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IN THE IOWA SUPREME COURT

NO. 17-1149

AMES 2304, LLC,

Plaintiff/Appellant,

vs.

CITY OF AMES, ZONING BOARD OF ADJUSTMENT,

Defendant/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
HON. JUDGE MICHAEL J. MOON
STORY COUNTY CASE NUMBER CVCV049820

RESPONDENT/APPELLEE'S FINAL BRIEF

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ROUTING STATEMENT

The Iowa Supreme Court should transfer this case to the Iowa Court of Appeals because this case involves issues presenting the application of existing legal principles. I.R.A.P. 6.1101(3)(a).

STATEMENT OF THE CASE

The Petitioner applied for an application to remodel the property located at 2304 Knapp Street in Ames, Iowa. (Ames 17, App. 131). The City of Ames's Department of Planning and Housing determined that the provisions of Ames Municipal Code Section 29.307(2)(a) prevented the proposed remodeling. (Ames 18-19, App. 132-133). Petitioner appealed to the Ames Zoning Board of Adjustment ("ZBA"). (Ames 17, App. 131). After a hearing on June 22, 2016, the Ames ZBA upheld the decision of the Department of Planning and Housing. (Ames 20, App. 134).

The Petitioner filed a petition for writ of certiorari asking the District Court to overturn this decision. (Petition, App. 11). The Respondent answered and provided a record return on the document. (Answer and Response to Writ, App. 14).

On June 16, 2017, the Court ruled in favor of the Respondent on all issues. (Order dated June 16, 2017 p. 10, App. 215).

Petitioner filed a notice of appeal on all of these issues on July 14, 2017. (Notice of Appeal, App. 219).

STATEMENT OF FACTS

The record in the present matter demonstrates that the Ames ZBA received sufficient evidence to support its conclusion. The first, and most relevant, evidence came from the City of Ames' Department of Planning and Housing. (Ames 1-6, App. 115-120). The Department of Planning and Housing set out its recommendations and findings in a report. (Ames 1-6, App. 115-120). The report explains that the property in question is currently zoned as "Low Density Residential" which permits only single family detached residential dwellings with one dwelling per lot. (Ames 1, App. 115). The report states, "[u]nder the current Zoning Ordinance, the property is determined to have a legal non-conforming use, as the apartment use was established prior to the current ordinance, and therefore must comply with the regulations of Section 29.307 of the Zoning Ordinance for any modifications to such nonconforming use." (Ames 1-2, App. 115-116). The Department's findings include:

(1) The home is currently configured as four one-bedroom apartment units, with two units occupying each of the floors in the two-story home. (Ames 2, App. 116).

(2) The proposal is to remodel the first floor of the home into one studio unit

and one two-bedroom unit (by definition in the zoning ordinance the staff views the den/living room in this unit as the second bedroom).

(3) The second floor would be remodeled into a studio unit and a three bedroom unit.

(Ames 2, App. 116)

The Department then concludes, "[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." (Ames 2, App. 116).

The plans submitted to the Ames ZBA at its hearing on June 22, 2016, demonstrate that this conclusion is correct. (Ames 66-69, App. 180-183). On the first floor the plans propose placing a wall down the middle of one living room and changing the dividing points between units 1 and 2. (Ames 66 and 67, App. 180-181). The plan documents that Unit 2 would have: (1) a living room; (2) den/living room; (3) a bedroom; and (4) open kitchen/living room. (Ames 67, App. 181). The plan would also reconfigure Unit 1 to be a studio apartment. (Ames 67, App. 181) On the second floor the plan would split one unit into two units. (Ames 68 and 69, App. 182-183). The newly created Unit 4 would be a studio apartment. (Ames 69, App. 183) (the second floor plan states "Add door opening. Install door with keyed deadbolt to separate units"). According to the plan Unit 3 would consist of: (1) a smaller kitchen; (2) a living room; and (3) three

bedrooms as opposed to the 2 bedrooms currently existing. (Ames 69, App. 183). The end result of the remodeling would be a house that contained either 6 or 7 bedrooms (depending upon whether the second living room is really a bedroom). The plans submitted by Ames 2304, LLC to the Ames ZBA at the hearing clearly demonstrates that there would be more people potentially living in the residence.

The City of Ames's Department of Planning and Housing (hereinafter "the Department") determined that the proposed remodel would constitute an increase in the intensity of the nonconformity. (Ames 3-5, App. 117-119). The Department's background findings explain, "[t]he single family home was converted to a four unit apartment building in 1928, as determined from a building permit record, to allow for four one-bedroom apartment units." (Ames 1, App. 115).

The plans submitted to the Department by the Petitioner show that the Petitioner desires to separate the second floor into two units when the second floor of the building was previously a single unit. (Compare Ames 68 and 69). (Ames 69, App. 183) (the second floor plan states "Add door opening. Install door with keyed deadbolt to separate units"). The Department notes that there was a permit for four units in 1928. There is some discrepancy between the plans and the findings of fact. However, the discrepancy is not material to the decision as the Ames ZBA adopted the alternative most beneficial to the Petitioner.

The background further explains, "[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." (Ames 2, App. 116). The Department correctly determined that the Petitioner's proposal would result in: (1) a studio unit on the first floor; (2) a two-bedroom unit on the first floor; (3) a studio unit on the second floor; and (4) a three bedroom unit on the second floor. (Ames 2, App. 116). The Department determined that the number of units in the building would not increase, but the plan would result in a net increase of 3 bedrooms in the home. (Ames 2, App. 116).

The District Court upheld the Ames ZBA's decision. (Order dated June 16, 2017, App. 206). The District Court specifically explained, "[t]he Ames ZBA asserts that nonconforming use of the building, at the time the grandfather clause was adopted, is what is allowed as a nonconforming use under the ordinance." (Order dated June 16, 2017 p. 8, App. 213). The District Court continued, "[s]pecifically, the actual nonconformity at the time of the ordinance's adoption – 4 units with 4 occupants – is the extent of the permissible nonconformity." (Order dated June 16, 2017 p. 8, App. 213). The District Court then described the Ames ZBA's position as "[u]nder that interpretation, Petitioner could not expand the use of the building beyond the four occupants in four different units; otherwise, such an expansion would increase the intensity of the nonconforming use and be beyond the scope of the grandfather clause." (Order dated June 16, 2017 p. 8, App. 213).

The District Court then characterized the evidence concerning Department's interpretation of the ordinance and grandfathering. The District Court recounted that "[t]he Department concluded '**However, the addition of bedrooms has been in the past and is still considered to be an intensification of such use. The change in the type of units going from one bedroom to a two or three bedroom intensifies the site requirements for the property requiring that additional parking be provided**.'" (Order dated June 16, 2017 p. 9, App. 214) (emphasis in original Department Report). The District Court held, "[t]he Department's interpretation of what was grandfathered as an existing nonconforming use best conforms to the terms of the ordinance." (Order dated June 16, 2017 pp. 9-10, App. 214-215).

The District Court provided several reasons for adopting the position that increasing the number of occupant bedrooms constitute an increase in intensity of the nonconforming use. The Court explained, "[a]n increase in the occupants from 4 to 7 increases the intensity or impact of the nonconformity on the neighborhood." (Order dated June 16, 2017 p. 10, App. 215). 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." (Order dated June 16, 2017 p. 10, App. 215). The District Court also relied upon this statement from the Department "the intended purpose of this section of the code

regarding nonconforming uses is to allow for a use and building to continue to be used and to provide the purpose in which it was originally approved." (Order dated June 16, 2017 p. 10, App. 215). (quoting the Department). The District Court then cited with approval the statement that "[i]t is not the intention of these provisions to allow for nonconforming uses to be increased in the degree of their nonconformity, which could have the potential to adversely affect surrounding properties." (Order dated June 16, 2017 p. 10, App. 215). (quoting the Department).

ARGUMENT

ISSUE I: THE DISTRICT COURT CORRECTLY DETERMINED THAT THE AMES ZONING BOARD OF ADJUSTMENT ACTED LEGALLY

A. Preservation of error and standard of review.

The Petitioner partially preserved error in this matter by filing a Notice of Appeal within 30 days of the District Court's ruling dated July 14, 2017. (Notice of Appeal, App. 219). Specifically, the Petitioner preserved error on its argument that Zoning Board of Adjustment improperly interpreted Ames Municipal Code Section 29.307(2)(a)(ii) as permissive as opposed to mandatory.

However, in this appeal, the Petitioner raises arguments not submitted to the District Court. In particular the Petitioner claims that the ZBA misinterpreted the ordinance because, in the Petitioner's view, the word "intensity" cannot apply to a

residential use. This argument was not raised in any of the briefing before the District Court. (Brief in Support of Petition for Writ of Certiorari p. 3, App. 19). The Petitioner made two arguments before the District Court. First, the Petitioner argued that Section 29.307(2)(a)(ii) is mandatory. (Brief in Support of Petition for Writ of Certiorari p. 3, App. 19). Second, the Petitioner argued that the facts did not support a conclusion that the proposal would not "increase in intensity" the nonconforming use. (Brief in Support of Petition for Writ of Certiorari p. 3, App. 19). The District Court did not address an argument that the word "intensity" cannot apply to a residential use under the Ames Municipal Code. (District Court Ruling dated June 16, 2017, App. 206). The Petitioner did not file a motion to reconsider to raise this issue before filing a notice of appeal.

In the context of a writ of certiorari a court reviews factual questions on a substantial evidence basis and legal questions de novo. *Bontrager Auto Service, Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483, 494-495 (Iowa 2008). In a de novo standard of review, the appellate court is not by bound by the trial court's conclusions of law or findings of fact, although the appellate court should give weight to factual findings, particularly when they involve the credibility of witnesses. *In re Estate of Roethler*, 801 N.W.2d 833, 837 (Iowa 2011).

B. <u>Argument.</u>

The Petitioner now makes three arguments concerning the Ames ZBA's

interpretation of the Ames Municipal Code 29.307(2)(a)(ii). First, the Petitioner argues, for the first time on appeal, that the word "intensity" is defined in such a way that it cannot apply to residential uses. (Appellant Brief pp. 41-52). Second, the Petitioner claims that the Ames ZBA erred because the Petitioner's proposed use would not constitute an expansion or extension under Ames Municipal Code 29.307(2)(a)(ii). (Appellant Brief p. 52-54). Finally, the Petitioner alleges that the terms of Ames Municipal Code 29.307(2)(a)(ii) are mandatory and require the Ames ZBA to grant its permit. (Appellant Brief p. 55). The Court should reject each of these arguments and affirm the District Court.

1. The Ames ZBA reached a legally correct interpretation of Ames Municipal Code 29.307(2)(a)(ii)

The Ames ZBA correctly interpreted Ames Municipal Code 29.307(2)(a)(ii) in its decision. The Ames ZBA determined that Ames Municipal Code 29.307(2)(a)(ii) must be read in conjunction with Ames Municipal Code 29.307(2)(a)(i). (Ames 19, App. 133). The text of the Ames Municipal Code reads as follows:

> (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 by the Zoning Board of Adjustment, pursuant to the procedures of Section 29.1503, excluding 29.1503(4)(b)(vii) of the Review Criteria General Standards, except as described in subsection b. following.

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 pursuant to Section 29.1503, but rather shall be construed as a request for a variance, subject to the procedures of Section 29.1504.

(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 <u>shall be subject to the provisions set forth in the above paragraph</u>.

Ames Municipal Code 29.307(2)(a) (emphasis supplied)

The parties disagree about the interpretation of this ordinance.

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). A statute is ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute. *Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice*, 867 N.W.2d 58, 72 (Iowa 2015). An ambiguity may arise from the specific language used in a statute. *Id.* An ambiguity might also arise "when the provision at issue is considered in the context of the entire statute or related statutes." *Id.* A statute may be ambiguous "even if the meaning of words might seem clear on their fact, their context can create ambiguity." *Id.* The statutory interpretation question that the Ames ZBA faced was whether "enlargement, expansion or extension" in 29.307(2)(a)(ii) meant: (1) enlargement, expansion or extension of the structure; or (2) enlargement, expansion or extension of either the nonconforming use or structure.

In other sections the ordinance uses the word enlargement to refer both to the structure and the nonconforming use. In Section 29.307(2)(A)(i)(a) entitled "enlargement" the language reads "[a] nonconforming use may not be increased in intensity and may not be enlarged, expanded or extended to occupy other parts of another structure or portions of a lot that it did not occupy…" Ames Municipal Code 29.307(2)(a)(i)(a). At the same time in Section 29.307(2)(a)(i)(c) the ordinance refers to "enlargement of a nonconforming use" when it states "[t]he

enlargement of a nonconforming use that has the effect of making a structure nonconforming…" Ames Municipal Code 29.307(2)(a)(i)(c). The different usages of the word "enlargement" in the ordinance make the use of the word "enlargement" ambiguous in paragraph (ii).

There are now three competing interpretations of the section. The first interpretation is that paragraph (ii) requires all remodeling to be subject to the requirements of paragraph (i)'s prohibition against increasing the intensity of the nonconformance. The Ames ZBA found this interpretation was appropriate. Petitioner originally contended that paragraph (ii)'s first clause is mandatory and "does not grant the City any discretion to prohibit the remodeling," unless there is actually an enlargement, expansion or extension of the physical structure. However, on appeal the Petitioner, has now presented an argument that the word "intensity" cannot apply to a residential property by virtue of the definitions in Section 29.201.

The Ames ZBA determined that the language in (ii) means that a remodeling must comply with both paragraph (i) and (ii). The Ames ZBA held, "[t]he 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 non-conforming use regarding remodeling the structure." (Ames 19, App. 133). The Board then continued,

"[t]herefore, the ordinance does not allow increases in intensity for non-conforming structures undergoing internal remodeling." (Ames 19, App. 133). The Board found that "[t]his is in line with the general purpose of the 'Nonconformities' section of the ordinance, expressed in Section 29.307(1)." (Ames 19, App. 133).

The Ames ZBA correctly interpreted the ambiguity in light of Section 29.307(1)(a). A statute or ordinance must be assessed in its entirety and not just through isolated words or phrases. *State v. Romer*, 832 N.W.2d 169, 177 (Iowa 2013). In Section 29.307(1)(a) the ordinances state, "[i]t is the general policy of the City to allow uses, structures and lots that came into existence legally, in conformance with then-applicable requirements, to continue to exist and be put to productive use, but to mitigate adverse impact on conforming uses in the vicinity." Ames Municipal Code Section 29.307(1)(a). The same section continues: "[t]he regulations of this Section are intended to: (i) recognize the interests of property owners in continuing to use their property; (ii) promote reuse and rehabilitation of existing buildings; and (iii) place reasonable limits on the expansion of nonconformities that have the potential to adversely affect surrounding properties and the community as a whole." Ames Municipal Code Section 29.307(1)(a)(i)-(iii).

The Ames ZBA determined that the language in (ii) means that a remodeling

must comply with both paragraph (i) and (ii). The Ames ZBA held, "[t]he 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 non-conforming use regarding remodeling the structure." (Ames 19, App. 133). The Board then continued, "[t]herefore, the ordinance does not allow increases in intensity for non-conforming structures undergoing internal remodeling." (Ames 19, App. 133). The Board found that "[t]his is in line with the general purpose of the 'Nonconformities' section of the ordinance, expressed in Section 29.307(1)." (Ames 19, App. 133). The language of Section 29.307(1)(a) provides the context and general intent for the provisions of Section 29.307(2)(a)(i)&(ii).

It would be incongruent to claim that paragraph (ii) "does not grant the City any discretion to prohibit the remodeling" in light of the overarching responsibilities set out in (1)(a). If the Ames ZBA or the Court were to adopt the Petitioner's position, then remodeling could increase the intensity of the nonconformance without any oversight by the Ames ZBA. The Petitioner's initial position is that it could remodel the existing structure to add 50 occupants and the Ames ZBA could not prevent such a remodeling as long as the building's exterior dimensions did not change. A court should avoid interpreting a statute in a manner that produces absurd results. *The Sherwin-Willams Co. v. Iowa Dept. of Revenue*,

789 N.W.2d 417, 427 (Iowa 2010).

The same is true if the proposed interpretation would be clearly inconsistent with the purpose and policies of the act in question. *Id.* (citations omitted). This increase in the nonconformance would certainly "have the potential to adversely affect surrounding properties and the community as a whole." Ames Municipal Code Section 29.307(1)(a)(iii). It would also constitute an "expansion of nonconformities." Ames Municipal Code Section 29.307(1)(a)(iii). The Petitioner's interpretation would prevent the Ames ZBA from exercising any judgment or discretion concerning these adverse effects. This puts the Petitioner's interpretation squarely in conflict with the purposes of this ordinance.

The use of the word "any" in paragraph (ii) is an indicator that enlargement, expansion or extension was meant to be read broadly. Paragraph (ii) states "any proposed enlargement…" Ames Municipal Code 29.307(2)(a)(ii). The terms of paragraph (i) deal with and set forth the rules for "enlargement" because it is the title of the paragraph. The first sentence of paragraph (i) dealing with "enlargement" prohibits two things: (1) increased intensity of the nonconforming use; and (2) enlarged, expanded or extended to occupy parts of another structure or portions of a lot that did not occupy on the effective date of this Ordinance. This strongly supports a conclusion that an "enlargement" under paragraph (i) includes both an increase in intensity of the nonconforming use and the expansion of the

structure. Thus, it stands to reason that "any enlargement" would include: (1) an increase in intensity of the nonconformity; and (2) an expansion of the structure.

2. The word "intensity" in Section 29.307(2)(a) can apply to residential nonconforming uses.

The dispute, which is being raised for the first time on appeal, is whether the word "intensity" in Ames Municipal Code 29.307(2)(a)(i)(a) applies to a residential nonconformance. The Petitioner claims that the Municipal Code defines "intensity" to apply to land "used for commercial, industrial, or any other *nonresidential* purpose." (Appellant's Brief p. 47). (quoting Ames Municipal Code Section 29.201(109) and adding emphasis). The Court should reject this argument.

The Petitioner fails to adequately address the qualifying statement in Section 29.201 that these definitions apply "[e]xcept as otherwise defined in this Ordinance or unless the context may otherwise require." Ames Municipal Code Section 29.201. In the context of "nonconforming uses" it is more than appropriate to apply intensity to commercial, industrial and residential nonconforming uses. Any other interpretation is a tortured attempt to twist the plain meaning of the word in order to reach the Petitioner's desired result.

The use of the word "intensity" to modify the word "nonconforming use" is a rather straightforward matter of interpretation. First, this Court must consider whether a nonconforming use can rightly be limited to nonresidential uses in light

of the overarching purposes described above. No reasonable person could reach the conclusion that "intensity" only applies to those nonconforming uses that are commercial or industrial in nature. In order to do so it would be necessary to conclude that a residential nonconforming use was subject to virtually no regulation.

The Petitioner's newly crafted argument falls prey to the same issues as the previous arguments to the District Court. In this case, the Petitioner's newly offered interpretation of the statute means that this particular property could have an unlimited number of bedrooms and residents. A Court should avoid statutory interpretations that create absurd results. *Brakke v. Iowa Dep't of Natural Res.*, 897 N.W.2d 522, 534 (Iowa 2017). (stating "[i]t is universally accepted that where statutory terms are ambiguous, courts should interpret the statute in a reasonable fashion to avoid absurd results."). If a house had an existing residential nonconforming use allowing more than the permissible number of residents, then under the Petitioner's newly offered interpretation the owner could have as many residents as the owner desired. After all, the word "intensity" is the word in Ames Municipal Code 29.307(2)(a)(i)(a) that potentially modifies the amount of the nonconforming use. The Petitioner's contention leads to an interpretation of the statute where there could be fifty people residing in this house as long as the exterior dimensions remain unchanged and the Ames ZBA would be powerless to

prevent that from happening.

The correct interpretation of the language prohibiting an increase in intensity of a nonconforming use is to apply the prohibition to residential and nonresidential nonconforming uses. There is no reason to believe the residential nonconforming uses are any less damaging to surrounding property owners than nonresidential nonconforming uses. It flies in the face of reason to suggest that the City's purpose in limiting the "intensity" of nonconforming uses would consider only commercial or industrial nonconforming uses harmful to the community. The Ames ZBA correctly considered evidence of the harmful effects of an increase in the intensity of this nonconforming use and denied the Special Use Permit.

The Court should also strike this argument based on preservation of error principles. The Iowa Supreme Court has repeatedly explained, "[i]t is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we decided them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). The proper mechanism for raising a late issue is a post-trial motion which is "essential to preservation of error when a trial court fails to resolve an issue, claim, defense or legal theory properly submitted for adjudication." *Arnold v. Long*, 259 N.W.2d 749, 753 (Iowa 1977). The essential question in a preservation of error analysis is whether the party presented enough information to alert the district court to the issue. *Segura v.*

State, 889 N.W.2d 215, 219-220 (Iowa 2017). If the party's argument was sufficient to alert the district court of the essential claim, then a district court's rejection of the general position would be sufficient. *Id.*

In this circumstance, the arguments below were not sufficient to alert the District Court that Petitioner took issue with the definition of the word "intensity" and its application to residential nonconforming uses. In the District Court the Petitioner argued: (1) the terms of Ames Municipal Code 29.307(2)(a)(i)(a) do not apply this project because Ames Municipal Code 29.307(2)(a)(ii) is freestanding of subparagraph (i); and (2) Ames Municipal Code 29.307(2)(a)(i)(a) only prohibits enlargement of physical structure. (Brief in Support of Petition for Writ of Certiorari p. 3, App. 19). There was no mention of the concept that the word "intensity" could not apply to a residential nonconforming use. The District Court could not have understood this essential claim that took issue with a wholly different phrase in Ames Municipal Code 29.307(2)(a)(i)(a).

3. The phrase "enlargement, expansion or extension" under Ames Municipal Code 29.307(2)(a)(i)(a) and (ii) supports the ZBA's decision

The Petitioner's next issue is a claim that Ames Municipal Code 29.307(2)(a)(i)(a) does not apply to this application because the Petitioner does not propose to enlarge, expand or extend the exterior of the structure. This argument bleeds into the Petitioner's argument that issuance of a permit was mandatory. The Petitioner's final issue is that in the absence of any enlargement, expansion or

extension to the physical dimensions of the structure, an application to increase the intensity of a nonconforming use must be granted as a matter right. The Petitioner properly preserved error on this legal theory below. The District Court also properly rejected this theory. (District Court Ruling, App. 206). This Court should affirm the District Court.

The dispute is whether paragraph (ii) is freestanding of paragraph (i). The Petitioner's argument is that paragraph (ii) is freestanding. Petitioner states, "[t]he Code imposes a mandatory duty to permit interior remodeling, and Ames ZBA acted illegally in failing to issue the permit." (Appellant's Brief p. 55). The Appellant argues that the phrase "interior remodeling or improvements to a structure containing a nonconforming use *shall* be permitted." (Appellant's Brief p. 55). (citing Ames Municipal Code 29.307(2)(a)(ii) and adding emphasis). The District Court correctly rejected the Petitioner's interpretation and this Court should affirm that decision.

The Court should also reject the Petitioner's interpretation of the statute because it relies upon taking language out of context. The Petitioner's trial brief citation of Section 29.307(2)(a)(ii) reads in two separate parts in order to support two separate arguments. First, Petitioner writes that the first clause as "exterior or interior remodeling or improvements to a structure containing a nonconforming use *shall* be permitted…" (Petitioner's Trial Brief p. 4, App. 20). Second, the

Petitioner then inserts language into the second clause "…provided that any proposed enlargement, expansion, or extension [to a structure containing a nonconforming use] shall be subject to the provisions set forth in [29.307(2)(a)(i)]." (Petitioner's Trial Brief p. 4, App. 20). The Petitioner's presentation of the ordinance in its trial brief separates the two clauses into two separate and different sentences. However, the actual text of 29.307(2)(a)(ii) reads "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." Ames Municipal Code Section 29.307(2)(a)(ii). The plain reading of the text of the ordinance demonstrates that the second clause clearly modifies the first clause in the ordinance.

Furthermore, if the Petitioner's interpretation were adopted as accurate, it would require the Court to read words into the ordinance that are not otherwise written in the ordinance. The Petitioner repeatedly states that "Petitioner's interior remodeling does not propose any enlargement, expansion or extension to the structure." (Petitioners' Trial Brief p. 4, 5, 6, 7, App. 20-23). The Petitioner points out that the word "intensity" does not appear in paragraph (ii). (Petitioner's Brief p. 6, App. 22). Petitioner fails to note that the words "to the structure" do not appear after the words "any proposed enlargement, expansion or extension…" in

the ordinance. Instead, the Petitioner has added those words when it quotes the ordinance in its trial brief. Petitioner's quotation reads "[s]econd, 29.307(2)(a)(ii) goes on to state '…provided that ay proposed enlargement, expansion or extension [to a structure containing a nonconforming use] shall be subject to the provisions in [29.307(2)(a)(i)].'" (Petitioner's Brief p. 4, App. 22). The phrase "[to a structure containing a nonconforming use]" does not appear in the text and instead is simply Petitioner's commentary on the ordinance.

The correct interpretation of the word "shall" in subparagraph (ii) is that it means an interior remodeling that does not increase the nonconforming use shall be permitted. If the remodeling results in an enlargement, expansion or extension of the nonconforming use then it must past the test of subparagraph (i). It bears remembering the subparagraph (i) involves "enlargement" and includes a prohibition both on: (1) increasing the size of the structure; and (2) increasing the intensity of the nonconforming use. The ordinance uses the heading "enlargement" and then states "[a] nonconforming use may not be increased in intensity and may not be enlarged, expanded or extended to occupy parts of another structure…" Ames Municipal Code 29.307(2)(a)(i). An increase in intensity of the nonconforming use is an "enlargement" for purposes of Ames Municipal Code 29.307(2)(a).

In the end, the Ames ZBA appropriately resolved the ambiguity in paragraph

(ii). The Ames ZBA considered the opposing interpretations of the ordinance and selected the interpretation most consistent with the purposes of Section 29.307 as expressed in 29.307(1)(a). The goal of any statutory interpretation is to "seek a 'reasonable interpretation that will best effect the purposes of the statute.'" *Woodbury County Atty v. Iowa AG*, 741 N.W.2d 793, 806 (Iowa 2007). While the Petitioner's parsing of the statute may seem appealing on its face, the Ames ZBA reached the correct interpretation under the plain language and purpose of the ordinance. This Court should affirm the District Court's decision to uphold that interpretation.

ISSUE II: THE DISTRICT COURT CORRECTLY DETERMINED THAT SUBSTANTIAL EVIDENCE SUPPORTS THE AMES ZONING BOARD OF ADJUSTMENT'S FINDINGS OF FACT

A. Preservation of error and standard of review.

The Plaintiff preserved error in this matter by filing a Notice of Appeal within 30 days of the District Court's ruling dated July 14, 2017. (Notice of Appeal Dated July 14, 2017, App. 219).

Although the certiorari review is *de novo*, the trial is limited to "the questions of illegality raised by the petition for the writ." *Bontrager*, 748 N.W.2d at 492 (citing *Deardorf v. Bd. of Adjustment*, 254 Iowa 380, 383, 118 N.W.2d 78, 80 (Iowa 1962); *accord Vogelaar v. Polk County Zoning Bd. of Adjustment*, 188 N.W.2d 860, 863 (Iowa 1971)). Additionally, the role of the district court on

certiorari is limited. The district court "is not free to decide the case anew," but, rather, "illegality of the challenged board action is established by reason of the court's findings of fact if they do not provide substantial support for the board's decision." *Weldon v. Zoning Bd.*, 250 N.W.2d 396, 401 (Iowa 1977) (overruled by *Bontrager*, 748 N.W.2d at 495: "to the extent it permitted the court to make new factual findings on issues that were before the board for decision" . . . "such fact-findings will be reviewed under the substantial-evidence test traditionally employed in certiorari reviews").

Evidence is substantial "when a reasonable mind could accept it as adequate to reach the same findings." *City of Cedar Rapids v. Mun. Fire & Police Ret. Sys.*, 526 N.W.2d 284, 287 (Iowa 1995) (quoting *Norland v. Iowa Dept. of Job Serv.*, 412 N.W.2d 904, 913 (Iowa 1987)). Thus, "if the district court's findings of fact leave the reasonableness of the board's action open to a fair difference of opinion, the court may not substitute its decision for that of the board." *Id.* (emphasis added). Stated another way, if one of the grounds of illegality is arbitrariness or unreasonableness based on the action of the inferior tribunal, and "on the facts the reasonableness of the board's action is open to fair differences of opinion, there is, as to that, no illegality." *Baker v. Bd. of Adjustment*, 671 N.W.2d 405, 413 (Iowa 2003).

Courts have further held that a "board may rely on commonsense inferences

drawn from evidence related to other issues, such as use and enjoyment, crime, safety, welfare, and aesthetics, to make a judgment . . . ." *A-Line Iron & Metals, Inc. v. Cedar Rapid Bd. of Adjustment*, 791 N.W.2d 710, at *5 (Iowa App. 2010) (quoting *Bontrager Auto*, 748 N.W.2d at 496). Decisions by boards of adjustment "enjoy a strong presumption of validity." *Leddy v. Bd. of Adjustment, City of Iowa City, Iowa*, 863 N.W.2d 302, at *3 (Iowa App. 2015) (citing *Ackman v. Bd. of Adjustment*, 596 N.W.2d 96, 106) (Iowa 1999)).

Evidence is substantial or sufficient when a reasonable mind could accept it as adequate to reach the findings below. *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W.2d 844, 846 (Iowa 1989). The fact that evidence might support a contrary inference does not render the evidence "insubstantial" or "insufficient." *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). First, a court evaluating sufficiency of the evidence must view it in the light most favorable to the judgment. *Grefe v. Ross*, 231 N.W.2d 863, 865 (Iowa 1975). Second, a court evaluating sufficiency of the evidence need only consider evidence favorable to the judgment, whether or not it is contradicted. *Id.* Third, a trial court's findings of fact are binding if supported by substantial evidence. *Id.* Fourth, a finding of fact is supported by substantial evidence if the finding may reasonably be inferred from the evidence. *Id.*

The Iowa Court of Appeals explained, "[s]ubstantial evidence is not absent

simply because it is possible to draw different conclusions from the same evidence." *Riley v. Oscar Mayer Foods Corp.*, 532 N.W.2d 489, 491 (Iowa App. 1995). (citing *Kostelac v. Feldman's Inc.*, 497 N.W.2d 853, 856 (Iowa 1993)). The Court continued "[t]he focus of the judicial inquiry is whether the evidence is sufficient to support the decision made, not whether it is sufficient to support the decision not made." *Riley* at 491. (citing *Coghlan v. Quinn Wire & Iron Works*, 164 N.W.2d 848, 852 (Iowa 1969)). A reviewing court may only interfere with the lower tribunal's findings of fact if the evidence is uncontroverted and reasonable minds could not draw different inferences. *Id.* (citing *Longford v. Kellar Excavating & Grading, Inc.*, 191 N.W.2d 667, 668 (Iowa 1971).

A factual decision only constitutes a legal error when the tribunal reaches "a conclusion based on uncontroverted evidence which is contrary to the conclusion reasonable minds would reach." *Id.* However, if there is a conflict in the evidence, the reviewing court has no room to interfere. *Id.* (citing *Kostelac v. Feldman's Inc.*, 497 N.W.2d 853, 856 (Iowa 1993)).

B. Argument.

In the alternative, the Petitioner argues that even if the intensity of use restrictions apply to the property, the Petitioner's proposed modification of the structure does not actually increase the intensity of the use. (Appellant's Brief pp. 56-60). However, the District Court correctly determined that the proposed

modification increased the intensity of the nonconformity. (District Court Ruling p. 10, App. 215). Substantial evidence supports that conclusion. This Court should affirm the District Court's decision on this issue.

The record reveals that the Ames ZBA took sufficient evidence to support its conclusion. The first and most relevant evidence came from the City of Ames' Department of Planning and Housing. (Ames 1-6, App. 115-120). The Department of Planning and Housing set out its recommendations and findings in a report. (Ames 1-6, App. 115-120). The report explains that the property in question is currently zoned as Low Density Residential which permits only single family detached residential dwellings with one dwelling per lot. (Ames 1, App. 115). The report states, "[u]nder the current Zoning Ordinance, the property is determined to have a legal non-conforming use, as the apartment use was established prior to the current ordinance, and therefore must comply with the regulations of Section 29.307 of the Zoning Ordinance for any modifications to such nonconforming use." (Ames 1-2, App. 115-116). The Department's findings include:

(1) The home is currently configured as four one-bedroom apartment units, with two units occupying each of the floors in the two-story home. (Ames 2, App. 116).

(2) The proposal is to remodel the first floor of the home into one studio unit and one two-bedroom unit (by definition in the zoning ordinance the staff views the den/living room in this unit as the second bedroom).

(3) The second floor would be remodeled into a studio unit and a three bedroom unit.

(Ames 2, App. 116)

The Department then concludes, "[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." (Ames 2, App. 116).

The background further explains, "[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." (Ames 2, App. 116). The Department correctly determined that the Petitioner's proposal would result in: (1) a studio unit on the first floor; (2) a two-bedroom unit on the first floor; (3) a studio unit on the second floor; and (4) a three bedroom unit on the second floor. (Ames 2, App. 116). The Department determined that the number of units in the building would not increase, but the plan would result in a net increase of 3 bedrooms in the home. (Ames 2, App. 116).

The plans submitted to the Ames ZBA at its hearing on June 22, 2016, demonstrate that this conclusion is correct. (Ames 66-69, App. 180-183). On the first floor the plans propose placing a wall down the middle of one living room and

changing the dividing points between units 1 and 2. (Ames 66 and 67, App. 180-181). The plan documents that Unit 2 would have: (1) a living room; (2) den/living room; (3) a bedroom; and (4) open kitchen/living room. (Ames 67, App. 181). The plan would also reconfigure Unit 1 to be a studio apartment. (Ames 67, App. 181) On the second floor the plan would split one unit into two units. (Ames 68 and 69, App. 182-183). The newly created Unit 4 would be a studio apartment. (Ames 69) (the second floor plan states "Add door opening. Install door with keyed deadbolt to separate units"). According to the plan Unit 3 would consist of: (1) a smaller kitchen; (2) a living room; and (3) three bedrooms as opposed to the 2 bedrooms currently existing. (Ames 69, App. 183). The end result of the remodeling would be a house that contained either 6 or 7 bedrooms (depending upon whether the second living room is really a bedroom). The plans thus admit that there would be more people potentially living in the residence.

The City of Ames's Department of Planning and Housing (hereinafter "the Department") determined that the proposed remodel would constitute an increase in the intensity of the nonconformity. (Ames 3-5, App. 117-119). The Department's background findings explain, "[t]he single family home was converted to a four unit apartment building in 1928, as determined from a building permit record, to allow for four one-bedroom apartment units." (Ames 1, App. 115). The plans submitted to the Department by the Petitioner shows that the

Petitioner desires to separate into two units when the second floor of the building was previously a single unit. (Compare Ames 68 and 69). (Ames 69, App. 183) (the second floor plan states "Add door opening. Install door with keyed deadbolt to separate units"). The Department notes that there was a permit for four units in 1928. However, the discrepancy is not material to the decision because the Ames ZBA adopted the alternative most beneficial to the Petitioner and concluded there were four units as opposed to three units. (Ames 2, App. 116).

The District Court's reasoning in reaching its conclusion is clearly based on the increase the number of occupants as opposed an increase in the number of units. The District Court's reference to an increase from 4 to 7 occupants clearly demonstrates the District Court did not rely upon the number of units as a basis for the decision. (Order dated June 16, 2017 p. 10, App. 215). The District Court's entire discussion of its reasoning for adopting the Ames ZBA's position makes no mention of the number of units. (Order dated June 16, 2017 p. 10, App. 215). In fact the District Court specifically approved the Department's conclusion that "[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." (Order dated June 16, 2017 p. 7, App. 212). (quoting the Department). The District Court then states, "[t]he plans submitted to the Ames ZBA supported that conclusion." (Order dated June 16, 2017 p. 7, App. 212).

The District Court correctly upheld the ZBA's decision that there was an increase in the intensity of the nonconforming use. The evidence demonstrates that the application intended to increase the number of bedrooms, and therefore residents, from four to seven residents. This constitutes an increase in the intensity of the nonconforming use under any reasonable interpretation of this zoning law.

CONCLUSION

The Court should affirm the District Court in all respects.

STATEMENT ON ORAL ARGUMENT

Pursuant to I.R. App. P. 6.908, Respondent-Appellee states no oral argument is required on this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 7,225 words, excluding the parts of the

brief exempted by Iowa R. App. P. 6.903(1)(g)(9).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and they type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14.

By: /s/ Brent L. Hinders .

CERTIFICATE OF SERVICE

I, Brent L. Hinders, a member of the Bar of Iowa, hereby certify that on the 22nd day of November, 2017, I served the above Appellee's Final Brief by electronic filing thereof to the following:

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By: /s/ Brent L. Hinders

CERTIFICATE OF FILING

I, Brent L. Hinders hereby certify that I, or a person acting on my direction, did file the attached Appellee's Final Brief by electronic thereof to the Clerk of the Iowa Supreme Court at 1111 East Court Avenue, Des Moines, Iowa 50319 on this 18th day of October, 2017.

By: /s/ Brent L. Hinders .