

In The Iowa Supreme Court  
Supreme Court No. 17-1149

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AMES 2304, LLC,

Petitioner-Appellant,

vs.

CITY OF AMES, ZONING BOARD OF ADJUSTMENT,

Respondent-Appellee.

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Appeal from the District Court for Story County

The Honorable Michael J. Moon

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Appellant's Final Brief

(Oral Argument Requested)

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## Statement of issues presented for review

### Division I

Did the Ames Zoning Board of Adjustment act illegally in denying Applicant's interior remodeling building permit request?

*Baker v. Bd. of Adjustment*, 671 N.W.2d 405 (Iowa 2003)

*Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483 (Iowa 2008)

*Bowman v. City of Des Moines Mun. Hous. Agency*, 805 N.W.2d 790 (Iowa 2011)

*City of Jewell Junction v. Cunningham*, 439 N.W.2d 183 (Iowa 1989)

*City of Okoboji v. Okoboji Barz, Inc.*, 746 N.W.2d 56 (Iowa 2008)

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*Henrich v. Lorenz*, 448 N.W.2d 327 (Iowa 1989)

*Holland v. State*, 115 N.W.2d 161 (Iowa 1962)

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*Irving v. Employment Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016)

*Jersild v. Sarcone*, 149 N.W.2d 179 (Iowa 1967)

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*Kucera v. Baldazo*, 745 N.W.2d 481 (Iowa 2008)

*Lauridsen v. City of Okoboji Bd. of Adjustment*, 554 N.W.2d 541 (Iowa 1996)

*Matter of Estate of Gantner*, 893 N.W.2d 896 (Iowa 2017)

*Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632 (Iowa 2002)

*Myria Holdings Inc. v. Iowa Dep't of Revenue*, 892 N.W.2d 343 (Iowa 2017)

*Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759 (Iowa 2016)

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*State v. Nall*, 894 N.W.2d 514 (Iowa 2017)

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## **Division II**

Was the Ames Zoning Board of Adjustment's decision that the proposed remodeling plan would result in an increase in intensity supported by substantial evidence?

*Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483 (Iowa 2008)

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

Ames Mun. Code § 29.501

## **Routing statement**

The issues raised in this appeal involve the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

## Statement of the case

This appeal stems from a certiorari proceeding over the City of Ames Zoning Board of Adjustment's ("Ames ZBA") refusal to issue an interior-remodeling building permit to Applicant Ames 2304, LLC ("Applicant"). The Ames Municipal Code's ("Code") unambiguous statutory text establishes Applicant's interior-remodeling plan "shall be permitted." Ames Mun. Code § 29.307(2)(a)(ii) (JA 248).<sup>1</sup> Ames ZBA acted illegally because its decision violated the plain text of the Code. Additionally, Ames ZBA's decision was not supported by substantial evidence. The district court should not have annulled the writ.

This appeal confronts Ames ZBA's refusal to issue an interior-remodeling building permit and its simultaneous failure to apply the plain and unambiguous Code. When a zoning ordinance clearly

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<sup>1</sup> The appellate court applies the municipal code in place at the time of appellate court's decision, unless the board did not act in good faith. *U.S. Cellular Corp. v. Bd. of Adjustment of City of Des Moines*, 589 N.W.2d 712, 718 (Iowa 1999). Applicant cites the current Code, without waiving the position that Ames ZBA acted in bad faith.

means one thing, we should be able to rely on it. The straightforward statutory text establishes basic rules by which we set expectations and make decisions. That includes decisions to invest and purchase property. Property owners must know what to expect.

Applicant owns property located at 2304 Knapp Street, Story County, Ames, Iowa (“2304 Knapp”). (JA 115, 178). In 1928, a single-family house on the property was converted to a four-unit apartment building. (JA 115). The apartment building continues to have four apartment units today. (JA 148).

In April 2016, Applicant sought a building permit for interior remodeling. (JA 115, 178). Applicant’s remodeling plan involves removing and altering several interior walls, without changing the number of dwelling units. (JA 148, 180-183). The apartment building has four dwelling units, and under the remodeling plan, the apartment building would continue to have four dwelling units. *Id.* The remodeling plan would change the structure from four one-

bedroom units to two efficiency units, one two-bedroom unit, and one three-bedroom unit. *Id.*

Although the Ames Municipal Code mandates that “interior remodeling or improvements to a structure . . . shall be permitted,”<sup>2</sup> an Ames Zoning Enforcement Officer denied Applicant’s permit request, relying on a Code provision that states “[a] nonconforming use may not be increased in intensity.” Ames Mun. Code § 29.307(2)(a)(i) (JA 248). The Ames Zoning Enforcement Officer reasoned that the interior remodeling plan would increase the intensity of the nonconforming use. (JA 115-119, 121-123).

Applicant timely appealed to Ames ZBA. (JA 176-183).

On June 22, 2016, Ames ZBA held a hearing. (JA 124-134, 184). Applicant appeared through counsel and presented arguments based on the Code’s statutory language. (JA 176-183). In a 3-1 vote, Ames ZBA approved an order denying permit. (JA 130). Ames ZBA made two conclusions to affirm the Zoning Enforcement Officer’s decision.

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<sup>2</sup> Ames Mun. Code § 29.307(2)(a)(ii) (JA 248).

(JA 130). First, under Ames Municipal Code § 29.307(2), “interior remodel of a nonconforming use cannot be increased in intensity.”

(JA 130). Second, an increase in bedrooms is an increase in intensity of use for a “nonconforming residential apartment unit.” (JA 130).

Ames ZBA memorialized its ruling in a written order and decision.

(JA 133).

Ames ZBA’s rationale is contrary to the Code’s plain text, which expressly defines “intensity” to “mean[] the degree or level of concentration to which land is used for commercial, industrial or any other nonresidential purpose.” Ames Mun. Code § 29.201(109) (JA 234). Under the Code, a residential use, apartment buildings included, can never increase in “intensity.” By definition, the term “intensity” never applies to residential land use. *Id.* In other words, based on the clear and unambiguous statutory text, Ames ZBA acted illegally in denying the interior-remodeling permit.

Applicant petitioned for a writ of certiorari. (JA 11-13). In a June 16, 2017 order, the district court annulled the writ and upheld

Ames ZBA's decision. (JA 206-218). Relying on Ames ZBA's reasoning, the district court affirmed Ames ZBA's denial of the interior-remodeling permit. (JA 206-218).

The district court's ruling shadowed the reasoning presented in Ames ZBA's Trial Brief. (JA 185-218). The district court reasoned that "[a]n interpretation of the term 'increase in intensity' in the Ames ordinance cannot ignore the practical effect of increasing the number of occupants." (JA 215). The district court concluded that the "Ames ZBA correctly interpreted the requirements of Section 29.307(2)(a) as prohibiting an increase in the intensity of a nonconformity through a remodeling project." (JA 217). The district court also concluded that "Ames ZBA correctly determined that the increase in bedrooms from 4 to 7 constitutes an increase in the intensity of the nonconformance." (JA 217). Finally, the district court concluded that "Ames ZBA correctly interpreted the provisions of the parking space ordinance as evidencing an increase in intensity of the nonconforming use." (JA 217).

## Statement of the facts

This appeal presents statutory interpretation issues relating to the Ames Municipal Code, Chapter 29, the “Zoning Ordinance for the City of Ames, Iowa.” Ames Mun. Code § 29.100 (JA 227). “Chapter 29 of the Ames Municipal Code is a comprehensive and detailed zoning ordinance enacted by the City in April 2000 to regulate the use of real estate within the City’s boundaries.” *Ames Rental Property Ass’n v. City of Ames*, 736 N.W.2d 255, 257 (Iowa 2007). The Ames Municipal Code’s operative language provides relevant background.

### A. 2304 Knapp.

Applicant owns the lot<sup>3</sup> located at 2304 Knapp Street, Ames, Story County, Iowa. (JA 115, 120-123, 177-178). In 1910, a single-family residence was erected on the lot. (JA 115, 131). In 1928, the

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<sup>3</sup> The Code defines “lot” as “a parcel of land intended for separate ownership, development or other use and that is described or platted in a subdivision recorded pursuant to the Subdivision Regulations or otherwise recorded with the office of the Story County Recorder.” Ames Mun. Code § 29.201(114) (JA 234-235).

structure<sup>4</sup> was converted to an apartment building,<sup>5</sup> consisting of four one-bedroom apartment units. (JA 115, 121-123, 131). 2304 Knapp is on the south side of Knapp Street. (JA 129, 162, 164).

**B. The Ames Municipal Code's "Use" regulations.**

Under the Code, "[n]o land, building or structure shall be used, . . . and no existing building or structure shall be moved, added to, or altered except in conformity with this Ordinance." Ames Mun. Code § 29.303(1) (JA 246). The Code regulates uses, stating that "[n]o building or land shall be used or occupied and no structure shall be constructed or altered to be used for any purpose other than a Permitted Use." Ames Mun. Code § 29.304(1) (JA 246). "Permissible uses" include "permitted uses," and the Code recognizes that "[u]ses

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<sup>4</sup> "Structure means anything constructed or erected, the use of which requires, directly or indirectly, a permanent location on the land." Ames Mun. Ordinance § 29.201(223) (JA 241).

<sup>5</sup> See Ames Mun. Code § 29.501(4), Table 29.501(4)-1 (JA 283-285) (describing "Apartment Building" as: "A single structure containing 3 or more Residential Units."). "Residential Unit means that portion of a building providing living space for an individual or a single family." Ames Mun. Code § 29.201(173) (JA 238).

permitted by right shall be allowed if they comply with all applicable regulations.” Ames Mun. Code § 29.304(2)(a) (JA 246). The Code establishes use categories, which “means a class of similar uses grouped together for purposes of delineating the uses permitted in a zone.” Ames Mun. Code § 29.201(233) (JA 240); *see also* Ames Mun. Code § 29.501(1) (JA 283).

**C. The Ames Municipal Code classifies an apartment building as a “household living” residential use.**

The Code establishes use regulations for all residential use categories. Ames Mun. Code § 29.700 (JA 299). The Code classifies an apartment building as a residential use in the “household living” category. Ames Mun. Code § 29.501(4), Table 29.501(4)-1 (JA 283-285). The household-living residential use category refers to: “Residential occupancy of a dwelling unit by a family, where the average length of stay is 60 days or longer.” *Id.* 2304 Knapp’s residential use subcategory is “Apartment Building.” *Id.*

**D. Ames ZBA recognizes Applicant's apartment building is a legal, nonconforming use.**

The north side of Knapp Street—across the street from 2304 Knapp—is a “Residential High Density” base zone. (JA 91-95). “Residential High Density” is the highest density residential zone recognized in the Code. Ames Mun. Code § 29.700(1) (JA 299). Residential High Density “is intended to accommodate certain high-density residential areas in the City, including areas on or adjacent to the Iowa State University campus and areas adjacent to existing commercial and employment centers.” Ames Mun. Code § 29.704(1) (JA 305). Spruce Point condominiums are located in the Residential High Density base zone that is across the street from 2304 Knapp. (JA 165). One area resident described the Spruce Point condominiums as “undergrad housing.” (JA 165). Several houses on this street are rental houses, including a rental house directly east from 2304 Knapp. (JA 157, 160). There are “some nice, high story apartment buildings” in the neighborhood. (JA 168).

2304 Knapp is located on the south side of Knapp Street. (JA 129, 162, 164-165). In that area, the Code currently designates the south side of Knapp Street a “Residential Low Density” base zone,<sup>6</sup> which “is intended to accommodate primarily single-family dwellings.” Ames Mun. Code § 29.701(1) (JA 299). (JA 115, 131).

Under the Code, apartment buildings with twelve dwelling units or less are classified “Residential Medium Density.” Ames Mun. Code § 29.702(1), Ames Mun. Code Table 29.702(2) (JA 301).

Residential Medium Density “is intended to accommodate medium-density residential development and to serve as a transition from high-density residential areas to low-density residential areas.” Ames Mun. Code § 29.702(1) (JA 301). The Code does not allow an “apartment dwelling” with twelve units or less within a Residential Low Density base zone, unless it is a nonconforming use. Ames Mun.

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<sup>6</sup> “Base zone means the mapped area to which a uniform set of general regulations apply, typically for agricultural, residential, commercial, or industrial uses.” Ames Mun. Code § 29.200(18) (JA 230).

Code § 29.700(2)-(3) (JA 299); Ames Mun. Code § 29.701(2) (JA 301);  
Ames Mun. Code § 29.307(2) (JA 248).

Some members of the public acknowledged that their experience with 2304 Knapp tenants did not reflect the unruly “hubbub” that this Court alluded to in *Ames Rental Property Association*, 736 N.W.2d at 262. (JA 154, 159-160). One resident commented “residents have lived compatibly with the subject property [2304 Knapp] in its current nonconforming rental configuration for many decades.” (JA 159-155). Another resident commented, “I sleep 20 feet from that house [2304 Knapp] . . . we’ve lived there for 16 years and only once have I had any kind of noise problem at all from that.” (JA 159-160).

Ames ZBA admits that Applicant’s apartment building is a legal nonconforming use. (JA 115-116, 118-119, 121-123, 125-127). The Code defines “Nonconforming Lot, Use or Structure,” which

means a lot, use or structure which lawfully existed prior to the adoption, revision or amendment of this Ordinance, but which fails by reason of such adoption, revision or amendment to conform to this Ordinance.

Ames Mun. Code § 29.201(140) (JA 236).

**E. The Ames Municipal Code's regulation on nonconforming uses.**

The Code regulates nonconformities generally, including nonconforming uses. Ames Mun. Code § 29.307(2)(a) (JA 248-249).

**(2) Nonconforming Uses.** Any use of any structure or lot that was conforming or validly nonconforming and otherwise lawful at the enactment date of this ordinance and is nonconforming under the provisions of this Ordinance or that shall be made nonconforming by a subsequent amendment, may be continued so long as it remains otherwise lawful, subject to the standards and limitations of this Section.

**(a) Movement, Alteration and Enlargement.**

**(i) Enlargement.**

a. A nonconforming use may not be increased in intensity and may not be enlarged, expanded or extended to occupy parts of another structure or portions of a lot that it did not occupy on the effective date of this Ordinance, unless the enlargement, expansion or extension complies with all requirements for the zone, does not create an additional nonconformity, and is approved for a Special Use Permit . . . .

b. Any building or structure containing a nonconforming use may be enlarged up to 125% of the floor area existing on the effective date of this ordinance, provided that the expanded building or

structure complies with all density, coverage and spatial requirements of the zone in which it is located.

c. The enlargement of a nonconforming use that has the effect of making a structure nonconforming, other than as described in subsection b. above, shall not be specially permitted . . . .

(ii) Exterior or Interior Remodeling or Improvements to Structure. Exterior or interior remodeling or improvements to a structure containing a nonconforming use shall be permitted, provided that any proposed enlargement, expansion or extension shall be subject to the provisions set forth in the above paragraph.

(iii) Relocation of Structure. A structure containing a nonconforming use shall not be moved unless the use and structure will comply with all of the regulations that apply in the new location . . . .

Ames Mun. Code § 29.307(2)(a) (JA 248-249).

**F. Applicant’s interior-remodeling permit request.**

In April 2016, Applicant requested a building permit to remodel the apartment building’s interior space, including removal and alteration of several interior walls.<sup>7</sup> (JA 121-123, 178-183).

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<sup>7</sup> Under the Code, an Ames building official may not issue a building permit “unless and until the Zoning Enforcement Officer certifies that such building structure or use is in conformity with this Ordinance or

Applicant's remodeling plan proposes an investment in the property to upgrade and improve it. (JA 168).

The interior remodeling plan does not propose an enlargement, expansion, or extension of the structure or of the use. (JA 178-183).

The structure would remain exactly the same size. (JA 122). The 2304 Knapp apartment building had four dwelling units before remodeling, and would continue to have four dwelling units after remodeling. (JA 115-116, 118-119, 121-123, 125-127, 130-131, 140-144, 147-149, 178-183).

The configuration of each dwelling unit would change. Currently, 2304 Knapp has four one-bedroom dwelling units. (JA 178-183). Under the proposed interior remodeling plan, 2304 Knapp

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is a valid nonconforming use." Ames Mun. Code § 29.1501(1)(a) (JA 376).

would have two efficiency dwelling units,<sup>8</sup> and what the Code treats as one three-bedroom and one two-bedroom dwelling units.<sup>9</sup> *Id.*

Before the district court, Ames ZBA asserted in its trial brief that the second floor plan would “split one unit into two units,” resulting in a “newly created Unit 4.” (JA 196-197). The record flatly contradicts that statement. Indeed, the Zoning Enforcement Officer and Ames ZBA reached a contrary conclusion. (JA 115-116, 118, 121-123, 125, 131, 140-141, 147-148, 178-183). Ames ZBA appears to have

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<sup>8</sup> An efficiency dwelling unit is “a dwelling unit consisting of not more than one habitable room together with a kitchen or kitchenette and sanitary facilities.” Ames Mun. Code § 29.201(65) (JA 232).

<sup>9</sup> The Code defines bedroom and living room. “A living room is typically . . . the largest furnished room by floor area in a residential living unit. . . .” Ames Mun. Code § 29.201(113) (JA 234). “A bedroom is any room or area within a dwelling unit that: is not a kitchen, bathroom, hallway or foyer; is at least 70 square feet . . . and does not provide the sole means of access or passage into any other room in the living unit except a bathroom or closet.” Ames Mun. Code § 29.201(20) (JA 230). If “there is no remaining room or area in the living unit that can reasonably be used as a living room, then one bedroom may be considered a living room if it otherwise meets the definition of living room.” Ames Mun. Code § 29.201(20) (JA 230).

presented that argument to the district court based on the second floor remodeling plan's reference to adding a door. (JA 196-197).

There is no legitimate factual dispute on this issue. Before and after remodel, the second floor had two kitchens, two baths, and two separate entrances, each with its own external door, all reflecting two units. (JA 182-183). Applicant, the Ames Zoning Enforcement Officer, and Ames ZBA consistently agreed on that point. (JA 115-116, 118, 121-123, 125, 131, 140-141, 147-148, 178-183). Even members of the public who presented comments at the Ames ZBA hearing acknowledged that 2304 Knapp is a four-unit apartment building. (JA 161-162).

Presented with no new evidence on this point, the district court nevertheless adopted the finding presented in Ames ZBA's Trial Brief that the second floor plan would "split one unit into two units," resulting in a "newly created Unit 4." (JA 196-197, 212). As discussed later, this finding by the district court is invalid. The district court cannot make new factual findings on issues that Ames ZBA decided.

*See Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483, 495 (Iowa 2008).

**G. An Ames Zoning Enforcement Officer denies the permit, reasoning that the proposed interior remodeling would result in an increase in “intensity.”**

In an April 19, 2016 email, an Ames Zoning Enforcement Officer denied Applicant’s permit request. (JA 123). Without citing a single Code provision, the Ames Zoning Enforcement Officer explained that “staff” had discussed the interior remodeling proposal and determined that Applicant “would not be able to increase the number of units or bedrooms for the property as it is a nonconforming use under the zoning code.” (JA 123). The Ames Zoning Enforcement Officer reasoned: “Based on current layout of the building you have 4 one bedroom units, therefore you are limited to not more than four units and four total bedrooms for the property.” (JA 123).

Applicant disputed the Zoning Enforcement Officer’s application of the proviso clause, citing the Code’s language

mandating that “interior remodeling or improvements to a structure containing a nonconforming use shall be permitted.” (JA 121-123) (citing Ames Mun. Code § 29.307(2)(a)(ii)).

The Ames Zoning Enforcement Officer focused on staff interpretations:

We talked about your request and position from your email, however, staff still makes the determination from code that the intensity of a nonconforming use cannot be increased, which is the addition of units or bedrooms to the site. What are you [sic] showing in your floor plans is an increase in bedrooms which is an increase in the intensity of the existing nonconforming use.

(JA 121).

Additionally, the Zoning Enforcement Officer expressed a concern about parking:

One other item to be think about [sic] regarding increased number of bedroom, if ZBA deemed possible under the code, would be how you are going to accommodate the increased required parking for the larger units. . . .

(JA 121).

## H. Applicant appeals to Ames ZBA.

Applicant appealed the interior-remodeling permit denial to Ames ZBA.<sup>10</sup> (JA 176-184). From a factual standpoint, the parties agree: the four-dwelling-unit apartment building was a legal, nonconforming use. (JA 115-116, 118-119, 121-123, 125-127, 130-131, 140-144, 147-149, 176-183).

The remodeling plan would alter interior walls. (JA 178). The 2304 Knapp apartment building has four dwelling units, and would continue to have four dwelling units after the proposed interior remodeling. (JA 115-116, 118-119, 121-123, 125-127, 130-131, 140-144, 147-149, 178).

Applicant presented several arguments based on the Code's statutory text. (JA 176-183).

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<sup>10</sup> For the decision challenged in this appeal, Ames ZBA had authority to “[h]ear and decide appeals where it is alleged that there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this Ordinance.” Ames Mun. Code § 29.1403(7)(a) (JA 372-373) (citing Iowa Code § 414.12).

First, under Section 29.307(2)(a)(ii), the proposed interior remodeling plan was not a “proposed enlargement, expansion or extension.” (JA 178). It was not subject to the proviso clause contained in Section 29.307(2)(a)(ii). (JA 178).

Second, because the proposed interior remodeling plan was not subject to the proviso clause contained in Section 29.307(2)(a)(ii), the “intensity” restriction contained in Section 29.307(2)(a)(i) was inapplicable. (JA 178).

Third, even if the proviso clause applied, the proposed remodeling plan would not cause an increase in intensity. (JA 178).

Fourth, because the Code stated “interior remodeling or improvements to a structure containing a nonconforming use shall be permitted,”<sup>11</sup> Ames ZBA had a duty to issue the permit for interior remodeling. (JA 178).

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<sup>11</sup> Ames Mun. Code § 29.307(2)(a)(ii) (JA 248).

## I. The ZBA hearing.

Ames ZBA set the hearing for June 22, 2016. (JA 184). Before the Ames ZBA hearing, the Ames Zoning Enforcement Officer submitted a written report summarizing her decision and refuting Applicant's position. (JA 115-119). The Zoning Enforcement Officer made decisions on two issues:

- a) the intensity of a non-conforming residential apartment use is increased with the addition of number of bedrooms for such use, and
- b) an interior remodel of a non-conforming use shall not increase the intensity of the use based on Section 29.307(2)(a)(i).

(JA 115).

In the written report, the Ames Zoning Enforcement Officer declared that she had made both decisions with a goal to eradicate the nonconforming use: "[a]s with any Zoning Ordinance change it is intended that eventually, through future redevelopment, that

property again becomes compliant with the current standards for the zoning district.”<sup>12</sup> (JA 118).

On the first decision, the Zoning Enforcement Officer reported a finding that the intensity of use would increase: “[w]hile there is no increase in the number of units proposed for the property, a net increase in 3 bedrooms is proposed from the existing 4 bedrooms within the home.” (JA 116). The Ames Zoning Enforcement Officer’s report stated her conclusion that the additional bedrooms would increase “intensity” of the nonconforming residential apartment-building use based on parking:

the addition of bedrooms has in the past and is still considered to be an intensification of such use. The change in the type of units going from a one bedroom to a two or three bedroom unit intensifies the site requirements for the property requiring that additional parking be provided.

(JA 118). The Zoning Enforcement Officer acknowledged, however, that she had not performed a review regarding parking. (JA 116, 118-

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<sup>12</sup> Applicant has been unable to find any statement of such intent in the Code regarding nonconforming uses.

119, 121). No determination has been made regarding the adequacy of off-street parking at 2304 Knapp.<sup>13</sup> (JA 116, 119, 121).

On the second decision, the Ames Zoning Enforcement Officer explained her interpretation that the Code's text, "the above paragraph," contained in Section 29.307(2)(a)(ii) refers to Section 29.307(2)(a)(i)(a)-(c). (JA 118).

At the Ames ZBA appeal hearing, the Ames Zoning Enforcement Officer relied on "general policy" and "staff" interpretation to establish the meaning of "intensity." (JA 126-127). She represented that her interpretation reflected a longstanding practice, stating "the addition of bedrooms has been in the past, and is still considered, to be an intensification of such use." (JA 126). She

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<sup>13</sup> As reflected in her written decision, the Zoning Enforcement Officer made no decision regarding parking, so no parking decision is ripe for adjudication. (JA 116) ("Staff has not reviewed any existing or proposed parking layouts for the project."). In identifying alternatives for Ames ZBA, the Zoning Enforcement Officer noted that if the interior remodeling proposal was approved, review for parking standard compliance would need to be completed. (JA 116, 119).

did not, however, inform Ames ZBA that the Code controverted any such past and present “staff” interpretation. (JA 125-130).

Also, the Zoning Enforcement Officer clarified “[a]t this time, the Board is only deciding whether or not they will allow the applicant to increase the number of bedrooms in a nonconforming use.” (JA 127). When Ames ZBA asked about the parking issue, the Zoning Enforcement Officer explained that parking “could be considered an expansion on top of the intensification but she’s not sure if they comply with current code but she’s not sure . . . what was allowed under a previous approval.” (JA 127). She said that if the interior remodeling permit was approved, they “would look at parking improvements that would need to be done as part of a remodel project.” (JA 127).

**J. Ames ZBA affirms the Zoning Enforcement Officer’s permit denial.**

Ames ZBA relied on the Ames Zoning Enforcement Officer’s reasoning. In a 3-1 vote, Ames ZBA approved an order denying the permit. (JA 130). Ames ZBA based its decision on the two grounds

identified by the Ames Zoning Enforcement Officer. (JA 115, 130).

First, Ames ZBA concluded that under Section 29.307(2), “interior remodel of a nonconforming use cannot be increased in intensity.”

(JA 130). Second, Ames ZBA determined an increase in bedrooms is an increase in intensity of use for a “nonconforming residential apartment unit.” (JA 130).

Although the issues raised related to nonconforming uses, Ames ZBA’s written Decision & Order<sup>14</sup> addressed “non-conforming structures.”<sup>15</sup> (JA 133). Ames ZBA’s written order concluded that the interior remodeling plan would cause an increase in “intensity in structures:”

The Board determines that the reference in Section 29.307(2)(a)(ii) to the preceding paragraph, 29.307(2)(a)(i), was intended to incorporate subsection (i)’s prohibition on increases in intensity in structures that are a non-

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<sup>14</sup> Under the Code, the “final disposition of any appeal to the Zoning Board of Adjustment shall be in the form of a written decision by the Board signed by the chairperson or acting chairperson, either reversing, modifying, or affirming the decision or determination appealed from.” Ames Mun. Code § 29.1508(1) (JA 388).

<sup>15</sup> The Code addresses “nonconforming structures” separately from nonconforming uses. *See* Ames Mun. Code § 29.307(3) (JA 250-251).

conforming use regarding remodeling of the structure. Therefore, the ordinance does not allow increases in intensity for non-conforming structures undergoing internal remodeling.

(JA 133).

**K. Applicant petitions for a writ of certiorari.**

On August 23, 2016, Applicant timely filed a petition for writ of certiorari with the Story County district court.<sup>16</sup> (JA 11-13).

Before the district court, Applicant reiterated its prior positions. First, the proposed remodeling would not result in enlargement, expansion, or extension. Second, Section 29.307(2)(a)(ii) was not subject to the proviso clause contained in Section 29.307(2)(a)(i)(a)-(c). Third, even if the proviso clause applied, the proposed remodeling plan would not result in an increase in intensity. Fourth, the Board had a mandatory duty to issue the interior-remodeling permit. (JA 11-13, 17-34).

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<sup>16</sup> Under the Code, appeals “to the court may be taken by any party aggrieved by a decision of the Zoning Board of Adjustment in accordance with Section 414.15 of the Iowa Code.” Ames Mun. Code § 29.1508(2) (JA 388).

Before the district court, Ames ZBA conceded that defining “intensity” is critical in this dispute, arguing “[t]he meaning of ‘increased in intensity’ is the key to understanding the proper interpretation of Ames Municipal Code Section 29.307.” (JA 199).

Ames ZBA argued the ordinance was ambiguous regarding “intensity,” stating: “The Ames Municipal Code is ambiguous when it comes to whether the increase in intensity of use provisions of paragraph (i) apply to remodeling under paragraph (ii).” (JA 191).

Ames ZBA also argued that the term “enlargement” in Section 29.307(2)(a)(ii) was ambiguous. (JA 191-192). Ames ZBA argued that “Ames ZBA appropriately resolved the ambiguity in paragraph (ii)” by applying the intensity restriction to Applicant’s interior remodeling permit request for an apartment building. (JA 195).

Ames ZBA contradicted the Zoning Enforcement Officer’s determination that 2304 Knapp is currently configured with four one-bedroom apartment units. (JA 195-197). Contradicting its own

written Decision & Order,<sup>17</sup> Ames ZBA claimed that 2304 Knapp’s second floor is currently configured as a single unit rather than two units. (JA 196-197). The “discrepancy” that Ames ZBA identified before the district court was never in question. The second floor unit that currently exists operates as two units, with two kitchens and two baths. (JA 182-183). Ames ZBA’s dissatisfaction with Applicant’s floor plans before the district court does not upend this undisputed fact in the record, agreed to by Applicant, the Zoning Enforcement Officer, and Ames ZBA. 2304 Knapp is currently and has been configured as a four-unit apartment building.

As evidence to support the alleged increase in intensity, Ames ZBA made two points. First, regarding occupancy, Ames ZBA argued “the actual nonconformity at the time of the ordinance’s adoption, 4

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<sup>17</sup> Ames ZBA’s Decision & Order states: “[t]he home is currently configured as four one-bedroom apartment units, with two units occupying each of the floors in the two-story home.” (JA 58). In its trial brief, Ames ZBA nevertheless characterized its determination as resolving a “discrepancy between the plans and the findings of fact,” and argued that “Ames ZBA adopted the alternative most beneficial” to Applicant. (JA 197).

units with 4 occupants, is the full extent of permissible extent of the nonconformity.” (JA 198). Ames ZBA claimed that Applicant “could not expand the use of the building beyond the four occupants in four different units because such an expansion would increase the intensity of the nonconforming use.” (JA 198). Second, Ames ZBA argued that substantial evidence, including parking, demonstrated an increase in intensity. (JA 201-202).

**L. The Ames Municipal Code defines “intensity” to exclude residential use.**

The district court’s order annulling the writ closely tracks Ames ZBA’s Trial Brief. (JA 185-205 (Trial Brief), 206-218 (Order)). The district court and Ames ZBA relied upon a rationale that is unsupported by the Code’s plain language, which defines “intensity.” Ames Mun. Code § 29.201(109) (JA 234). That definition expressly excludes any residential use:

(109) **Intensity** means the degree or level of concentration to which land is used for commercial, industrial or any other nonresidential purpose.

Ames Mun. Code § 29.201(109) (JA 234).

## Argument

Based on the Code's unambiguous statutory text, a residential land use, including an apartment building, cannot increase in "intensity." The Code's language directly contradicts the "increase in intensity" reasoning relied on by the Ames Zoning Enforcement Officer, Ames ZBA, and the district court. Furthermore, the proposed remodeling plan would not result in an enlargement, expansion, or extension of the existing nonconforming use as an apartment building. Ames ZBA's determination that the remodeling plan was impermissible under the Code is not supported by substantial evidence. Consequently, Ames ZBA acted illegally in refusing to issue the permit. The district court made an error of law in annulling the writ.

## Division I

### II. **Ames ZBA acted illegally by failing to permit the proposed interior remodeling.**

#### A. **Error preservation.**

Applicant preserved error on this issue by filing a petition for writ of certiorari, contending that the Ames ZBA acted illegally when it denied Applicant's interior-remodeling permit request. (JA 11-13, 17-34). The district court ruled on this issue. (JA 36-37).

#### B. **Standard of review.**

This Court reviews certiorari actions for the correction of errors at law. *Bowman v. City of Des Moines Mun. Hous. Agency*, 805 N.W.2d 790, 796 (Iowa 2011). The "final construction and interpretation of zoning ordinances is a question of law." *Lauridsen v. City of Okoboji Bd. of Adjustment*, 554 N.W.2d 541, 543 (Iowa 1996). On appeal of a certiorari action, this Court is not bound by a district court's "erroneous legal rulings that materially affect the court's decision." *Baker v. Bd. of Adjustment*, 671 N.W.2d 405, 414 (Iowa 2003). A board of adjustment acted illegally if the board's "decision violates a

statute.” *Bowman*, 805 N.W.2d at 796. The appellate court reviews the district court’s factual findings for substantial evidence. *Bontrager Auto Serv., Inc.*, 748 N.W.2d at 495.

**C. The proposed interior-remodeling plan was not an increase in “intensity.”**

A nonconforming property use “is one that lawfully existed prior to the time a zoning ordinance was enacted or changed, and continues after the enactment of the ordinance even though the use fails to comply with the restrictions of the ordinance.” *City of Okoboji v. Okoboji Barz, Inc.*, 746 N.W.2d 56, 60 (Iowa 2008). The property’s prior use “essentially establishes a vested right to continue the use after the ordinance takes effect.” *Id.* Here, there is no dispute about 2304 Knapp’s status: 2304 Knapp is a legal, nonconforming use. (JA 115, 131-133). The use category is residential “household living,” as an apartment building (twelve units or less). Ames Mun. Code § 29.501(4), Table 29.501(4)-1 (JA 283-285). It has four dwelling units. (JA 115-116, 123, 125, 131, 178).

In refusing to permit the proposed interior-remodeling plan, Ames ZBA overreached its quasi-judicial authority and, by violating the statutory text, effectively legislated. As a quasi-judicial body, Ames ZBA “cannot disregard the provisions of, nor exceed the power conferred by, a zoning ordinance.” *Johnson v. Bd. of Adjustment*, 239 N.W.2d 873, 886 (Iowa 1976) (citation omitted). *See also Greenawalt v. Zoning Bd. of Adjustment*, 345 N.W.2d 537, 544 (Iowa 1984). By refusing to permit the proposed interior remodeling, based on a statutory interpretation that the proposed remodeling was an “increase in intensity” of use, Ames ZBA violated the Code’s plain and unambiguous statutory text that excluded residential land use from any “intensity” restriction. *See Ames Mun. Code* § 29.201(109) (JA 234). The district court made the same error of law when it annulled the writ and allowed Ames ZBA’s illegal decision to stand.

Interpreting municipal zoning ordinances is a question of law. *Baker*, 671 N.W.2d at 416. General rules of statutory construction apply. *Lauridsen*, 554 N.W.2d at 543. In determining what a statute

means, the Court will first look to the statute's language. *Myria Holdings Inc. v. Iowa Dep't of Revenue*, 892 N.W.2d 343, 348 (Iowa 2017). When a statute's meaning is unambiguous, the plain meaning applies. *State v. Nall*, 894 N.W.2d 514, 518 (Iowa 2017). An unambiguous statute must be applied "as written." *Id.*

Ames ZBA is not a legislative body. Ames Mun. Code § 29.1403(7)(a) (JA 372); *see also* Iowa Code § 414.12; *Deardorf v. Bd. of Adjustment*, 118 N.W.2d 78, 83 (Iowa 1962). "A zoning ordinance should not be extended by implication to prevent a use not clearly prohibited." *Johnson*, 239 N.W.2d at 881-82. "Simply stated, a board of adjustment cannot disregard the provisions of, nor exceed the power conferred by, a zoning ordinance." *Id.* at 886. Ames ZBA exceeded its statutory authority when it disregarded unambiguous statutory text and substituted its own interpretation.

Here, the Code's unambiguous language controls. The Code certainly contemplates a plain meaning approach. Under the title

“General Rules of Construction,” the Code establishes straightforward principles for construing the zoning ordinance:

In the construction of this Ordinance, words and phrases shall be construed according to the commonly approved usage of the language, except that technical words and phrases that have acquired a particular and appropriate meaning in law shall be construed accordingly.

Ames Mun. Code § 29.200 (JA 229).

Generally, zoning restrictions are constructed “strictly in order to favor the free use of property.” *Ernst v. Johnson County*, 522 N.W.2d 599, 602 (Iowa 1994). Courts avoid “an interpretation which would make them confiscatory.” *Id.* (citing *Jersild v. Sarcone*, 149 N.W.2d 179, 183 (Iowa 1967)).

Not only is Ames ZBA bound by such precedent, but also the Code affirmatively recognizes the property owners’ interest. Section 29.307 regulates “Nonconformities.” The City’s expressly stated general policy protects nonconforming uses: “It is the general policy of the City to allow uses, structures and lots that came into existence legally, in conformance with then-applicable regulations, to continue

to exist and be put to productive use.” Ames Mun. Code § 29.307(1)(a) (JA 248). The stated purpose in regulating nonconformities is to “[r]ecognize the interests of property owners in continuing to use their property.” Ames Mun. Code § 29.307(1)(a)(i) (JA 248). The City intends to “[p]romote reuse and rehabilitation of existing buildings.” Ames Mun. Code § 29.307(1)(a)(ii) (JA 248).

An express statement of purpose is a particularly relevant factor in statutory interpretation. *Irving v. Employment Appeal Bd.*, 883 N.W.2d 179, 191 (Iowa 2016). Ames ZBA nevertheless flouted these stated purposes, declaring: “[a]s with any Zoning Ordinance change it is intended that eventually, through future redevelopment, that property again becomes compliant with the current standards for the zoning district.” (JA 133). The Code does not recognize this rationale. Although the Code balances interests, the stated intent is to “[p]lace *reasonable* limits on the expansion of nonconformities that have the potential to adversely affect surrounding properties.” Ames Mun. Code § 29.307(1)(a)(iii) (JA 248) (emphasis added).

Because “intensity” is expressly defined, the Code’s definition of the term “intensity” controls. “The legislature may act as its own lexicographer.” *Henrich v. Lorenz*, 448 N.W.2d 327, 332 (Iowa 1989). “When a statute declares what a term ‘means,’ this usually excludes any items not listed in the definition.” *Matter of Estate of Gantner*, 893 N.W.2d 896, 902 (Iowa 2017). *See also State v. Pettijohn*, 899 N.W.2d 1, 15 (Iowa 2017) (“When the legislature chooses to ‘act as its own lexicographer’ by defining a statutory term, [the court is] ordinarily bound by its definition.”).

This principle applies to municipal zoning ordinances. *Lauridsen*, 554 N.W.2d at 543. “[W]here the legislature defines its own terms and meanings in a statute, the common law and dictionary definitions which may not coincide with the legislative definition must yield to the language of the legislature.” *Id.* (citation omitted). Ames ZBA didn’t yield to the Code’s definition of intensity. Ames ZBA simply relied on the Zoning Enforcement Officer’s unsupported

declaration that “the addition of bedrooms has been in the past and is still considered to be an intensification of such use.” (JA 133).

Based on the Code’s definition and the pertinent statutory text allowing interior remodeling for nonconforming uses, Ames ZBA should have granted Applicant’s permit. The Code defines “intensity” to apply to land “used for commercial, industrial or any other *nonresidential* purpose.” Ames Mun. Code § 29.201(109) (JA 234) (emphasis added). Applicant’s interior remodeling plan for this apartment building, a residential land use, did not result in an increase in intensity. Simply put, under the Code, “intensity” isn’t applicable to a residential use such as an apartment building. Intensity is different from “density,” the term that the Code applies to residential land use. “Density means the average number of dwelling units per acre of land, expressed in terms of ‘units per acre.’” Ames Mun. Code § 29.201(50) (JA 231).

The Ames City Council intended that these definitions would apply to the entire Ames zoning code. *See Lauridsen*, 554 N.W.2d at

544. Article 2 is titled “Rules of Construction and Definitions.” (JA 229). Under the “Definitions” heading, the Code defines 250 terms and phrases. Ames Mun. Code § 29.201 (JA 229-243). These definitions apply, “[e]xcept as otherwise defined in this Ordinance or unless the context may otherwise require.” Ames Mun. Code § 29.201 (JA 229). “Intensity” is not defined elsewhere. Contextually, there is no reason to conclude a different interpretation is required for nonconforming uses.

Other Code provisions confirm that “intensity” applies to nonresidential land use. *See, e.g.*, Ames Mun. Code § 29.401(3) (JA 252) (referring to “intensity” of development for all use categories except residential); Ames Mun. Code § 29.800 (JA 312) (differentiating commercial zones by “intensity” of development allowed); Ames Mun. Code § 29.900(1) (JA 340) (differentiating industrial zones by “intensity”); Ames Mun. Code § 29.1201, Table 29.1201(6) (JA 353-354) (differentiating between “density”

(residential) and “intensity” (commercial or industrial) of land use development standards).

The Ames City Council could have regulated an increase in density, in addition to an increase in intensity. But it did not do so. “[L]egislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.” *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008). In other words, *expressio unius est exclusio alterius*.<sup>18</sup> *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 636–37 (Iowa 2002). It was not Ames ZBA’s prerogative (or the district court’s) to second-guess the plain language of the ordinance and extend a zoning restriction by implication or interpretation. *See Ernst*, 522 N.W.2d at 602.

Additionally, when the Ames City Council intends to apply “intensity” to a residential land use, it does so expressly. In one

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<sup>18</sup> *See also* Black’s Law Dictionary 1913 (10th ed. 2014) (“The expression of one thing is the exclusion of another.”).

subsection addressing “nonconforming structures,” the Code clearly specifies that “intensity” applies to residential uses, stating:

Any nonconforming structure damaged . . . may be rebuilt, provided such rebuilding does not increase the intensity of use, as determined by the number of dwelling units (for residences) or floor area or ground coverage (for nonresidential uses). . . .

Ames Mun. Code § 29.307(3)(c)(i) (JA 250).

When the legislature says one thing, it generally does not mean something else. *Holland v. State*, 115 N.W.2d 161, 164 (Iowa 1962).

Even sloppy drafting does not allow Ames ZBA to act illegally by rewriting zoning ordinances. *Id.* (“Ours not to reason why, ours but to read, and apply. It is our duty to accept the law as the legislative body enacts it.”). Section 29.307(2) contains no language specifying that the word “intensity” applies to residential land use.

Consequently, Ames ZBA’s obligation was to apply the plain and unambiguous Code as written.

Related statutes should be read together in an attempt to harmonize them. *In re A.M.*, 856 N.W.2d 365, 372 (Iowa 2014).

Applicant's interpretation harmonizes all provision in the Code. Ames ZBA's does not. Courts "read statutes as a whole rather than looking at words and phrases in isolation." *Estate of Gantner*, 893 N.W.2d at 902 (citations omitted). In its trial brief, Ames ZBA acknowledged this principle, stating that a "statute or ordinance must be assessed in its entirety and not just through isolated words or phrases." (JA 192) (quoting *State v. Romer*, 832 N.W.2d 169, 177 (Iowa 2013)).

Under the Code, a residential use—including an apartment building—can never increase in intensity. That's because by definition (unless otherwise stated), "intensity" never applies to a residential land use. Ames Mun. Code § 29.201(109) (JA 234). The Ames ZBA acted illegally, because in denying the interior remodeling permit based on an increase of "intensity," Ames ZBA ignored the Code's plain statutory text. The district court made an error of law in concluding the proposed interior remodeling plan would result in an increase in intensity, and in annulling the writ.

**D. The proposed remodeling plan would not result in an enlargement, expansion, or extension.**

The proposed remodeling plan is not a proposed enlargement, expansion, or extension under Section 29.307(2)(a)(ii). Applicant does not propose increasing floor area, occupying parts of another structure or lot, or increasing height. Applicant proposes interior remodeling to upgrade and modernize the four dwelling units that already exist.

Under Section 29.307(2)(a)(ii), interior remodeling “to a structure containing a nonconforming use shall be permitted” in the absence of a proposed enlargement, expansion, or extension. Based on the Code’s plain language, because there was no enlargement, expansion, or extension, the Zoning Enforcement Officer and Ames ZBA were obligated to issue the proposed interior-remodeling permit. There is no justification under the Code’s text to continue with an “intensity” analysis where, as here, the interior remodeling does not propose enlargement, expansion, or extension. Ames Mun. Code § 29.307(2)(a)(ii) (JA 248).

In *City of Jewell Junction v. Cunningham*, 439 N.W.2d 183 (Iowa 1989), this Court recognized that, in the commercial context, an “increase in business alone does not constitute an illegal extension of a nonconforming use.” *Id.* at 186. This Court recognized that “considerable latitude will be allowed a landowner in making changes in the original nonconforming use if the changes are not substantial and do not impact adversely on the neighborhood.” *Id.* “[T]he key is that the present use must not be ‘substantially or entirely different’ from the original use.” *Id.*

Here, the evidence does not establish a material change in the existing nonconforming use for this four-dwelling-unit residential use apartment building. Under the Code, an apartment building with twelve or less dwelling units is classified as “Residential Medium Density.” Ames Mun. Code § 29.702(2) (JA 301). The residential use category would be household-living, apartment dwelling (twelve units or less). *See* Ames Mun. Code § 29.501(4), Table 29.501(4)-1 (JA 283-285); Ames Mun. Code 29.702(1)-(2), Table 29.702(2) (JA 301-302).

In 1928, the apartment building had twelve or less dwelling units. (JA 115-116, 125). This household-living, apartment building use classification would not change under Applicant's proposed interior remodeling plan. 2304 Knapp would continue as an apartment building with twelve or less dwelling units. (JA 178-183).

Applicant hasn't even asked to increase the number of dwelling units. With the proposed remodeling plan, the apartment building would have exactly the same number of dwelling units that it has today; that it had in 2000, when the Ames zoning ordinance was enacted; and that it had in 1928, when the structure was converted to a four-unit apartment building. (JA 115-116, 123, 125, 131, 178-183).

Section 29.307(2) pertains to "nonconforming uses." Section 29.307(2)(a) is titled "Movement, Alteration and Enlargement." Section 29.307(2)(a)(i) addresses "Enlargement." Section 29.307(2)(a)(ii) addresses "Exterior or Interior Remodeling or Improvement to Structure." Section 29.307(a)(iii) addresses

“Relocation of Structure.” The Code treats these concepts as separate and distinct.

“Alteration means a change or rearrangement in the structural parts of an existing building or structure.” Ames Mun. Code § 29.201(11) (JA 229). “Enlargement,” a subset of “Alteration,” is a physical change in size or reach. Ames Mun. Code § 29.201(11) (JA 229). An enlargement, “whether by extending a side, increasing the height, or the moving from one location or position to another, shall be considered an alteration.” Ames Mun. Code § 29.201(11) (JA 229).

Applicant requests a permit that would maintain the apartment building’s status as a four-dwelling-unit residential use. Applicant’s proposed remodeling plan does not propose an enlargement, expansion, or extension. Ames ZBA acted illegally in concluding that Applicant’s interior remodeling plan proposed an enlargement, expansion, or extension. The district court erred in annulling the writ.

**E. The Ames Municipal Code imposes a duty to issue the requested interior remodeling permit.**

When the term “shall” appears in a statute, it imposes a mandatory duty. *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 771 (Iowa 2016); Iowa Code § 4.1(30)(a). The Code recognizes this principle: “the word ‘shall’ is mandatory and not directory.” Ames Mun. Code § 29.200 (JA 229).

The Code provides “interior remodeling or improvements to a structure containing a nonconforming use *shall* be permitted.” Ames Mun. Code § 29.307(2)(a)(ii) (JA 248) (emphasis added).

Consequently, under the Code, the proposed interior remodeling plan must be permitted. Ames Mun. Code § 29.307(2)(a)(ii) (JA 248).

The Code imposes a mandatory duty to permit the interior remodeling, and Ames ZBA acted illegally in failing to issue the permit. The district court made an error of law in annulling the writ.

## Division II

III. **Ames ZBA's determination that the proposed interior remodeling plan is an enlargement of use that would result in an increase in intensity is not supported by substantial evidence.**

A. **Error Preservation.**

Applicant preserved error on this issue by filing a petition for writ of certiorari, contending that the Ames ZBA's decision denying Applicant's interior-remodeling permit request was not supported by substantial evidence. (JA 11-13, 17-34). The district court ruled on this issue. (JA 217).

B. **Standard of review.**

The appellate court reviews the district court's factual findings for substantial evidence. *Bontrager Auto Serv., Inc.*, 748 N.W.2d at 495.

C. **Substantial evidence does not support Ames ZBA's decision, and the district court erred in annulling the writ.**

If the facts relied on by the district court do not provide substantial evidence to support the board of adjustment's decision, "then the illegality of the board's action is established." *Martin*

*Marietta Materials, Inc. v. Dallas County*, 675 N.W.2d 544, 551 (Iowa 2004).

For the reasons already discussed, the record does not contain substantial evidence that an alleged increase in “intensity” occurred to preclude an interior remodeling permit. Similarly, the record does not contain substantial evidence that the interior remodeling plan proposed an enlargement, extension, or expansion.

The district court made a finding that the apartment building’s current configuration is three dwelling units. (JA 212). This position was first presented in Ames ZBA’s Trial Brief, contending that the second floor plan would “split one unit into two units,” resulting in a “newly created Unit 4.” (196-197, 212). This finding by the district court is invalid. The district court cannot make new factual findings on issues that were before the board for decision. *Bontrager Auto Serv., Inc.*, 748 N.W.2d at 495.

The evidence in the record consistently establishes 2304 Knapp is a four-unit apartment building:

- “The single family home was converted to a four unit apartment building in 1928” (JA 115);
- “The home is currently configured as four one-bedroom apartment units, with two units occupying each of the floors in the two-story home.” (JA 116);
- “Based on current layout of the building you have 4 one bedroom units” (JA 123);
- “The home is currently configured as four one-bedroom apartment units, with two units occupying each of the floors in the two-story home.” (JA 125);
- “The home is currently configured as four one-bedroom apartment units, with two units occupying each of the floors in the two-story home.” (JA 131);
- “Currently, the property is divided into 4 apartment units.” (JA 178).

Evidence regarding off-street parking does not establish substantial evidence to support an increase in intensity or an enlargement, expansion, or extension. Parking is not, and has never been, 2304 Knapp’s primary use. 2304 Knapp’s principal use is a residential use, consisting of an apartment building with four dwelling units. Ames Mun. Code § 29.501(1) (JA 283) (“Uses shall be

assigned to the category with the description and listing of uses most closely describing the nature of the Principal Use.”).

Ames ZBA’s decision that the proposed interior remodeling plan is an enlargement of the principal use that would result in an increase in intensity is not supported by substantial evidence. Ames ZBA had an obligation to issue a permit, and acted illegally in refusing to permit the interior remodeling. The district court erred in annulling the writ.

### **Conclusion**

The district court should have sustained the writ. Ames ZBA acted illegally, in contravention of the Ames Municipal Code, in denying the interior remodeling permit request submitted by Applicant Ames 2304, LLC.

Petitioner-Appellant Ames 2304, LLC, respectfully requests that the Court reverse the judgment of the district court, remand the case to the district court and order the district court to sustain the writ and direct the Ames Zoning Board of Adjustment and the Zoning

Enforcement Officer to permit and authorize Applicant Ames 2304, LLC's interior remodeling building permit.

**Request for oral submission**

Petitioner-Appellant Ames 2304, LLC, respectfully requests oral argument regarding the issues presented in this appeal.

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December 1, 2017

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