

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 REPLY BRIEF

CERTIFICATE OF FILING

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

/s/ Susan M. Hess

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

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ARGUMENT

I. SUTTON HELD THAT IN MATTERS RELATED TO THE REZONING PROCESS AT PUBLIC HEARING, A CITY COUNCIL'S ACTIONS ARE QUASI-JUDICIAL RATHER THAN LEGISLATIVE.

Respondents have urged the Court for three years to ignore the requirements of *Sutton* as they wish to avoid the requisite procedure that follows when an adjudicatory process is triggered. To find that the City was required to act as an adjudicatory body during the public hearing process, would be to critically look into the manner in which the public hearing on the rezoning was conducted in this matter. Respondents must avoid the correct interpretation in order to prevail.

The interpretation urged by Respondents goes against *Sutton*, which clearly stands for the proposition that a rezoning 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 *Marianne Craft Norton Trust v. City Council of Hudson*, 776 N.W.2d 302 (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.

In *Marianne Craft*, the City Council conducted public hearings and took public comment, considered the Comprehensive Plan, future land use map, and recommendation of the Planning & Zoning Commission. The Council delayed action in order to receive additional public comments. In the case at hand, the City Council refused to take a letter containing public comment and a signed petition related to the rezoning, did not consider the Comprehensive Plan and land use maps and refused to delay action in order to receive additional public comment. (App. pp. 1168-1177) (Exhibit 17 17:54-54:20)

The *Sutton* case relied on *Buechele v. Ray* to define the parameters for determining whether a zoning decision is administrative or legislative. (See Petitioners' Proof Brief, Argument I) It is illustrative for purposes of reply to Respondent's Proof Brief, to review in detail the cases relied upon by the *Sutton* court. The court defined the nature of a quasi-judicial function in *Buechele v. Ray*, 219 N.W.2d 679 (Iowa 1974) and expressed similar criteria in *Curtis v. Board of Supervisors*, 270 N.W.2d 447, 449 (Iowa 1978). The *Sutton* Court also adopted principles set forth in a Washington Supreme Court

case to determine whether zoning activities are quasi-judicial in nature.

Fleming v. Tacoma, 81 Wash.2d 292, 502 P.2d 327, 331 (1972) (*Sutton at 798*) In the *Fleming* case, the court explained factors used to render rezoning decisions quasi-judicial and the attendant procedural requirements afforded to those whose rights are affected. The *Fleming* court stated:

“Generally, when 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...

Another feature of zoning amendment decisions, which distinguishes them from other types of legislative action, is their localized applicability. Other municipal ordinances which affect particular groups or individuals more than the public at large apply throughout an entire geographic area within the municipal jurisdiction, whereas ordinances that amend zoning codes or reclassify land thereunder apply only to the immediate area being rezoned.

Finally, legislative hearings are generally discretionary with the body conducting them, whereas zoning hearings are required by statute, charter, or ordinance. The fact that these hearings are required is itself recognition of the fact that the decision making process must be more sensitive to the rights of the individual citizen involved.

In light of these distinctions, it is appropriate to apply the appearance of fairness doctrine to all hearings, conducted by a municipal legislative body, which are aimed at amending existing zoning codes or reclassifying land thereunder. Not only must the hearings appear fair, but the motives of the persons conducting the hearings and voting therein must be above reproach... We now hold that members of municipal legislative bodies who

conduct such hearings must, as far as practicable, be open minded and free of entangling influences...They must be ‘capable of hearing the weak voices as well as the strong...it is important not only that justice be done but that it also appear to be done.’”

Fleming, at 298.

The District Court seemed to recognize 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)). However, the District Court then erroneously concluded 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.” Citing *Montgomery*, 299 N.W.2d at 694.

Respondents violated the requirement of conducting the rezoning process in a quasi-judicial manner with an open-minded voting body free of entangling influences. (App. pp. 1475-1478, 1978-1890, 2025-2027) (Supp. App. pp. 224-227) The self-serving testimony of Respondents that they

remained open minded is not supported by the facts that came to light at trial. (App. pp. 2018-2020, 2027-2028) (Supp. App. pp. 246-251) Notably absent from the public hearing [or, for that matter, at any City Council meeting discussed at the trial of the proceeding] is any deliberative process that was followed by the City Council in rezoning the subject property. (Trial Ex. 17 17:54-54:20) No written findings were made at the public hearing regarding any testimony or evidence necessary to support the rezoning. (Id.)

Respondents make a public policy argument that imposing a requirement of quasi-judicial procedures for rezoning would be “acute”. Respondents suggest that Council members would be prohibited from considering the wishes of their constituents unless those constituents came to the hearing and spoke on the record. They state fears that hearings would be “all-or-nothing, laden with procedural requirements akin to a court of law and outside the expertise or resources of the ordinary citizen/council member.”

Petitioners disagree that it would be outside the expertise or resources of the ordinary citizen/council member to give the public a fair and impartial hearing on a rezoning issue. This is exactly what the law demands and according to the experience of Petitioners’ expert witness Chris Shires, exactly the type of proceedings that take place in practice in other

municipalities of all sizes in Iowa. (App. pp. 1827, 1856-1878) Upon review of the record, Shires opined that deficiency number one was the failure on the part of the Commissioners and Council to remain impartial during the hearing process. (App. p. 1866) Respondents called no expert witness and offered no testimony or opinion to refute Chris Shires' testimony.

Gary Taylor, an attorney at Iowa State University Extension, Department of Community and Regional Planning, published similar opinions in an Iowa State University Extension article setting forth his commentary regarding the *Sutton* decision. He expressed his opinion with regard to the quasi-judicial process required in Iowa following that case. (App. pp. 1169-1170) Petitioners attempted to convey that exact commentary to the City Council on August 6, 2012 to impress upon them the manner in which they are required to conduct the public hearing on the rezoning following the *Sutton* decision. (Id.)The letter, which contained a link to the article, was intercepted by the City Attorney. (Ex. 17 31:00-31:34) Respondents did not refute that part of the letter.

There is no evidence in the record that the mandated quasi-judicial requirement would impose a financial burden on small municipalities when a rezoning is involved. Respondents improperly interject evidence in their brief

not in the record and not preserved on appeal. Conversely, there was evidence in the record that municipalities of all sizes all around the State of Iowa are already complying with this legal requirement. (Id.) Due process is not always convenient, but it is required by law in Iowa following *Sutton*.

A majority of states have determined that rezoning is administrative, not legislative and therefore a quasi-judicial proceeding is required. *Cooper v. Board of County Commissioners*, 614 P.2d 947 (Idaho 1980); *Consaul v. City of San Diego*, 6 Cal. App. 4th 1781 (California 1992); *Neuberger v. City of Portland*, 603 P.2d 771 (Oregon 1979); *West Old Town v. City of Albuquerque*, 927 P.2d 529 (New Mexico 1996); and *Board of County Commissioners v. Snyder*, 627 So.2d 469 (Fla 1993); According to the 5th District Court of Appeals in *Snyder*, nine other states adopted a similar approach including Colorado, Hawaii, Idaho, Illinois, Kansas, Montana, Nevada, Virginia, and Washington. 595 So.2d at 77-78)

A. The Record does not reflect that the Commission and Council considered or discussed whether the rezoning was reasonably related to a legitimate interest of improving the economy and tourism sector.

Dyersville Ordinance 38-12 to Rezone the subject property from A-1 to

C-2 was presented for the first time on July 2, 2012 at a City Council meeting. There was no discussion of the rezoning during the July 2, 2012 City Council meeting. (App. pp. 831-833) (Supp. App.pp. 143-145) (MM) At the next regularly scheduled City Council meeting on July 16, 2012 a resolution was adopted to set the public hearing on the rezoning. (App. pp. 834-840) (Supp. App. pp.1-7) Notice was published in the newspaper on July 25, 2012 with the Ordinance and legal description but no map. (App. p. 1530) Those two City Council meetings were the only City Council meetings prior to the public hearing.

There was no testimony or evidence presented at the public hearing on August 6, 2012 that the proposed rezoning would improve the economy and tourism in Dyersville or that it was a concern that the Field of Dreams movie site was in danger of losing the draw of tourists. (Ex. 17 17:54-54:20) Respondents cite the Economic Impact Study in their brief stating projected and speculative revenue that the proposed development might bring. (App. pp. 881-934) The study was not discussed at the public hearing and was information provided and paid for by the developer with the assistance of the City Administrator, Mr. Michel. (App. pp. 881-934) (Supp. App. pp. 15-26)

The study was dated February, 2012 and did state with regard to tourism that “For the most recent four-year period, an estimated 65,000 visitors per year have traveled from around the world to visit the “Field of Dreams” site. It has not been uncommon any day of the week any time of the day, to meet other travelers who had made the pilgrimage to Dyersville and joined a baseball game made up of international visitors.” (App. p. 885) This fact defeats the argument that the Field of Dreams movie site, in its present state, was in danger of being lost as a tourist attraction for Dyersville.

Respondents failed to do any independent investigation or make any findings regarding whether the rezoning would further the economy and tourism sector of Dyersville. Instead, they relied on speculative projections from the developer. The City Council failed to conduct any of the necessary studies that are ordinarily done to determine if a rezoning is appropriate. (App. pp. 1867-1876, 2006-2013, 2022, 2096, 2102-2105) (Supp. App. pp. 218-219, 220-222, 228, 231-232, 246-250, 254-258) Counsel for Respondents now argue that the actions by the City Council were justified because the rezoning was reasonably related to “tourism” however the record on review does not support that argument which was made for purposes of defending the rezoning after the fact.

B. There was no “debate” at the public hearing on August 6, 2012.

Respondents lump all 12 City Council meetings leading up to the rezoning into the argument that this was a matter of significant debate. The Ordinance to Rezone the subject property was not presented by the City Council until July 2, 2012 when the motion passed to send the rezoning ordinance to the Planning & Zoning Commission. The only meeting where there was debate concerning the actual rezoning resolution and the manner in which it was proposed was the Planning & Zoning work session led by the developer on July 8, 2012 and the Planning & Zoning Commission meeting on July 9, 2012 where the developer was also present to provide information along with the City Administrator. (App. pp. 806-813, 818-824, 1140, 1196-1229)

The developer who had a clear bias in favor of the rezoning and City Administrator who was working on the developer’s timeline, both clearly had an agenda and led the meetings on July 8 and 9 providing information to Planning & Zoning Commissioners to garner their support for the rezoning. (Id., App. pp. 1141, 1154-1161, 1979-1981, 2048-2055) (Supp. App. p. 236)

The City Administrator represented to the Planning & Zoning Commission on July 9, 2012 that increased crime issues were going to be limited at best adding the proposed development would not increase crime. Further that there would be a traffic study down the road and an informal survey was done for now which did not reveal any issues. (App. pp. 1197, 1213-1215) In 2013 the Dyersville Goal Setting initiative after the rezoning, revealed that there were potential traffic issues on Hwy 136 by Dyersville East Road; the city was growing quicker than services could adequately cover and more police protection was needed because of the ballpark. (App. p. 1132)

There were no City Council meetings where the subject rezoning could have been “debated” other than the public hearing on August 6, 2012. At that hearing, not a single person spoke in favor of the rezoning and there was no evidence presented in favor of the rezoning, no testimony and no discussion or debate. (Ex. 1717:54-54:20) The City Administrator, City Attorney and the Mayor, who was leading the meeting, took steps to block the debate, stifle protest, withhold information, and mislead the Council. (Supp. App. pp. 29-34, 218-219) (Exhibit 17 31:00, 33:08, 38:40) City Council members relied on a verbal report of the 8-0 vote by Planning & Zoning. (App. pp. 288-289) The information provided to that body came from the lead developer and the City

Administrator. (App. pp. 802-824) The City Council had no written report or minutes from Planning and Zoning detailing the decision in their agenda packet. (Supp. App. pp. 47-142) The minutes from the Planning & Zoning meeting of July 9, 2012 were not approved until August 13, 2012 *after* the public hearing. (Supp. App. pp.38-45)

C. Petitioners were not afforded the procedural due process required for a quasi-judicial proceeding and were denied equal protection.

Procedural Due Process. As set forth in Argument I, Respondents were required by law to conduct the public hearing on the rezoning in a quasi-judicial manner and they failed to do so. Again, Respondents erroneously assert that all hearings were conducted appropriately and that appropriate notice was given. (Respondent’s brief, p. 23) They also assert that there were no less than 12 public hearings on the rezoning and that Petitioners were given a meaningful opportunity to be heard. (Id.)

The record reflects there was just one City Council public hearing on the rezoning of the subject property which was held on August 6, 2012. (App. pp. 2006, 1530) (Supp. App. pp. 8-14) There is a difference between a “public meeting” of the City Council and a “public *hearing*” required by statute.

During the public hearing it is evident that Petitioners were not afforded their right to a quasi-judicial proceeding both in substance and appearance. (Ex. 17 17:54-54:20) There was no *meaningful* opportunity to be heard. Petitioners testified that it appeared the Council, by their actions, had their mind made up in favor of the rezoning prior to the public hearing and did not do the requisite studies to determine if the rezoning was in furtherance of health, safety and welfare of Dyersville. (App. pp. 1758, 1795-1800, 1927, 1942, 1946) (Supp. App. pp. 158-159, 162-163, 198, 205-206, 208-210, 211-212) These are key considerations for rezoning and Shires found that the typical studies a municipality would need to review to make this decision were not done by Respondents prior to the rezoning. (App. pp. 1869-1871)

The manner in which the Mayor conducted the public hearing was unfair and biased toward passing the ordinance to rezone. (App. pp. 2000-2013) (Supp. App. pp. 219, 220-222) The City Administrator instructed the Council to not answer a question posed to the Council by a member of the public. (App. pp. 278-279) (Supp. App. pp. 158-159) (Ex. 17 33:08, 38:20, 38:40) That same City Administrator was working with the developer to achieve the goal of getting the development project on schedule with her timeline. (App. pp. 2051-2055)

On the day of the public hearing a letter detailing opposition to the rezoning was submitted in person with a signed Petition attached to the Dyersville City Clerk. (App. pp. 1953, 2038-2043) (Supp. App. p. 216) The signed Petition was a protest pursuant to Dyersville City Ordinance 165.39(5) and Iowa Code Section 414.5. The Clerk represented that copies of the letter would be distributed to the City Council for the meeting. (Id.) Instead of providing the Council with the letter, the City Attorney was notified. (Id.) The City Attorney intercepted the letter before it could get to the Council and although he deemed it was submitted too late for consideration, he had sufficient time to research it as he declared the contents of the letter and Petition “fatally defective” during the public hearing that evening. (Trial Ex. 17 28:38-31:34, 33:16-34:00, 39:56-42:05) Attorney Casey admitted at the trial that a Petition of this nature can be presented at or before the public hearing according to the statute. (App. pp. 2042-2044) Council member Platz admitted at trial that it was not a fair process to withhold a signed Petition presented at a public hearing. (Supp. App. p. 229)

Equal Protection. The District Court erred in failing to consider or address the Equal Protection claims and Respondents argument is not supported by the facts or the law. The entire zoning designation of the subject

property was A-1. The Council proposed that the interior portion of the property be rezoned to C-2. They designated a 200 foot buffer zone on just three sides of the proposed rezoning around the development area. (App. pp. 831-833) The use of the buffer zone attempted to prohibit certain, but not all, adjoining property owners from asserting a meaningful protest that would trigger the requirement of unanimous approval of the rezoning by the Council. The two classes are those that are able to file a valid protest under 165.39(5) and those persons that are not able to file a valid protest under 165.39(5).

Dyersville Ordinance 165.39(5) provides:

Council vote. If the Commission recommends against, or if a protest against such proposed amendment, supplement, change, modification or repeal is presented in writing to the Clerk, duly signed by the owners of twenty percent (20%) or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending the depth of one lot or not to exceed two hundred (200) feet therefrom, or of those directly opposite thereto, extending the depth of one lot or not to exceed two hundred (200) feet from the street frontage of such opposite lots, such amendment supplement, change modifications, or repeal shall not become effective except by the favorable vote of all members of the Council. (App. p. 1065)

Petitioners have met the first prong of the equal protection claim in that they were similarly situated persons treated differently than other land owners that had the right to file a protest to the rezoning. Respondents did not have a

valid reason to treat some similarly situated neighboring land owners differently than others with respect to the manner in which Ordinance 770 was drafted. There were no basis to deem the classification of some land owners ineligible to file a protest under 165.39(5) and therefore the manner in which the buffer zone was drawn was arbitrary.

The second step is also met by the Petitioners as the ordinance is unreasonable, arbitrary and capricious. There is no rational relationship between the buffer zone which takes away a right of protest in furthering the health, safety, morals, or the general welfare of the community. See *Ames Rental Property Ass'n*, 736 N.W.2d at 260 (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 10 (Iowa 2004)) (internal quotation omitted).

The City Administrator could not provide any testimony as to how a 200 foot buffer zone would solve any problems related to safety, health or morals. (App. pp. 2084-2091) (Supp. App. pp. 243-244) Respondents used the buffer zone in relation to certain surrounding property owners for the sole purpose of taking away the right of protest. (App. pp. 282, 1202) The stated reasoning for using the 200 foot buffer zone on a previously contested rezoning for the ethanol plant could not be supported by a reasonable basis.

(App. pp. 2081-2083) (Supp. App. pp. 238-242) This testimony shows a pattern of continued violation of equal protection by the City of Dyersville.

At trial the City Administrator testified that he, not the City Council, prepared the rezoning with the 200 foot buffer strip. (App. pp. 2060-2061) (Supp. App. p. 237) He also testified that he did not consult with any neighboring landowners before using the 200 foot buffer strip other than the Deutmeyers who indicated they did not wish to contest the rezoning.

(App. pp. 1197, 2082-2091) (Supp. App. p. 243)

The Planning & Zoning Commission was led to believe the 200 foot buffer zone was to protect agricultural practices. (Supp. App. pp. 185, 190-192) Planning & Zoning Commissioner Willenbring voted in favor of the rezoning. He later testified he would have changed his vote if he had known the 200 foot buffer zone took away the right of the neighboring land owner's ability to file a protest. (Supp. App. pp.184-196)

The cases cited by Respondents from other jurisdictions involving an applicant avoiding the necessity for a super majority by creation of a buffer zone are distinguishable. In *Schwarz v. City of Glendale*, 950 P. 2d 167, 170, 190 Ariz. 508, the court found that there are instances where the buffer zone is illusory and should not be allowed to prevent application of the super-majority

voting requirement. One example is if the property can be used without any changes to the buffer zone. That is not the case here as there are facts in the record to show that an access road to gain access to the proposed development is planned to go directly through the buffer zone. (App. p. 1143, Ex. 17 42:20-43:55)

There is authority stating that a buffer zone is not authorized to avoid the necessity of a super-majority as the owner of the buffer zone could later seek to rezone the buffer strip which would in effect create piecemeal rezoning. *Herrington v. Peoria County*, 295 N.E.2d 729, Ill. App. 3d 7 (Ill. App.3 Dist., 1973) This is consistent with the deficiency in the rezoning expressed by Petitioners' expert witnesses, Chris Shires. Chris Shires opined that the manner in which the 200 foot buffer zone was drawn in this case is at an access point to the development, it's very irregular and does not follow an easement, right of way or existing property line in several of its boundaries.

Further, that the buffer zone should have clearly established uses and this one does not. (App. pp. 1851-1856) Respondents did not refute this opinion with any lay witness or expert opinion testimony. Iowa should not follow the path of the cases cited by Respondents to circumvent a right of protest afforded to landowners in rezoning in instances such as Dyersville is

proposing to do.

D. The arguments advanced by Respondents do not support the legality of the spot zoning and were not considered by the Council in Rezoning the Property.

The parties do not dispute the applicable case law on this issue. They dispute the application of the facts of this case to the spot zoning analysis. Under the first prong, whether “the new zoning is germane to an object within the police power” Respondents dispute Petitioners contention that there is no evidence in the record that the public would benefit from the rezoning. There are no facts in the record from the public hearing, and there was no analysis, as to whether there would be any benefit of the rezoning. (Exhibit 17 17:54-54:20) (App. pp. 2102-2105)

Respondents argue there is no citation to the assertion that Iowa law places an emphasis on preserving the state’s finite supply of agricultural land. (Brief, p. 29-30) This long standing notion of preserving agricultural land is found not only in the Iowa Code, but also the Dyersville Comprehensive Plan. (Iowa Code Section 414.3, App. pp. 494, 505, 572) Further, it is an important concern to local farmers and global food markets. (App. pp. 1800-1804) The land that rezoned from A-1 to C-2 had some of the highest producing soil in

the State of Iowa. (App. p. 1800) The highest and best use of the land was not discussed or debated at the public hearing. (App. p. 2104-2105) (Trial Ex. 17 17:54-54:20)

Second prong. Respondents argue that the property is “unique” based on a statement made by Jacque Rahe, Executive Director of the Dyersville Economic Development Corporation: She states that the development (All Star Ballpark Heaven) can’t go anywhere else because the Field of Dreams is where the Field of Dreams is. The proposed development is a sports complex for youth age 8-18 to do tournament play and training 13 weeks out of the year. This development is proposed to be located on agricultural property adjacent to the original Field of Dreams movie site, which would remain preserved. (App. pp. 887-888) The vast majority of the subject property to be rezoned is crop ground and historically always had been. (App. p. 1926) There is no record that Respondents reviewed the commercial district as contemplated in the Comprehensive Plan. (Ex. 1717:54-54:20) (App. pp. 663-674)

There is nothing in the record regarding any changing conditions in the area that would warrant a rezoning. The original movie site field makes up a small portion of the entire 193 acres which was the proposed rezoned area;

therefore there is nothing to support distinguishing the rezoned property (the entire area) to the surrounding property, which is also agricultural crop ground. One neighbor testified that the Field of Dreams area is without a doubt an agricultural setting. (App. p. 1733) Jeff Pape and Al Demmer described the extensive farm traffic that uses the road surrounding the proposed rezoning and also testified that Dyersville East Road is designated a “farm to market” road. (App. pp. 1783-1784, 1807) (Supp. App. pp.168, 179-182)

Respondents misstate the Petitioners explanation of the prior B-2 usage of 9 acres for permission to open a corn maze to the public. Wayne Ameskamp, whose parents owned the property previous to the current owner, explained the conditional usage authorized by Dubuque County Zoning (the property was in the County at the time). No structures were allowed on the 9 acres and it was to revert back to A-1 when Field of Dreams Left and Center ceased to exist. Wayne Ameskamp testified that ceased to exist as of September 2007. (Supp. App. pp. 201-204) It is not true that “only because of the annexation” did it revert back to A-1, as it had reverted back to A-1 in 2007 by operation of law when Field of Dreams Left and Center ceased to exist. (Id.)

Third prong. The third requirement under Perkins is the rezoning must be consistent with the Comprehensive Plan. The Reply to Respondent's Brief is addressed in Section I.E.

E. Respondents and the District Court were unable to find any facts in support in the record that the rezoning was in accordance with the Comprehensive Plan.

Respondents have attempted during this litigation to go back after the fact to correct the deficiency in the rezoning process. They cannot do so. The District Court stated "the closest and most difficult analysis is whether the rezoning is consistent with the Comprehensive Plan." (App. p. 289)

The court went on to erroneously find that "Since the Planning and Zoning Commission members and the City Council members did not, for the most part, know the contents of the Comprehensive Plan, it cannot be said that Ordinance 770 was intentionally passed in accordance with that plan.

However, it is clear that the issues considered by those two governmental bodies were the very issues addressed by the Comprehensive Plan, the Community Builder Plan, and the Annexation Plan. In other words Ordinance 770 was unintentionally and unknowingly passed in accordance with, and in further of, the Comprehensive Plan." (App. p. 290)

Respondents and the District Court relied on a few statements found in the Comprehensive Plan concerning “economic development and tourism” to make the argument that this rezoning was in accordance with the plan. Their argument fails for several reasons. As the District Court pointed out, the Planning & Zoning Commission and the City Council were not familiar with the Comprehensive Plan. (App. pp. 281-282, 290) The City Council did not discuss the Comprehensive Plan. (Trial Ex. 17) (App. p. 2000) The minutes of the Planning & Zoning Commission do not mention the Comprehensive Plan or any discussion related to tourism under the Plan. (App. pp. 818-824)

Respondents argue that Petitioners cited no authority for the statement that Planning & Zoning commissioners relied on misleading information from the City Administrator. The authority for the assertion is found in the Planning & Zoning Transcript (App. p. 1198) where the City Administrator discussed the Comprehensive Plan. The City Administrator admitted at trial that this representation did not accurately reflect the Comprehensive Plan for the City of Dyersville. (App. pp. 2067-2079) The rezoning did not mesh with the goals and objectives of the 1997 plan for expanding tourist sectors. The stated Objectives for obtaining the goal were to encourage businesses to develop along the highway that require a large amount of space and parking. There

was no objective concerning tourism that was consistent with expanding commercial development anywhere near the Field of Dreams area. (Id.)

Further, the City Administrator testified that the Comprehensive Plan for Dubuque County does not apply to this rezoning. (App. p. 2078)

Respondents' state that the 2003 Annexation Plan was "discussed" at both the November 21, 2011, and the February 20, 2012 City Council meetings. This discussion was related to the annexation as the rezoning was not proposed until July, 2012. Those earlier discussions only highlighted the fact that the City of Dyersville had very detailed plans in place and had determined that its growth and commercially designated properties should not stretch out as far as the Field of Dreams movie site area at least until beyond the year 2023. (App. pp. 664-671) (Supp. App. pp. 46, 187-189) One of the Petitioners specifically relied on the annexation plan in making his decision to purchase his property next to the Field of Dreams. (App. pp. 1734-1738) Chris Shires opined that this rezoning was not consistent with the Comprehensive Plan. (App. pp. 1843-1850)

Respondents highlight the fact that water, sewer and street access are important when considering commercial development outside of the downtown. The plan discouraged development in agricultural areas unless the

same can be served by public sewer. As of trial, the commercial development was not in place. (Supp. App. p.205) Though the water and sewer lines are not in and the project has not gone forward, if it does, there will need to be infrastructure upgrades done by the city. (App. pp. 988-989) (Supp. App. p. 213) Nothing in the memorandum of understanding obligated the developer to pay for upgrades to the wastewater treatment plant and the City would need to invest those dollars for the upgrade. (App. pp. 1982, 797-801, 866-878)

Both the District Court and Respondents cite the top threat in the 1991 Community Builder Plan as “loss of Field of Dreams or other major tourist attraction.” (App. p. 290) There was no evidence of any loss of the Field of Dreams as a major tourist attraction. To the contrary, there was evidence that it was still a booming tourist industry as it sits today and there is no threat of loss. (App. p. 885)

Respondents, for the first time, raise the argument that the Memorandum of Understanding should be considered an amendment by the Council responding to the change of circumstances presented in the form of an opportunity for economic development by Denise Stillman. (Brief, at p. 38-39) Respondents failed to preserve error on this issue and it should not be considered. In the event the court does entertain this argument, it should be

noted that the case Respondents cite in support of this proposition is *Alexanderson v. Bd. of Clark Cnty. Comm'rs*, 144 P.3d 129 (Wash. 2006) The case is not applicable to the facts at hand. The facts of the Alexanderson case are that the parties all agreed that this MOU did not follow the Comprehensive Plan. The Dyersville City Council did not discuss or review the Comprehensive Plan in relation to the MOU. Further, the Memorandum of Understanding utilized by Dyersville was not meant to be a binding document as it was intended to be in the *Alexanderson* case. (Supp. App. pp. 143-145) This case does not hold that all Memorandums of Understanding are an amendment to a Comprehensive Plan and the case is therefore distinguishable.

F. Petitioners Triggered the Provision of Section 165.39(5).

Petitioners submitted a valid, signed protest by hand delivery to the City Clerk prior to the public hearing on August 6, 2012. (App. pp. 1953, 2038-2043) (Supp. App. p. 216) The letter and signed protest were not “faxed” as asserted by Respondents but hand delivered to the City Clerk prior to the public hearing. (Id.) App. p. 1065)

Respondents argue that at trial Petitioners provided self-serving and contradictory testimony. This is inaccurate. Respondents are clearly confused about the purpose of the testimony from each witness on this issue.

Petitioner Matt Mescher testified why the *City's calculations* and Mr. Michel's interpretation of the ordinance as applied to the rezoning were inaccurate. (App. pp. 1754-1757) Allan Demmer testified that he owned approximately 1,000 feet along the frontage of the property to be rezoned, which was 40%, which more than met the requirement of Ordinance 165.39(5). Based on that, he and his wife signed the Petition that was filed with the City Clerk prior to the public hearing on August 6, 2012. (App. pp. 1895-1896) The formula was calculated using an exhibit prepared by the City. (App. p. 879) Petitioners made a showing that at least one property owner that signed the Petition had a sufficient percentage of property in compliance with the Ordinance.

Respondents go on to make the argument that Petitioners' reading of 165.39(5) is wrong. Although Respondents refer to the Ordinance as quoted in its entirety above, they then go on to mis-state the language in their argument. They state that it provides for three categories of landowners who may file a protest: (1) owners of 20% or more of the area of the lots included in the proposed change; (2) owners of 20% or more of the *property* immediately adjacent in the rear of the proposed change extending the depth of one lot or not to exceed two hundred (200) feet; or (3) owners of 20% or more of the

property directly opposite the proposed change extending the depth of one lot or not to exceed two hundred (200) feet from the street frontage of such opposite lots.” (Respondent’s Brief, p. 42)

In each instance where they use the word “property” they have substituted the language of the ordinance which reads “lots”. They have done so in an effort to avoid using the definition of “lots” from the Ordinance. According to Dyersville Ordinance 165.04(35) “Lot” means a parcel of land occupied, or intended for occupancy, by one main building, together with its accessory buildings officially approved. (App. p. 1031) The buffer zone does not fit the definition of “lot” according to the definition found in the City Ordinance.

Respondents cite to the *Heaton* case from North Carolina. The Brief outlines the relevant statute from that case. The statute is not similar to the Dyersville Ordinance and the definitions from the North Carolina statute are not provided. The court should interpret the Dyersville City Ordinance in its plain meaning as it applies to the Petitioners in this case.

G. The record reveals that the Respondents failed to act

Impartially.

Respondents site to *Sutton* for the statement that the Supreme Court was

satisfied that the District Court’s ruling that it was not only legal but wholly proper and reasonable for a developer to take individual Council members, “one at a time” to a proposed development was “was correct.” These are not the facts of this case as the developer hosted two city Council members in Des Moines for a private meeting with the Governor in support of pending legislation for tax rebates related to her development and then took them to dinner. (App. p. 269) The stated purpose of taking two Council members to the meeting was that a time would come when they would “need their yes votes on the project” making it clear that the intended purpose of the trip was to persuade the Council members to vote in favor of the rezoning. (App. pp. 1978-1982, 1991)

The City supported the developer’s project, worked on the developer’s timeline and hosted a work session at the request of the developer. (App. pp. 1146-1161) (Supp. App. pp. 27-34) When a council member requested a work session for purposes of discussing concerns of the public, the mayor refused to hold one. (App. pp. 1997-1999) (Supp. App. pp. 35-37)

Respondents rely on a Utah case in support of the contention that it is appropriate for a City Council to consider information received outside of public hearing in voting on zoning amendments. (Brief, p. 46) Petitioners

disagree with Respondents interpretation and rely on the arguments asserted in Section IA of this Reply Brief.

II. ORDINANCE 777 IS INVALID.

The Dyersville City Council attempted to quickly rezone a parcel of property without going through the appropriate legal process. They attempted to correct the erroneous legal description on May 13, 2013 by amending the legal description at a City Council meeting without publishing notice and having a public hearing. Ordinances and City practice require that a legal description be published prior to a rezoning. (App. p. 1035) (Supp. App. p. 215)

Gorman applies and *Heitz* is distinguishable and not applicable to the facts of this case. The legal description for the initial rezoning ordinance was published in July, 2012. In May, 2013, Petitioners presented a press release setting forth information that the City used an incorrect legal description in the original rezoning by mis-describing an entire parcel of the subject property. (App. pp. 1230-1236) The City Council, in an effort to hastily correct the erroneous description, moved to amend it without having a public meeting to put people on notice and hold a public hearing on the property to be rezoned. (App. pp. 1144, 1230-1240, 1405-1411)

Respondents argue that Petitioners first conceded that the purpose of Ordinance 777 was not a rezoning. What Petitioners argued, was that it was not a *proper and legal* rezoning. It is NOT undisputed that Ordinance 777 was provided to the public. That is exactly what Petitioners dispute. Exhibit S is simply a City Council agenda. (Supp. App. pp. 146-149) It is insufficient to constitute notice to the public of a rezoning and also violates City Ordinance 165.06(4). The agenda would not have provided the public with sufficient notice of the rezoning of a specific and identifiable parcel and therefore property owners affected by the rezoning of the parcel that had not previously been rezoned property were not allowed an opportunity to come to a public meeting on the rezoning.

III. THE COURT FAILED TO GIVE WEIGHT TO EXPERT TESTIMONY.

Mr. Shires did a thorough review of all writ materials and testimony taken in in the case. He has extensive experience in city planning in Iowa. (App. pp. 1185-1188) He has attended several hundred public hearings in his career in Iowa. (App. pp. 1826-1827) Mr. Shires gave his opinion with regard to the deficiencies he found in the rezoning of the subject property. The District Court did not make a ruling that the opinions were impermissible

opinion testimony because he did not testify regarding an opinion on the law, but only on deficiencies in the process. The District Court made an error at law when it completely neglected evidence. The court made no findings that Mr. Shires testimony did not aid and therefore was not material to the Court's decision instead they made no mention of the evidence.

CONCLUSION

For all the reasons asserted herein, it is respectfully requested that this Court reverse the decision of the District Court; Sustain both Writ Petitions; and hold that the actions of the City Council on Ordinances 770 and 777 were illegal.

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 6,937 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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