petition for Writ of Certiorari was filed on May 15, 2013, as a result of the Dyersville City Council approving Building Permit No.13-1575 and Approving Ordinance 777 with regard to the subject property. (App. pp. 75-91) Petitioners include nearly all Petitioners to Writ #1 (hereinafter collectively referred to as "Petitioners"). (App. pp. 75-91) Respondents are the Dyersville City Council and its five individual Council Members. Petitioners challenged the legality of Ordinance 777 which purported to amend an incorrect legal description used in Ordinance 770 to correct a "scriveners errors" without notice and public hearing required for a rezoning process. Petitioners further challenged the issuance of Building Permit No. 13-1575, which authorized commercial

development to begin on property presently zoned A-1.¹ (App. pp. 75-91)

The court directed that the Writ issue on May 23, 2013. The Writ was returned in that matter on June 10, 2013. (App. pp. 92-94) Trial in that matter was scheduled to begin on January 6, 2014. (App. pp. 95-97)

On November 6, 2013 The Iowa Court of Appeals reversed the decision of the District Court and remanded the matter for issuance of the Writ as requested in Petition for Writ #1. (App. pp. 98-109) Petitioners filed a Motion to Consolidate Petition for Writs #1 and #2 and continue the Trial date. (App. pp. 110-113) The Court granted the Motion to Consolidate, continued the trial date and scheduled all pending motions for hearing on January 6, 2014. (App. pp. 114-115) At the hearing held on January 6, 2014, the Court denied Respondent's Motion to Dismiss individual Council members; denied Petitioners' 1.904 Motion; denied Petitioners' request for an injunction; and granted Petitioners' Motion for Discovery.² (App. pp. 118-121)

By May, 2014 the District Court had still not issued the Writ and therefore Petitioners filed a Motion for Issuance of Writ requesting that the

1 The Petitioners' challenge of the Building Permit #13-1575 was dismissed for failure to exhaust administrative remedies and is not an issue on appeal. (App. p. 119)

2 The Court also required the City to inform counsel for Petitioners of any new building permit sought for the property in question. As of the date of trial, no permits were sought and no construction was started. (App. pp. 120-121, 1926)

District Court follow the directive of the Court of Appeals ruling of November 6, 2013. (App. pp. 122-139) The Court issued the Writ and directed that the Respondents return the Writ by June 12, 2014. (App. p. 140) Respondents filed Return of Writ on June 12, 2014. (App. pp. 141-145) Petitioners requested the now consolidated matters be set for trial. (App. p. 182) The court set this matter for trial. (App. pp. 183-185)

Trial began on February 16, 2015 and concluded on February 24, 2014. (App. p. 268) Closing argument was submitted in writing. (App. pp. 246-267) The court entered its Order holding that the actions of the Dyersville City Council are sustained, and the writs with respect to Ordinances 770 and 777 are now annulled. (App. pp. 268-293) Petitioners timely filed a Motion to Enlarge on June 22, 2015. (App. pp. 294-318) Respondents filed a Resistance on July 1, 2015. (App. pp. 319-324) The Petitioners filed a Reply to Resistance. (App. pp. 325-331) The court denied the Motion to Enlarge on July 24, 2015. (App. pp. 332-333) Petitioners timely filed Notice of Appeal on August 20, 2015. (App. pp. 334-336)

STATEMENT OF FACTS

THE PROPERTY: There is a parcel of property that is now located within the City of Dyersville that was the primary filming location for the 1989 movie “Field of Dreams.” (App. pp. 37-43) The property contains a baseball diamond and farmstead that featured prominently in the movie. *Id.* The remainder of the 193 acre property has long been used as farmland. (App. p. 1926) The Dyersville-based owners of the property, Don and Becky Lansing, reached an agreement to sell the farmstead, baseball diamond and surrounding agricultural land, all of which were located in rural Dubuque County, to Go the Distance Baseball, LLC. (App. pp. 26-30)

Go the Distance Baseball, LLC, intended to use the property for commercial development as the site of All-Star Ballpark Heaven, a complex of 24 baseball and softball fields. (*Id.*) Denise Stillman, a developer from the Chicagoland area, was the leading proponent of the project and part owner of Go the Distance, LLC. (App. p. 945) The purchase agreement was contingent upon the annexation of the property into the City of Dyersville, the rezoning of the property from A-1 Agricultural to C-2 Commercial, and certain other financing and infrastructure activities that were to be undertaken by the City of Dyersville. (App. pp. 797-801, 867-878)

THE CITY OF DYERSVILLE'S COMPREHENSIVE PLAN:

Dyersville was originally settled in 1846 and was incorporated in 1872. (App. p. 357) In 1960, the Dyersville Comprehensive Plan noted that Dyersville “is located in an area of rich agricultural land and is to a large extent dependent upon the agricultural economy as are most Iowa cities of its size.” (Id.) In the 1960 Comprehensive Plan, commercial development was contemplated in downtown Dyersville and along two other areas of the north and south fringes of Iowa Highway 136 (App. pp. 451-452) The 1974 Comprehensive Plan was subsequently amended with additional documentation and plans in 1975. (App. pp. 468-659)

The 1974 Comprehensive Plan specifically discussed the Dyersville area’s future land use plan and established a goal of encouraging “further development of the existing business community by providing the opportunity for expansion and new commercial uses, thus strengthening the image of the downtown area while at the same time discourag[ing] proliferation of scattered commercial development throughout the residential community.” (App. p. 569) Further, the 1974 plan stated several objectives for commercial development, including the retention and expansion of the central business district (downtown), encouraging planning and construction of secondary

commercial development in well-designed clusters to discourage sprawl, and to encourage business locations only in those areas which can easily and economically be served with public sewer and water. (App. p. 570)

The Comprehensive Plans makes no projection of future land use for commercial development anywhere near the Field of Dreams location. The City of Dyersville Community Builder Plans that were drafted in 1991 and 1997 do mention the property. (App. pp. 711-776) The 1991 Plan observed, “Dyersville is a community with many different facets.” (App p. 719) Those facets included the presence of successful industrial and blue-collar jobs, a popular location to retire for area farmers, a bedroom community for individuals commuting to Dubuque, and a small town atmosphere that boasted its own hospital with abundant retail and service businesses. (Id.) Further, it was noted that, “[t]he most recent facet of Dyersville’s personality is tourism.” (Id.) Among the tourist attractions identified were the movie site for “Field of Dreams,” the Basilica of St. Francis Xavier, the Dyer House and Doll Museum, the new National Farm Toy Museum, as well as the renewed tourist industry in Dubuque.” *Id.* The 1991 Plan continued, stating:

“Dyersville would like to keep all of these different facets alive. The community is attempting to maintain a balance between all of its elements and not sacrifice one for another. Each of them

are important and each has ample room to grow and flourish within the community.”

(Id.) It was thought the Field of Dreams movie site would continue to attract a fairly constant number of visitors. It should be noted that, in 1991, the Field of Dreams Movie site was located in rural Dubuque County and was not a part of the City of Dyersville. (App. pp. 723, 749)

The 1997 Community Builder Plan was adopted on February 3, 1997, through passage of Dyersville City Resolution 05-97. (App. p. 779) One of the objectives in the 1997 Plan was to “encourage businesses that require a large amount of space and parking, to develop along the highway.” (App. p. 784)

The City of Dyersville adopted an Annexation Plan September 22, 2003. (App. p. 660) The plan introduction explains that the City of Dyersville initiated the plan for annexation as an effort to promote a process for orderly growth. (App. p. 663) It went on to explain that Dyersville is concerned about the increasing level of development occurring just outside its boundaries, as such developments continue, their impacts on city infrastructure and services continue to increase in an unplanned manner. Future commercial growth was planned to focus in areas along Highway 136 north of the city and adjacent to existing commercial developments. The City intended that the plan would

reserve certain areas only for future industrial and commercial development.
(App. pp. 663-665)

The 2003 plan is the most recent and did not provide for annexation of property or any commercial development outside the city limits stretching to the rural Field of Dreams area even going out as far as the year 2023. (App. pp. 666-671) At no time was the Annexation plan reviewed or amended by the City Council. (App. pp. 2021-2022)

SALES TAX REBATE: The developer of the project pursued a sales tax rebate from the Iowa State Legislature to retain state sales taxes for up to ten years after the project opened up to \$16.5 million. Return of Writ #1 contains emails detailing the involvement of the Dyersville City Mayor and city staff involvement in making contacts with State Representatives and other various political connections to get the bill passed. (App. pp. 141-145) The legislation itself did not benefit the City and only benefited the developer. (App. pp. 141-145, 1982, 2017, 2100-2101) The governor approved the legislation on April 18, 2012. (App. p. 143)

THE MEMORANDUM OF UNDERSTANDING: On June 18, 2012, the City Council passed Resolution Number 35-12, in which a Memorandum of Understanding was executed between the City of Dyersville

and Go the Distance Baseball, LLC. (App. pp. 825-830) The Memorandum stated that the City and Go the Distance Baseball, LLC, had “been negotiating a Development Agreement for a youth baseball and softball development and tournament facility” that would feature “24 baseball and softball fields targeted for competition and training for youth aged 8 – 14.” (Id.)

Several “key points” were identified in the body of the Memorandum. (Id.) The City promised that it would “put forth its best effort to annex all of the property” that Go the Distance Baseball wanted to buy. The City also promised that it would undertake “its best effort” to add the property to the Urban Renewal Area and establish the property as a tax increment financing district. Lastly, the Memorandum stated, “[f]urthermore, the City agrees to use its best efforts to rezone the Property to commercial use or other appropriate use to allow the Company to use it for its intended purpose. (Id.)

THE ANNEXATION: On July 2, 2012, the Dyersville City Council approved Resolution 37-12, approving the annexation of several properties, including the Field of Dreams property. (App. p. 880) The City Administrator made a statement during City Council meetings that the Developer was doing the negotiating for the “voluntary” annexation. (App. 1162-1164, 2056-2060) (Supp. App. pp.151-157) The evidence in the Writ and at trial revealed that

City officials were involved in negotiations with property owners to get them to voluntarily annex. (Id)

THE REZONING: On July 2, 2012, the City Council, on its own motion, moved to rezone the Field of Dreams property from A-1 Agricultural to C-2 Commercial. (App. pp. 831-833) The Council did not actually ask to rezone the entire parcel of property. Instead, it intended to leave a 200 foot “buffer zone” of A-1 Agricultural zoned land around the property that was to be rezoned C-2 Commercial. (Id.) The City Administrator created the map. (App. p. 282)

The following parcels were specifically identified for rezoning:

SW ¼ of the SE ¼ of Section 22, Township 89 North, Range 2 West of the 5th Principal Meridian in Dubuque County, Iowa, except for the Northerly 200 feet thereof;

SW ¼ of the SW ¼ of Section 23, Township 89 North, Range 2 West of the 5th Principal Meridian in Dubuque County, Iowa, except for the Northerly and Easterly 200 feet thereof;

NE ¼ of the NE ¼ of Section 27, Township 89 North, Range 2 West of the 5th Principal Meridian in Dubuque County, Iowa, except for the South 200 feet of the West 200 feet and the West 200 feet of the South 200 feet thereof;

NW ¼ of the NW ¼ of Section 26, Township 89 North, Range 2 West of the 5th Principal Meridian in Dubuque County, Iowa, except for the Southerly 200 feet of the East 400 feet and the Easterly 200 feet.
Lot 1 of the SW ¼ of the NW ¼ of Section 26, Township 89 North,

Range 2 West of the 5th Principal Meridian in Dubuque County, Iowa, except for Southerly and Easterly 200 feet thereof; and

Lot 2 of Trinity Acres of the SE ¼ of the NE ¼ of Section 27, Township 89 North, Range 2 West of the 5th Principal Meridian in Dubuque County, Iowa, except for the Southerly and Westerly 200 feet thereof.

(App. pp. 831-833) It should be noted that the above property description is the legal description that was used in each and every notice associated with the rezoning, each and every motion associated with the rezoning, and other agreements, ancillary to the rezoning, since July 2, 2012. (App. pp. 834-878)

Go the Distance Baseball, LLC intended to develop and wanted to rezone property that was legally described in both Petitions to Intervene. (App. pp. 22-33) Through the enactment of Ordinance 770, the Dyersville City Council rezoned the “SW ¼ of the SE ¼ of Section 22, Township 89 North, Range 2 West of the 5th Principal Meridian in Dubuque County, Iowa, except for the Northerly 200 feet thereof. (App. pp. 831-833) This 40 acre parcel of land is not part of the Field of Dreams property or the development contemplated by Go the Distance Baseball, LLC. (App. pp. 831-833, 1230-1236)

PLANNING AND ZONING COMMISSION: On July 6, 2012, an Agenda for a Dyersville Planning and Zoning Commission Work Session was

posted at City Hall. (App. pp. 802-805) The Agenda called for “A community overview meeting on All-Star Ballpark Heaven. There will be a presentation followed by a question and answer period. Overview provided by Denise Stillman, lead developer.” (Id.) The Minutes of the meeting reflect that five of the nine Planning and Zoning Commissioners attended the Work Session. Two sets of Minutes were prepared and approved by the Recording Secretary – an original version of the Minutes and a “Revised” version of the Minutes. (App. pp. 806-813) The first set of Minutes, signed and dated on July 8, 2012, the date of the Work Session, state: “Meeting called to order by Denise Stillman at 6:30 P.M.” (App. pp. 806-809) The revised Minutes, signed and dated August 13, 2012, strike the statement regarding Ms. Stillman and replace it with the notation: “Attendance was taken by Tricia Maiers, Recording Secretary.” (App. pp. 810-813) Tricia Maiers authored and executed both sets of minutes. (Id.)

The Dyersville Planning and Zoning Commission met the next day on July 9, 2012, to consider the Field of Dreams Rezoning. (App. pp. 814-817) The minutes indicate that Ms. Stillman told the Committee that, “The original design was just a concept. A traffic study has not been done yet. These are usually done later in the process.” (App. pp. 274-278, 818-824) Later, while

asked when a new drawing of the Park would be available, Ms. Stillman responded that, “[S]he was hoping around September.” (Id.) One concerned citizen wondered why plans could not be available before all of the decisions were made. (Id.) The Planning and Zoning Commission voted unanimously “to approve a positive report to the City Council on the rezoning of Field of Dreams Property from A-1 Agricultural to C-2 Commercial.” (Id.) No Commission member reviewed the Dyersville Comprehensive Plan or discussed it during or prior to the meeting; many of the members had never seen the Comprehensive Plan; and one member didn’t believe he needed to follow the plan if it was good for economic development. (App. pp. 281, 289, 818-824, 1196-1229, 1965-1966)

THE CITY COUNCIL’S PUBLIC HEARING & REZONING: The Dyersville City Council met in regular session on August 6, 2012, at 6:00 P.M. and, as part of their meeting, held a public hearing on the rezoning. (Ex. 17 at 0:17:54) Attorney for Petitioners’ addressed the City Council and questioned the impartiality of the Zoning Commissioner’s positive report. She also disputed the use of a 200 foot buffer zone as device to quiet any formal opposition to the rezoning. (Ex. 17 at 21:39-28:33) Petitioners’ Attorney requested a delay on any rezoning vote to address additional

concerns. (Ex. 17 at 25:49-26:17, 28:31-28:34) In response, the Dyersville City Attorney, Marc Casey, “informed the Council that he will be reviewing the letter that was dropped off to the City Clerk at approximately 4:30 pm today from [Attorney] Susan Hess on behalf of the citizens of Dyersville.” (Ex. 17 at 28:38) Petitioners’ Attorney reminded the City Council of the quasi-judicial nature of the rezoning action and further admonished them regarding the need to remain impartial. She further expressed disappointment that the Council was not provided with the letter that she filed with the Clerk earlier in the day. (Ex. 17 at 45:37, App. pp. 1168-1177) The only other person to speak at the public hearing was Jack Mescher, a neighboring resident at 29217 Lansing Road, who asserted that the use of a 200 foot buffer area of A-1 Agricultural Property surrounding the C-2 Commercial property takes away the rights for nearby property owners to protest the rezoning. (Ex. 17 32:14-45:30) City Attorney Casey represented that a 200 foot buffer was consistent with state code but did not provide authority in support thereof. (App. pp. 2037-2040, Ex. 17 41:08-42:05)

Council Member Molly Evers moved to table the rezoning and delay the vote, but her Motion died for lack of a second. (Ex 17 at 48:28-49:50) The Council then waived the first reading of the rezoning ordinance on a 4 to 1

vote. (Id.) Next, the Council approved the rezoning on a 4 to 1 vote. The second and third readings of the rezoning ordinance were also waived in a similar 4 to 1 vote, and the measure was passed. (Id.) Mayor Heavens subsequently executed Dyersville Ordinance 770 in which the rezoning was legally described as approved by the City Council.

ORDINANCE 777: On April 15, 2013 Petitioners issued a statement to the Dyersville City Council to bring to their attention an error in the legal description on Ordinance 770. (App. pp. 1230-1236) At the next regularly scheduled City Council meeting on May 8, 2013, Ordinance 777 appeared as an action item on the agenda. (App. pp. 1237-1240) Ordinance 777 purported to correct a “scrivener’s error” in the legal description. (Id.) The “scrivener’s error” involved an entire 40 acre parcel of property. (App. pp. 1230-1236, 1758-1759) Ordinance 777 rezoned property. (App. pp. 1237-1240) No notice was published prior to the vote on Ordinance 777 and no public hearing was held on Ordinance 777 prior to the May 8, 2013 Council meeting. (Supp. App. p. 234) Ordinance 777 passed on a vote of 4 to 1. (App. pp. 1405-1411)

ARGUMENT

I. THE TRIAL COURT APPLIED THE INCORRECT STANDARD OF REVIEW AS THE CITY COUNCIL'S ACTIONS WERE QUASI-JUDICIAL RATHER THAN LEGISLATIVE, AS MANDATED BY SUTTON.

A. Preservation of Error and Standard of Review.

The Scope of Review on appeal is governed by the rules of appellate procedure applicable to appeals in ordinary civil actions. I.R.C.P. 1.1412. Review of a certiorari action is ordinarily for corrections of errors at law. However, even in a certiorari action, the court must review de novo evidence bearing on a constitutional issue. *Perkins v. Bd. of Supervisors of Madison County*, 636 N.W.2d 58, 64 (Iowa 2001) The Petitioners argued all of the following issues at trial, they timely filed a 1.904 Motion and Notice of appeal on all issues raised herein.

B. Sutton Applies.

The District Court's Order concludes that the essential nature of the Dyersville City Council's zoning decision was legislative, rather than adjudicative. (App. p. 287) In this case, however, the rezoning action was in fact quasi-judicial, based on guidance from the Iowa Supreme Court, which

alters the amount of deference that must be given to the Council's actions.

The Order correctly cited *Montgomery v. Bremer County Board of Supervisors*, 299 N.W.2d 687, 692 (Iowa 1980), in saying that “[c]ertiorari may be a proper remedy for reviewing the legality of decisions made by city councils and county boards of supervisors, in zoning matters.” (App. pp. 285-286) However, the Order goes on to cite *Montgomery* for the proposition that the “essential nature of the decision to rezone is legislative and the hearing before the [council] was of the comment-argument type. The [council] is not determining adjudicative facts to decide the legal rights, privileges or duties of a particular party based on that party’s particular circumstances.” (App. p. 286) (quoting *Montgomery*, 299 N.W.2d at 694; parenthesis added in Order).

This may have been the nature of the action in *Montgomery*, but the Iowa Supreme Court has specifically held that that nature may change based on the circumstances. “Although municipal zoning ordinarily involves the enactment of an ordinance, an action that on first blush appears to be legislative in nature, rezoning often takes on a quasi-judicial character by reason of the process by which it is carried out.” *Sutton v. Dubuque City Council*, 729 N.W.2d 796, 798 (Iowa 2006). The nature of a quasi-judicial function was defined in *Buechele v. Ray*, 219 N.W.2d 679 (Iowa 1974). The

Court stated in that case that a quasi-judicial function is involved if the activity “(1) involves proceedings in which notice and an opportunity to be heard are required, or (2) ‘a determination of rights of parties is made which requires the exercise of discretion in finding facts and applying the law thereto.’” *Sutton*, 729 N.W.2d at 798 (citing *Buechele*, 219 N.W.2d at 681).

The Sutton court expanded on the definition set forth in *Buechele*, by favorably citing a Washington Supreme Court case which found that zoning decisions may or may not be legislative depending on the nature of the act. “[W]hen a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change.” *Sutton*, 729 N.W.2d at 798, quoting *Fleming v. Tacoma*, 502 P.2d 327, 331 (Washington 1972).

The Sutton court then recited the factors identified in *Fleming* that would serve to render rezoning decisions quasi-judicial in character:

“Those factors include (1) rezoning ordinarily occurs in response to a citizen application followed by a statutorily mandated public hearing; (2) as a result of such applications, readily identifiable proponents and

opponents weigh in on the process; and (3) the decision is localized in its application affecting a particular group of citizens more acutely than the public at large.” *Sutton*, 729 N.W.2d at 798, quoting *Fleming*, 502 P.2d at 331.

All of the factors enumerated above are present in this case. The City, on its own application, submitted an Ordinance for the property in question to be rezoned. Numerous meetings were held as mandated by statute (see descriptions of various City Council and Planning and Commission meetings at App. pp. 269-279) The minutes of those meetings clearly show that there were readily identifiable proponents and opponents that weighed in on the process. As examples: at least six of the Petitioners appeared at the February 20, 2012 City Council meeting to speak against the project. (App. p. 269) Local businessman Joe Scherrman appeared at the May 21, 2012 Council meeting to speak in favor of the project. (App. p. 270) Numerous citizens spoke at the June 11, 2012 Council meeting, some speaking in favor, some in opposition, and some undecided about the project. (App. p. 271) “Various citizens and concerned residents stood up and spoke on June 18, 2012. Some voiced their support for the project. Others voiced their objection.” (App. p. 272) (5) The developer spoke at that same meeting. Others spoke at meetings

on July 2, 2012, July 8, 2012, and August 6, 2012. (App. pp. 272,273, 278)

With regard to the third factor identified in *Sutton*, the decision is clearly “localized in its application affecting a particular group of citizens more acutely than the public at large.” *Sutton*, 729 N.W.2d at 798. The District Court identified several of those citizens in its Order. Jeff Pape is a local farmer concerned about the possible reduction in crop yields if farmers were not able to do aerial spraying near a commercial development and the large farm machinery driven between farms and fields. (App. pp. 279-280) Mary Ann Rubly, from whose front porch the Field of Dreams property is visible, expressed concern that the peace and quiet of the area would be destroyed by the project. (App. p. 280) Wayne Ameskamp, who lives straight west of the field, expressed concerns about his ability to hunt on his land, as well as about the additional traffic, noise and lighting. (Id.) Gerald Wolf expressed concerns about traffic, flooding, and sewer problems. (Id.) These examples all show that certain citizens were affected by the application of the rezoning more acutely than the general public.

This Court’s Order correctly pointed out that, in the performance of an adjudicatory function, the parties whose rights are involved are entitled to “the same fairness, impartiality, and independence of judgment as are expected in a

court of law.” (App. p. 286 (citing *Martin Marietta Materials, Inc. v. Dallas County*, 675 N.W.2d 544, 554 (Iowa 2004), which in turn cited *Jarrott v. Scriviner*, 225 F.Supp. 827, 833 (D.D.C. 1964)). Therefore, the conclusion in Montgomery that a board’s action must be upheld if supported by any competent and substantial evidence (*Montgomery*, 299 N.W.2d at 692, citing *Carstensen v. Board of Trustees*, 253 N.W.2d 560, 562 (Iowa 1977), is not relevant in this case.

Respondents have asserted *Sutton* stands for the proposition that whether or not the City Council was acting in a quasi-judicial manner is only relevant when deciding what remedy is available to challenge the action, and cited a subsequent Court of Appeals opinion in arguing that *Sutton* did not overrule *Montgomery* on the substantive standard of review for zoning cases. It is the Respondents that misread both of these cases. *Sutton* clearly stands for the proposition that a zoning action can be construed substantively, not just in deciding the available remedy, as either legislative or quasi-judicial based on the process by which it is carried out. *Sutton*, 729 N.W.2d at 798. In the subsequent Court of Appeals case, *Marianne Craft Norton Trust v. City Council of Hudson*, 776 N.W.2d (Iowa Ct. App. 2009), the court did not say that *Sutton* left the substantive standard of review unchanged. Rather, the

opinion suggests that the Respondent in that case met the proper standard of review set forth for quasi-judicial actions. *Norton Trust*, No. 9-450/08-1704 at 6-10.

For the foregoing reasons, the trial court erred in its conclusion that Petitioners were not entitled to the same protections afforded by a court of law, and that the City Council's rezoning decision must be upheld if supported by any competent and substantial evidence. Instead, following *Sutton*, the rules of procedure the City of Dyersville was required to follow is more akin to a court-like hearing procedure; no ex-parte contacts outside the hearing and a written decision that includes adequate justifications for the decision. The City Council is not permitted to rely on some fact or opinion that was not presented in testimony or evidence at the rezoning hearing. The decision of the District Court should be reversed.

II. ORDINANCE 770 IS INVALID.

A. Preservation of Error and Standard of Review.

The Scope of Review on appeal is governed by the rules of appellate procedure applicable to appeals in ordinary civil actions. I.R.C.P. 1.1412.

Review of a certiorari action is ordinarily for corrections of errors at law.

However, even in a certiorari action, the court must review de novo evidence

bearing on a constitutional issue. *Perkins v. Bd. of Supervisors of Madison County*, 636 N.W.2d 58, 64 (Iowa 2001) The Petitioners argued all of the following issues at trial, they timely filed a 1.904 Motion and Notice of appeal on all issues raised herein.

B. The Ordinance is Invalid Because The City Council Failed to Remain Impartial and Violated the Requirements of a Quasi-Judicial Proceeding.

The weight of the evidence as outlined infra. proves that the Council members were not impartial; they engaged in improper ex parte communications; they acted in bad faith; and were biased and should have been recused from participating in the vote to rezone. Iowa law and Dyersville City Ordinances proscribe the manner in which the City Council was supposed to hear this zoning matter. *See*, Iowa Code Chapter 414, et seq.; Dyersville City Ordinance Chapter 165, et seq. The rezoning process is specifically set forth at Dyersville City Ordinance Section 165.39, and requires (1) initiation, proposal, or petition for a change in zoning; (2) payment of an application fee for the rezoning; (3) review and recommendation by the Zoning and Planning Commission; (4) hearing by the City Council; and (5) a vote by the City Council. It is this process that is

quasi-judicial and in this process, the City Council (and, by extension, the Planning and Zoning Commission) must be impartial and fair. (See *Sutton* analysis, *supra*.)

There are compelling considerations, including the basic considerations of fairness, which prohibit members of boards of adjustment from ex parte communications with interested parties. *Rodine v. Zoning Board of Adjustment of Polk County*, 434 N.W.2d 124, 127 (Iowa App. 1988) Iowa Administrative Code Section 17A.17 deals with ex parte communications, and while not legally applicable to board of adjustment or councils, this provides helpful guidance in analyzing restrictions on boards [and a city council]. *Rodine*, 434 N.W.2d at 27. The testimony presented to the District Court was sufficient to find that the conduct of City officials was improper and the decision to rezone the property was the product of bad faith and improper conduct. See *Martin Marietta Materials, Inc., v. Dallas County*, 675 N.W.2d 544 (Iowa 2004)

The actions by City Staff and Council evidenced a biased and impartial attitude when they took a stand early on in the process favoring the developer. The Mayor, himself, seemed to be unaware of his legal obligation altogether. (App. pp. 2000-2003) The Council, required to be sitting as a body similar to

that of a court of law, engaged in the following behavior:

They managed communication streams to avoid violation of open meetings laws and public records of the communication. (App. pp. 1149-1153, 1167, 2063-2064)

In late 2011, Ms. Stillman and/or her company, Go The Distance Baseball, LLC, arranged with the Mayor to host two sitting Dyersville City Council members, Robert Platz and Dan Willenborg. The stated purpose of the meeting that “they would be on site to offer support if necessary and I want to keep them in the loop as best we can as there will come a time when we will need their yes vote on the project. I think it would be worth taking them to supper with us.” (App. pp. 1475-1478, 1978-1890, 2025-2027) (Supp. App. pp. 224-227) During this same time frame those two City Council members were aware they would need to annex and rezone the subject property. (App. pp. 2015-2016, 2025-2026)

The two Council members engaged in ex parte communications with the developer when she took them out for dinner after the private meeting with the Governor concerning the pending sales tax rebate legislation for the development at the Field of Dreams. (App. p. 1980) It was assumed by Council members that the developer paid for the trip expenses. (App. p. 269,

1981-1982, 2017, 2026) Council Member Platz made a second trip to the Capitol to attend a subcommittee meeting on the topic of the pending legislation for the Field of Dreams legislation. (App. pp. 2017-2018) Council Member Willenborg attended an investor meeting and had ex parte communications with the developer concerning this project in December, 2011. (App. p. 2027) None of these meetings were disclosed to the public or the other City Council members prior to, or at, the public hearing on the rezoning. (App. pp. 2019-2020, 2026-2027)

In March, 2012, there was a bus trip to Des Moines to lobby for the sales tax rebate. Dyersville Planning & Zoning Commission member and sitting board vice-president of Dyersville Economic Development Corporation, Roger Gibbs attended and had ex parte communications with the developer. Also present on the bus was the Mayor, City Administrator, City Clerk Tricia Maiers and the developer. (App. pp. 1141-1142, 1981) Tricia Maiers publicly supported the developer and privately sent her a note of support from her City email account. (App. pp. 1146-1148)

Gibbs attended an ex parte investor meeting concerning this project with the developer in late 2011. (App. pp. 1959-1960) Gibbs engaged in a private email discussion with the developer about a land swap concerning

property surrounding the Field of Dreams for use in the development in April, 2012.³ (App. pp. 1472-1474, 1963-1964) Gibbs made a motion to send a positive report on the rezoning to the City Council on July 9, 2012. (App. p. 824) None of the aforementioned meetings were disclosed to the public or the rest of the commission at the time of the vote to send a positive report to the Council on rezoning. App. pp. 1961-1965)

Michel worked closely with the developer to establish a timeline and engaged in weekly conference calls from May, 2012 through September, 2012 for the purpose of getting updates on the rezoning to ensure deadlines were being met on the “crucial 17-week plan to achieve our goal and close by August 31, 2012.” (App. pp. 1149-1161, 1983-1992, 2049-2053) The Mayor was also involved in discussions on the timeline. (Id.)

At times, the developer pressured the City on the lack of progress and criticized the City for not moving fast enough. (App. pp. 1165-1167, 2054) There was an exchange of “confidential” emails in May, 2012 between the

³ Roger Gibbs was both vice-president of the Dyersville Economic Development Corporation and Chair of the Dyersville Planning & Zoning Commission. The Dyersville Economic Development Corporation purchased a farm that they then sold to the ethanol plant in the City of Dyersville which resulted in a net profit of \$1.2 million dollars. There was a similar 200 foot buffer zone at the ethanol plant rezoning to prevent neighbors from petitioning for protest. (App. pp. 1966, 2081-282) The Dyersville Economic Development Corporation supported the development at the Field of Dreams prior to the vote of the Planning & Zoning Commission on July 9, 2012. The Dyersville Economic Development Corporation also privately approached the developer of the Field of Dreams property on a land swap that would have ultimately benefitted them. None of this came to light until return of the Writ and trial in this case. (App. pp. 1963-1974)

developer and the Mayor and City Administrator where the developer expressed her frustrations with the City. (Id., App. pp. 1149-1161) In that same email, the developer wanted to know “are the votes there or not?” they thought they “had the overwhelming support of the city” and they “needed to know where they stand with some certainty”. (App. pp. 1165-1167, 1991-1992)

Michel was doing the behind the scenes work with the developer on her timeline; negotiated with property owners to get the “voluntary annexation” accomplished; drafted the map attached to the Ordinance for 770; lobbied for tax dollars for the project; and provided information and overview to the Commission and Council that they based their decision on. The Mayor, Council Members and a Commission member were supporting the development to get tax dollars and looking for investors for the development. It is not possible for City Council members to remain impartial triers of fact at a public hearing when there are months of behind-the-scenes meetings in support of the development and further communications reveal that the developer’s demands and timelines were being met to advance her project.

On July 8, 2012 the developer hosted a community overview and invited the public. (App. p. 1140) This turned into a Planning & Zoning Commission

Work Session that the developer called to order. (App. pp. 802-813) The developer led the meeting and provided the information on which the Zoning Commission would base their vote. (App. p. 1739) There were no detailed minutes of the meeting and no record to reflect what was specifically discussed at the meeting. This “meeting” was just one day prior to the Planning & Zoning Commission meeting to vote on the rezoning. (App. p. 810)

The public hearing took place on August 6, 2012. The Dyersville City Council was required by law to act in a quasi-judicial capacity, that is, to exercise discretion of a judicial nature. This imposes a requirement that during the hearing process that they, “investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them.” BLACK’S LAW DICTIONARY p. 866, Abridged (6th ed). The Mayor and some City Council members testified they made up their mind in advance of the public hearing that they favored the rezoning. (App. 287-288, 2001-2002, 2018, 2027) Consider the following:

- 1) Not a single person spoke in favor of the rezoning (App. pp. 2007-2013, Ex. 17 17:54-54:20);
- 2) City Staff Michel, Maiers and Attorney Casey publicly supported the

development project and interfered with proponents' attempts to contest the rezoning (Ex. 17 29:30-31:34, 32:14-33:09);

- 3) Members of the public were not allowed to speak more than five minutes and were interrupted by city officials (Ex. 17 1:38-2:02, 33:08, 38:30-38:40);
- 4) Council members had private meetings with the developer on investing and lobbied in support of legislation to assist the developer's project. These meetings were not disclosed prior to the vote; (App. pp. 2019-2020, 2025, 2028)
- 5) A letter from a licensed attorney enclosing a signed Petition timely and appropriately directed to the Council specifically addressing issues on the rezoning was withheld from the Council by the City Attorney (App. p. 2034, Ex. 17 at 31:00-31:34);
- 6) The City Attorney also misinformed the Council when he stated that in response to the letter that was withheld. "We are doing what the law requires us to do" for the rezoning. He further stated that the letter that was withheld from the Council was "fatally defective." And that the vote would not need to be unanimous (Ex. 17 28:38-31:34, 39:56-42:20);

- 7) When a question was posed to the Council for discussion City Administrator Michel directed the Council not to answer the question (Ex. 17 33:08); and
- 8) The Mayor at the meeting started with a Motion to “approve” the rezoning intimidated speakers from the public by challenging whether they “had a license to practice law” somehow suggesting that they had no right to challenge the Council on legal matters. (App. pp. 2007, Ex. 17 17:54-21:15, 38:20)

Substantial evidence was presented and not rebutted showing that the City Council did not remain impartial; they engaged in improper ex parte communications; they acted in bad faith; and had a bias toward approving the rezoning prior to the public hearing. For these reasons the decision of the District Court should be reversed and all sanctions imposed as allowed.

C. Ordinance 770 is Invalid Because it is Arbitrary, Capricious and Unreasonable.

The court erred in finding that the decision was not arbitrary, capricious, unreasonable and discriminatory. (App. p. 288) If the ordinance constitutes piecemeal or haphazard zoning of a small tract of land similar in character and use to the surrounding property for the benefit of the owner and

not pursuant to a Comprehensive Plan for the general welfare of the community, it is arbitrary, unreasonable and invalid. *Jaffe v. City of Davenport*, 179 N.W.2d 554 (Iowa 1970) (citations omitted) A City Council acts arbitrarily or capriciously if it acts “without regard to the law of facts of the case.” See *Dawson v. Iowa Bd. of Med. Exam’rs*, 654 N.W.2d 514, 519-20 (Iowa 2002) In determining the reasonableness of a zoning classification or an amendment thereto, each case must be determined upon its own facts. *Keller v. City of Council Bluffs*, 66 N.W.2d 113 (Iowa 1954) (citations omitted)

The analysis of this case turns on what facts and evidence the City Council had before them for consideration at the time of the public hearing on August 6, 2012 when they voted on Ordinance 770. The decision to rezone the property was made in a hurried, haphazard manner, with little or no investigation, information, analysis, or fact finding necessary to ensure that this rezoning furthers the public safety, health, morals and general welfare of the people of the City of Dyersville. (Ex. 17 17:54-54:20) (App. pp. 1168-1177)

The Council was focused on “economic development” instead of the specific requirements of zoning set forth by law. Iowa Code Section 414.3, states, in pertinent part:

“The [zoning] regulations shall be made in accordance with a comprehensive plan and designed to preserve the available of agricultural land; to consider the protection of soil from wind and water erosion; to encourage efficient urban development patterns; to lessen congestion in the street; to secure safety from fire, flood panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to promote the conservation of energy resources; to promote reasonable access to solar energy; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.”

Ordinance 770 is at odds with the requirements set out in Iowa Code Section 414 and Section 165.02 of The Ordinances of the City of Dyersville (App. p. 601). The City Council failed to consider any of the elements as set forth by law and further failed to utilize alternative zoning tools. Furthermore, there is no discussion of any of the elements in Iowa Code Section 413.3. The Council should have made the subject property a planned unit development in order to further the public safety, health, comfort, morals and general welfare of the citizens of Dyersville. (App. p. 1856) The City could have amended their zoning to permit a planned unit development. The City felt this project was good for economic development and disregarded all other elements imposed by law in a rezoning action. (App. pp. 2002-2003)

Many of these issues were in fact raised by citizens in the only two

public forums that were available prior to rezoning vote. The City Council failed to discuss or investigate the impact of the rezoning on the community and instead focused on meeting the deadlines imposed by the developer. Further, in rezoning this property, the City Council didn't follow their own policies and procedures as adopted Strategic Planning & Goal Setting which were highlighted at trial. (App. pp. 1088-1139, 1992-1999) Following the rezoning, the City Council still identified certain issues as problems that were created by the rezoning in their Strategic Planning & Goal Setting. (App. pp. 1127, 1132-1133)

The City rezoned all but 200 feet on certain areas of the parcel for the stated purpose that it was “to protect agricultural practices” and that it “worked well when there was a disagreement with the ethanol plant”. (App. p. 1197) Michel knew there was disagreement on the rezoning by neighboring land owners. (App. pp. 2085-2087) He worked with the developer in creating the map attached to Ordinance 770 and used the 200 foot buffer strip to take away the right of neighboring land owners from protest. (App. pp. 2084-2087) He did so without fully explaining that purpose to the Planning & Zoning Commission and City Council. He led them to believe that the 200 feet protected “farming” practices of neighboring land owners. (Ex. 17 43:55-

44:15) No evidence existed that farming practices were going on in the areas that bordered the buffer zone of the C-2 property and Michel did not consult the neighboring land owners where the 200 foot buffer zone was used to inquire as to whether they wanted it. (Ex. 17 43:55-44:15) (App. pp. 2085-2086) In the same manner that Michel misled the Commission, the Council and the public during the annexation process, he also misled the public, the Council and the Commission in the rezoning process. The wrong legal description was used on every notice. (App. pp. 1230-1236)

The return of the Writ contained a file called “studies”. In that file there were no studies on water run-off, traffic, emergency medical services or impact on farming practices done prior to the rezoning. (App. p. 144, 2103-2104) No traffic studies were conducted and no detailed site plan was prepared prior to the rezoning as the developer did not want to incur the cost at that time. (Supp. App. pp. 159-161) The water run off studies were not done and presented to the Council until months *after* the rezoning at the time of a request for building permit. (App. pp. 92-94, 2103)

There was no evidence in the returned writ, or in deposition or trial testimony that any consideration was given to appropriate land use, density, the use of open space, and effects on the nearby environment, including

surrounding agricultural land, use and enjoyment of surrounding landowners. (App. pp. 2008-2009) More specifically Respondents failed to consider the impact of rezoning on the Hewitt Creek Watershed. There was no evidence in the writ or outside that record of consideration or investigation on concerns of the environmental impact on this 23,000 acre watershed that's been developed and runs right through the subject property. (App. pp. 1784-1799, 1870, 2102-2105)

No consideration was given to the rich agricultural ground being taken out of production. Jeff Pape testified about the soil conditions on and near the Field of Dreams proposed development. (App. pp. 1781-1783) He farms a plot just north of the Field of Dreams with a CSR of upper 70s.⁴ The CSR on Phase 1 of the proposed development at the Field of Dreams property is rated at 85. (App. p. 1800). The rezoned property is some of the best soil in the state for use in agricultural production and was never considered by the City Council. (App. pp. 1781-1785)

The State has a vital public interest in preserving the open spaces devoted to agriculture. Agriculture is Iowa's leading industry. Good

⁴ Corn Suitability Rating is a measurement of the condition of the soil from 5-100 with 100 being the highest and best soil. Dubuque County has an average of 51 CSR but the soil ratings at the Field of Dreams property are much higher than the average. (App. p. 1781) There are only twelve out of the ninety-nine counties in the entire state that average in the 70s. (App. p. 1782)

stewardship requires us to protect and preserve agricultural land. The statutes applicable to zoning specifically state that zoning regulations shall...[be] designed to preserve the availability of agricultural land...(Iowa Code Section 414.3) Specifically, Petitioner Jeff Pape testified about the impact the rezoning of this property has on taking 193 acres of prime Iowa farmland out of production. This rezoning constitutes a violation of public policy. (App. pp. 1800-1806)

The City Code and State Code both require the City to act in accordance with a Comprehensive Plan. The record is completely devoid of any evidence that the Comprehensive Plan was ever consulted by Planning & Zoning and the Dyersville City Council. Council member Willenborg admitted that they did not consider the health, safety and welfare. (App. pp. 2034-2035) The District Court's findings are not supported by substantial evidence and are based on erroneous legal rulings and should be reversed as Ordinance 770 is arbitrary, capricious unreasonable and discriminatory.

D. The Ordinance is Invalid Because it is Contrary to the City's Comprehensive Plan.

City ordinances and regulations must be made in accordance with a Comprehensive Plan. *Iowa Code* § 18B.2 and 414.3 and Dyersville Ordinance

165.02. *Wolf v. City of Ely*, 493 N.W.2d 846, 849 (Iowa 1992) *See also* *Holland v. City Council of Decorah*, 662 N.W.2d 681, 686 (Iowa 2003). The purpose of a Comprehensive Plan is to control and direct the use and development of property in the area by dividing it into districts according to present and potential uses. (Id.) The Comprehensive Plan requirement is intended to ensure that the municipal zoning authorities act rationally rather than arbitrarily in exercising their delegated zoning authority. (Id.)

Where a municipality has enacted a written Comprehensive Plan, separate from its zoning ordinance, then an ordinance rezoning must be designed to promote the goals of the plan. *Webb v. Giltner*, 468 N.W.2d 838, 841 (Ia. Ct. App. 1991) If any proposed zoning change is not in conformity with the existing Comprehensive Plan, then it is legally necessary for the city to amend its Comprehensive Plan so as to bring it into conformity with the proposed zoning change before the proposed zoning change can become legally effective.

A zoning ordinance not made in accordance with the Comprehensive Plan is invalid. *Wolf v. City of Ely*, 493 N.W.2d 846 (Iowa 1992). The court erred as a matter of law in finding that “Ordinance 770 was unintentionally and unknowingly passed in accordance with, and in furtherance of, the

Comprehensive Plan.” (App. p. 290)

The court erred in finding that “other legislative action by the City, such as other zoning decision, also helps to shape the comprehensive plan”. (App. p. 289) This is a misstatement of law. The purpose of the Comprehensive Plan is to control and direct zoning decisions to prevent piecemeal and haphazard zoning, not the other way around. *Plaza Recreation Ctr v. Sioux City*, 111 N.W.2d 758, 765 (Iowa 1961)

The City of Dyersville had a Comprehensive Plan in place. (App. pp. 337-342) There is a procedure to amend the Comprehensive Plan and that was never done. (App. pp. 289, 2022) (Ex. 17 17:54-54:20) City Council members that voted in favor of Ordinance 770 testified they relied on the positive report from the Planning & Zoning Commission to make their vote to rezone. (App. pp. 1448, 2022, 2030) Neither body considered the Comprehensive Plan. That vote was based on misleading information provided exclusively by Michel. The other source of information was from the developer. (App. pp. 274-278)

The City of Dyersville adopted an Annexation Plan in September 22, 2003, which was 14 years after the establishment of the Field of Dreams movie site and the most recent plan. (App. pp. 660-700) The plan goals are set forth in the Statement of Facts, *supra*. Petitioner Matt Mescher relied on the

Annexation Plan in making the decision to purchase his property adjoining the Field of Dreams. (App. pp. 1734-1738) Ordinance 770 is clearly in conflict with the goals outlined in the most recent plan.

City Administrator Michel could point to nothing in the Dyersville Comprehensive Plans that supported annexation out to the Field of Dreams, or rezoning the property from A-1 to C-2 as set forth in Ordinance 770 and he relied on “inferences to tourism”. (App. pp. 2064-2079) For all of these reasons Ordinance 770 is invalid and the District Court decision should be reversed.

1. The Trial Court failed to Include Certain Key Findings and Conclusions Regarding Petitioners’ Unrebutted Expert Testimony and Opinion.

The District Court erred in failing to give appropriate weight to Petitioners’ unrebutted expert testimony and opinions. The District Court made no mention that there was expert testimony in this case, let alone comment on the weight it was given. (App. pp. 268-352) *Iowa Rule of Evidence 5.702* governs the admissibility of expert testimony and provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness

qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Petitioners called Christopher Shires to testify as an expert in this matter. (App. pp. 1820-1893) Mr. Shires has a degree in community and regional planning from Iowa State University. He is a certified planner. His experience was outlined on his CV. (App. pp. 1185-1188, 1826-1828) In the public sector his work experience included processing hundreds of rezonings, comprehensive plan amendments and on the private side he has assisted with rezoning and comprehensive plan updates. (App. pp. 1826-1827) He has attended several hundred public hearings with roughly half concerning rezoning and comprehensive plan matters in Iowa. (Id.) Mr. Shires was retained as an expert to review the writs to determine if there were deficiencies in the rezoning process by the City of Dyersville. (App. p. 1832)

The methodology Mr. Shires used in this case was review of the process the City used in rezoning the property. He looked at existing City Code on the rezoning process, meeting minutes, agenda, public hearing notice, Council and Commission packets, and Comprehensive Plans. (App. p. 1834) He reviewed the return of both writs, deposition transcripts and pleadings. (App. p. 1832) He only agreed to be an expert in the event he found deficiencies

because he did not want to give his firm a black eye on being on the wrong side of an issue. (App. pp. 1834-1835)

Mr. Shires identified four deficiencies in the rezoning process for Ordinance 770: 1) the Zoning Amendment process used by the City of Dyersville; 2) the Public Hearing Noticing; 3) Rezoning was inconsistent with the Comprehensive Plan; and 4) Spot Zoning. (App. pp. 1846-1851, 1872)

In Mr. Shires' experience, it was not proper planning procedure for the City to enter into the Memorandum of Understanding as they "agreed to use their best efforts" to rezone and it leads to a concern that the Council pre-decided outside of the public hearing process that rezoning the property to commercial was appropriate. (App. p. 1837) The proper procedure would be to first amend the Comprehensive Plan if it is the desire of the community to designate the area as commercial use, then proceed with the Memorandum of Understanding but not commit to rezoning. (App. p. 1839) It is important for the Commission and Council to maintain the appearance of impartiality during a rezoning procedure. (App. pp. 1837, 1873-1875)

Most important to his opinions were that review of the Comprehensive Plan in this case and found that the rezoning was not consistent with the Plan. (App. pp. 337-796, 1845-1849) Regarding spot zoning, Mr. Shires testified as

to when spot zoning occurs. In this case, with the 200 foot separation from the major road way the way the rezoning map was drawn it's surrounded by agricultural land in no way relating to its surrounding area that constituted spot zoning. In his experience a sound planning practice would be to rezone the property as a planned unit development written specifically for that property with limitations and restrictions for a buffer between properties. That was not done in this case and was a deficiency in the rezoning. (App. pp. 1854-1856)

The public hearing noticing was another deficiency. They did not ensure that the public had ample opportunity to be heard. He pointed out that the attorney was not allowed to present a letter with comments and a petition from property owners. (App. p. 1858) There was also an error in the legal description and that was the only information from which a member of the public would have had on what property was going to be rezoned. (App. p. 1859) No fee was paid for the rezoning application as required. (App. p. 1861) There was no review of the impact of rezoning on public safety, fire and emergency medical services. (App. p. 1868) There were no studies done prior to the rezoning to investigate the impact of the rezoning. (App. pp. 1869-1871)

The expert testimony was not rebutted by any witness. The expert testimony was further proof that there was no substantial support for the decision by the Dyersville City Council to approve Ordinance 770 and this testimony was completely disregarded and not even mentioned in the final order of this case. (App. p. 268-293) For these reasons the decision of the District Court should be reversed.

E. The Ordinance is Illegal Spot Zoning. The District Court stated only that the property is “extremely unique” but did not make findings or consider the appropriate analysis for spot zoning in Iowa. (App. p. 289) Petitioner Mescher a neighboring landowner spoke to the “unique” nature of the property and as he described it, the lure of the movie site is the fact that the ballfield is dropped in the middle of surrounding cornfields in rural Iowa, and changing the landscape as proposed would take away the “uniqueness” forever if the development is built. (Supp. App. pp.164-166) The finding by the court was erroneous and was not a sufficient reason to allow spot zoning to occur in this area.

Spot zoning occurs when an ordinance creates a small island of property with restrictions on its use that are different from those imposed on surrounding property. *Perkins v. Board of Supervisors*, 636 N.W.2d 58, 67

(Iowa 2001) While spot zoning is not favored, it is not automatically illegal. *Jaffe v. City of Davenport*, 179 N.W.2d 554 (Iowa 1970) If the ordinance constitutes piecemeal or haphazard zoning of a small tract of land similar in character and use to the surrounding property for the benefit of the owner and not pursuant to a comprehensive plan for the general welfare of the community, it is arbitrary, unreasonable and invalid. *Anderson v. City of Cedar Rapids*, 168 N.W.2d , 739, 744 (Iowa 1969); *Keppy v. Ehlers*, 253 Iowa at 1023, 115 N.W.2d at 200; *Herman v. City of Des Moines*, 253 Iowa at 1284, 1288, 97 N.W.2d at 895, 897; *Keller v. City of Council Bluffs*, 246 Iowa at 206, 66 N.W.2d 116; *McQuillin*, Vol. 8 Section 25.83, pp. 223-227. See also Ex. 17 37:00-37:35)

Spot zoning is valid if it passes a three-pronged test. *Perkins*, 636 N.W.2d at 68. The court must determine: “(1) whether the new zoning is germane to an object within the police power; (2) whether there is a reasonable basis for making a distinction between the spot zoned land and the surrounding property; *and* (3) whether the rezoning is consistent with the comprehensive plan.” (Id.) (Emphasis added)

With regard to spot zoning, and discussed in *Jaffe at 556*, “Each case must be decided on its own facts. *Keller v. City of Council Bluffs*. The

difficulty lies not with the law set out above, but with its application to the facts of this case.” The case at hand is no different.

In analyzing the first prong, whether the new zoning is germane to an object within police power, it is relevant to consider Iowa law that places an emphasis on preserving the state’s finite supply of agricultural land. *Iowa Code Section 352*. In voting to rezone the subject property, the Respondents presented no evidence of benefit to the public and it only benefited the developer. (Trial Ex. 17 37:00-37:35) (App. pp. 866-878)

The Iowa Court of Appeals discussed the second prong at length in *Woodward v. Monona County Board of Supervisors*, 2-577/11-2102, Iowa Court of Appeals November, 2012. In analyzing the second prong, the court considers “the size of the spot zoned, the uses of the surrounding property, the changing conditions of the area, the uses to which the subject property has been put[,] and its suitability and adaptability for various uses.” *Little v. Winborn*, 518 N.W.2d 384, 386, 387 (Iowa 1994) (citing *Jaffe*, 179 N.W.2d at 556). Those factors as applied to this case are:

a. The Size of Spot Zone and Uses of the Surrounding Property.

The rezoned tract is approximately 193 acres and was previously used as agricultural land. Additionally, it is surrounded by agricultural land on all

sides and there is no commercial development in close proximity to the subject property. (App. p. 1145)

b. The Changing Conditions of the Area. Review of the Comprehensive Plan for the Dyersville area does not reveal any proposal or discussion of commercial development in the area that is the subject of this rezoning, nor does it recommend removing existing farm land or taking agricultural areas out of production. (App. pp. 337-796) Further, at the public meetings on the rezoning, there were concerns raised by the public and city officials that commercial development in this area would cause problems with water run-off, traffic flow, and interference with farming practices by neighboring land owners. These issues, among other things, were not fully considered, nor were they addressed by Respondents or by the District Court. (Trial Ex. 17 17:54-54:20) (App. pp. 278-279)

c. The Uses to Which the Subject Property Has Been Put. The previous use of the property was agricultural, with a small portion retained for use as the Field of Dreams movie site as a tourist attraction. Petitioner Wayne Ameskamp resided at the Field of Dreams property from 1964 through 1990. (App. p. 1924) Mr. Ameskamp farmed the ground for years during that time. (App. p. 1925) He now resides on the property directly west of the Field of

Dreams. He has never known the property to be anything other than agricultural ground. (App. p. 1926) After the movie site was created it remained surrounded by corn and Wayne's mother owned the property at that time. (App. p. 1926) She obtained a change in zoning from Dubuque County for a conditional business use for 9 acres to operate a corn maze near the original movie site. No structures were permitted and the conditional use was to end at the termination of the business Left and Center, which ended in 2007. (App. pp. 1928-1933) Since that time there has been no other business activity. (App. p. 1933)

A review of the public record provided by Respondents does not reveal any consideration of previous use in determining whether the rezoning of this tract is reasonable. (Ex. 17 17:54-54:20) There was a previous conditional business zoning authorized by Dubuque County prior to the property being annexed into the city for operation of a corn maze on 9 acres. There were no buildings authorized to be constructed and it reverted back to A-1 designation upon termination of the Left and Center in 2007. (App. pp. 1929-1933) The developer has not changed the condition of the property or begun construction of the development while this matter has been pending. See footnote 2.

d. Its Suitability and Adaptability for Various Uses. There is no evidence in the record, nor any considerations by the Respondents in voting to rezone that commercial use is the best use of the land for the City's needs, as opposed to agricultural. (App. pp. 2104-2105) There is no evidence in the record that there was a consideration by the Respondent that alternate sites in the Dyersville area had similar adaptability, or that this property is suitable for the development of a 24 field baseball complex. (App. p. 2105) It appears from the record that the City did not investigate or consider whether the tract in question had any uniqueness other than its proximity to the Field of Dreams movie site. There is no evidence in the record before the Council that a development for youth training facilities has any relation to this movie site. The property is surrounded by farm-to-market roads and the roads are heavily utilized by farm equipment. (App. pp. 1775-1780, 1807-1808)

The third prong is whether the rezoning is consistent with the Comprehensive Plan. Review of the record and the Comprehensive Plan for the Dyersville area does not reveal any proposal or discussion of commercial development in the area that is the subject of this rezoning, nor does it recommend removing existing farm land or taking agricultural areas out of production. (See discussion regarding Comprehensive Plan, *supra*.)

No evidence was submitted or considered at the public hearing in support of the tract of land, surrounded by agricultural land, being suitable for commercial development. To the contrary, there were concerns raised with regard to rezoning to commercial, for purposes of a large development, at this particular tract leading to higher volume of traffic in this otherwise rural or agricultural area. (App. pp. 269-279) The Order contains no analysis of consideration or presentation of evidence in support of the factors that would qualify the spot zoning as legal. It is clear by the record in this case that The City of Dyersville rezoned the subject property in an unreasonable and haphazard manner for the benefit of the developer and not for the welfare of the community. The court erred as a matter of law. They did not do an analysis or make a ruling with regard to the legality of the spot zoning and as a result the decision of the District Court should be reversed.

F. Ordinance 770 is Invalid Because it Violated Due Process and Equal Protection.

The District Court erred in failing to consider the Equal Protection and Due Process claims by Petitioners. The Iowa Constitution prohibits laws that "grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. Art.

I, § 6. By creating a zoning map with the purpose to extinguish the rights of some neighboring landowners, the City Council violated the Petitioners' equal protection rights.

Iowa Courts typically deem the federal and state equal protection clauses to be identical in scope, import, and purpose. *Bowers*, 638 N.W.2d at 689; *Exira Cmty. Sch. Dist. v. State*, 512 N.W.2d 787, 792-93 (Iowa 1994). We therefore apply the same analysis in considering state equal protection claims as we do in considering federal equal protection claims under the Fourteenth Amendment to the Federal Constitution. *Morrow*, 616 N.W.2d at 547; *see also Miller v. Boone County Hosp.*, 394 N.W.2d 776, 778 (Iowa 1986). The Equal Protection Clause requires that similarly-situated persons be treated alike. *Morrow*, 616 N.W.2d at 548. "If people are not similarly situated, their dissimilar treatment does not violate equal protection." *Id.*

In this case, the neighboring landowners are all similarly situated persons in that they would have an opportunity to exercise their rights under Dyersville City Ordinance 165.39(5). (App. pp. 831-833) However, the City chose to impose the 200 foot buffer area on only portions of the rezoned area, effectively blocking only those that the City had reason to believe would object to the rezoning. Gerald and Alice Deutmeyer's property borders on the

west side of the rezoned area, yet this property does not have a 200 foot buffer zone like the north, south and east sides of the rezone property. By granting certain neighboring landowners the right to object and denying other similar-situated landowners the same right, the City has violated the Equal Protection Clause. (App. pp. 831-833, 1197, 2004-2006, 2028-2029) The District Court's failure to address the claim of equal protection is grounds for reversal of the decision.

The Iowa Due Process Clause mandates that “no person shall be deprived of life, liberty, or property, without due process of law.” Iowa Const. art. I, §9. Courts have interpreted the Due Process Clause to have both “substance” and “procedural” components and have employed different frameworks of analysis as to each component. *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa, 2002)

A person is entitled to procedural due process when state action threatens to deprive the person of a protected liberty or property interest. *Callender v. Skiles* 591 N.W.2d 182, 189 (Iowa, 1999) Before there can be a deprivation of a protected interest, there must be notice and opportunity to be heard. *Bowers*, 638 N.W.2d at 690-691.

Petitioners and others were not given the proper notice of Ordinance 770 due to incorrect legal and did not have an opportunity to be heard. Further, Petitioners do not dispute they were allowed to speak at public meetings concerning Ordinance 770 however, they had no meaningful opportunity to be heard due to the conduct of City Council and staff. A petition filed with the Clerk and signed letter of protest pursuant to Dyersville City Ordinance 165.39(5) was not delivered to the Council and withheld in violation of their right to due process. (Ex.17 31:00-31:34, 46:20) (App. pp. 1168-1177) The District Court failed to address these claims and the decision should be reversed.

III. THERE WAS SUFFICIENT PROTEST TO INVOKE THE PROVISIONS OF DYERSVILLE CITY ORDINANCE 163.39(5).

A. Preservation of Error and Standard of Review.

The Scope of Review on appeal is governed by the rules of appellate procedure applicable to appeals in ordinary civil actions. I.R.C.P. 1.1412. Review of a certiorari action is ordinarily for corrections of errors at law. However, even in a certiorari action, the court must review de novo evidence bearing on a constitutional issue. *Perkins v. Bd. of Supervisors of Madison*

County, 636 N.W.2d 58, 64 (Iowa 2001) The Petitioners argued all of the following issues at trial, they timely filed a 1.904 Motion and Notice of appeal on all issues raised herein.

The District Court erred in holding that the Petitioners failed to establish that they had sufficient opposition to trigger Dyersville Code 165.39(5) at the Council meeting and at trial. (App. p. 291) Petitioners established that they complied with the Ordinance in that they filed a signed Petition with the Clerk at or before the public hearing containing the signature of the requisite 20% or more of adjoining land owners as defined by the Ordinance. (App. pp. 879, 1749-1757, 1895-1896, 2040-2044,) This was sufficient to invoke 165.39(5). The District Court did not apply the appropriate Dyersville City Ordinance definitions of “Lot” and failed to analyze the Ordinance and apply it to the facts of this case and therefore incorrectly applied the calculation necessary to invoke the right of protest. (Id.)

The issue of using a buffer zone to circumvent filing a challenge to force a unanimous vote of the Council has not been decided in Iowa. The court order cites other jurisdictions in holding that an applicant for a zoning change may avoid the necessity for a super majority vote by creating a buffer

zone between the property to be zoned and the lands of adjacent property owners. (App. p. 291) That line of cases acknowledges that other circumstances may exist to invalidate the use of a buffer zone. Those cases are distinguishable from the facts of this case. Further, it is a slippery slope to set a precedent that allows an arbitrary buffer zone to be utilized to circumvent the right of neighboring property owners to exercise a legal right and Iowa should not follow that line of cases.

There is no question the buffer zone's intended purpose was to circumvent the provisions of 165.39(5). (App. pp. 290-292) It is clear that the developer intended to put access roads in the buffer zone. (App. p. 1143) The City admitted at trial that the buffer zone was used to take away the protest, but during the rezoning process, the stated reason for the buffer zone from the city was to "protect agricultural practices". No agricultural practices were going on around the buffer zone and the City admitted that the buffer zone would not resolve any of the stated concerns. (App. pp. 1741-1744, 2088-2091)

IV. ORDINANCE 777 IS INVALID AS IT PURPORTED TO REZONE PROPERTY WITHOUT THE APPROPRIATE NOTICE, PUBLIC HEARING AND ATTENDANT REQUIREMENTS OF DUE PROCESS UNDER THE GORMAN CASE.

A. Preservation of Error and Standard of Review.

The Scope of Review on appeal is governed by the rules of appellate procedure applicable to appeals in ordinary civil actions. I.R.C.P. 1.1412. Review of a certiorari action is ordinarily for corrections of errors at law. However, even in a certiorari action, the court must review de novo evidence bearing on a constitutional issue. *Perkins v. Bd. of Supervisors of Madison County*, 636 N.W.2d 58, 64 (Iowa 2001) The Petitioners argued all of the following issues at trial, they timely filed a 1.904 Motion and Notice of appeal on all issues raised herein.

B. Gorman Applies.

On April 15, 2013 Respondents authorized issuance of a building permit on the subject property. Petitioners, prior to the issuance of the permit, brought to the City's attention an incorrect legal description that had been used on the rezoning and every public notice associated with the rezoning.

The Respondents dismissed this error and stated that it was an easy fix. The agenda for the next meeting indicated that an Ordinance 777 would be considered to correct the legal description. At their next City Council Meeting, Respondents determined that the legal description used to rezone the Field of Dreams Property [w]as merely a “scrivener’s error” that could be corrected by simple vote of the Respondents. Agenda of May 6, 2013, Dyersville City Council Meeting. (App. pp. 1237-1411) On May 6, 2013, Respondents approved the revision of the rezoning property description. No notice was published containing the legal description and no public hearing was held. The legal description was not published until after Ordinance 777 was passed therefore no opportunity was provided for public input on a rezoning. (App. pp. 1953-1954, 2046) (Supp. App. p.234)

According to *Gorman v. City Development Board*, 565 N.W.2d 607, (Iowa 1997), the rezoning is invalid and the Respondents cannot simply pass an Ordinance to correct the error. While *Gorman* dealt with the annexation of property rather than the rezoning of property, it is analogous and on-point. The processes of Zoning and Annexation are both statutorily defined, require notice and hearing, and the exercise of a quasi-judicial function. Compare, Iowa Code Chapter 414, et seq., and Iowa Code Chapter 368, et seq.

In *Gorman*, the Court was faced with the following facts:

The application [for annexation] contained a legal description that mis-described the property. Enclosed with the application was a map that correctly showed and described the landowners' property. The application description error was not corrected until after the City Development Board (Board) approved the annexation, which occurred after notice of the application for annexation was published in the newspaper and after the Cedar Rapids City Council passed a resolution approving the annexation.

**

In the application, the [Applicant] described the land as follows:

N ½ of the SE ¼ of section 35-83-8, Linn County, Iowa, subject to the public road;

And

NW ¼ of the SE ¼ of section 35-83-8, Linn County, Iowa, subject to the public road.

Unfortunately, the [Applicant] mis-described their property and the first line of the description should have stated: "N ½ of the SW ¼," not "N ½ of the SE ¼." Because of this typographical error, eighty acres of the [Applicant's] property was not described and forty acres of land not owned by

the [Applicant], the NE ¼ of the SE ¼, were included in the description of the land to be annexed. *Gorman* at 607 – 608.

The *Gorman* Court went on to say:

Legal descriptions are an important part of a voluntary annexation proceeding because they are relied on by property owners, the approving authorities, and the public. Incorrect descriptions can cause significant problems in annexation proceedings. Depending on whether the territory is an urbanized or non-urbanized area, legal descriptions are provided to the Secretary of State, county boards of supervisors, affected public utilities, the Iowa Department of Transportation, and regional planning authorities. If the property is in an urbanized area, notice of the application, including the legal description, must be published in an official county newspaper prior to any action by the City Council. The city clerk of the Board must file and record a copy of the legal description, map, and resolution with the county recorder when the annexation is completed.

We conclude that the... application did not satisfy the reasonable objectives of the statute. It did not give notice as to the property under consideration for voluntary annexation. In determining whether the

erroneous description satisfies the requirement of substantial compliance, we consider the impact of the error upon the proceedings. If a small error causes significant problems, the statutory requirements are not satisfied. Here, the [Applicants] erred by describing the property as the “N ½ of the SE ¼” instead of the “N ½ of the SW¼.”

Id. at 610.

As indicated, *supra*, the same ingredients necessary for a legal annexation are necessary for a legal rezoning. In the instant matter, the City erred in describing part of the rezoned property as the “SW ¼ of the SE ¼” instead of the “South East ¼ of the South East ¼.”

Pursuant to the logic of *Gorman*, the rezoning was illegal. There was no notice, all the published legal descriptions were incorrect, and the mistake was significantly more than a mere “scrivener’s error.” There was no map published with the legal description to clearly identify the property. (Trial Trans. pp. 102-105) This so-called scrivener’s error is little more than an attempt to end-run around proper zoning and city governance and yet another way to push through the process on the developer’s timeline. The Mayor himself stressed the importance of a legal description when he read it aloud [the erroneous legal description] at the public hearing, and prefaced that by

stating “I would read the notice of the public hearing because I think that the legal description has some application here tonight, maybe more than normal and it is not very long, so before we let the Council and the folks in it would be good to just let everyone know what we are discussing.” (Ex. 17 18:10-21:04)

The District Court relied on a subsequent Court of Appeals decision to conclude the *Gorman* case was “easily distinguishable” and “inapplicable” to this case. (Order, p. 24) citing *Heintz v. City of Fairfax*, 730 N.W.2d 210 (Iowa App. Ct. 2007). The District Court’s reliance on *Heintz* is misplaced for two reasons. First of all, the *Heintz* court noted that the applicable statute in its case differed from that in *Gorman*, in that one statute required published notice including a legal description of the property and the other did not. The statute at issue in *Heintz*, Section 368.4, “only requires ‘notice and hearing’ before a city may ‘agree with another city or cities to refrain from annexing’ property.” *Heintz*, No. 6-1039/06-0979, at page 6. In the case before this court, the Dyersville zoning regulations clearly require a proper description of the property and boundaries to be changed. Section 165.39(1), Code of Ordinances, Dyersville, IA (“Such proposed amendment, supplement, modification or change shall clearly describe the property and its

boundaries...”) The ordinance goes on in Section 165.39(4) to require seven days’ notice of a public hearing on the change. (App. pp. 2045-2046)

Therefore, the description requirement in this case is more analogous to the one in *Gorman* than that in *Heintz*.

This case can be further distinguished from *Heintz* based on the *Heintz* court’s reliance on the *Anderson* case for the proposition that an error in the description of land affected by a Council action does not necessarily invalidate said action. *Heintz*, at page 7, citing *Anderson v. City Development Board*, 631 N.W.2d 671, 676-677 (Iowa 2001). However, *Anderson* did not involve an improper description of the property itself, as in *Gorman*, but rather “an inconsistent statement as to what direction the territory lays from each city.” *Id.* at 676. The court found such an inconsistent statement to be “inconsequential to the notice of the citizens.” *Id.* In this case, the legal description itself was in error, meaning the property was improperly described. The District Court made an error at law and the decision should be reversed.

The surveyor who prepared the map identifying the error in the legal description testified at trial. He testified that Ordinance 777 which purported to correct the erroneous description still did not bring it in conformance with

the map used in Ordinance 770. (App. pp. 1144, 1230-1236, 1904-1913)

CONCLUSION

For all the reasons asserted herein, it is respectfully requested that this Court reverse the decision of the District Court and Sustain both Writ Petitions.

REQUEST FOR ORAL ARGUMENT

Hammer, Simon & Jensen, P.C., Attorneys for Appellants, request Oral Argument in this matter.

CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 13,909 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). This brief complies with the typeface requirements of the Rules of Appellate Procedure as this Brief has been prepared in a proportionally spaced typeface using Word2010 in Times New Roman 14.

Respectfully submitted, Petitioners/Appellants

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