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

AMES 2304, LLC,

Petitioner-Appellant,

vs.

CITY OF AMES, ZONING BOARD OF ADJUSTMENT,

Respondent-Appellee.

Appeal from the District Court for Story County

The Honorable Michael J. Moon

Appellant's Reply Brief

(Oral Argument Requested)

Debra Hulett, AT0003665
NYEMASTER GOODE, P.C.
700 Walnut Street, Suite 1600
Des Moines, IA 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: dlhulett@nyemaster.com

Attorneys for Petitioner-Appellant AMES 2304, LLC

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Introduction

The facts are straightforward. Applicant Ames 2304, LLC ("Applicant") requested an interior remodeling permit for a structure at 2304 Knapp Street, Ames ("2304 Knapp").[1] 2304 Knapp has a "pre-existing"[2] and legal nonconforming use as a four-unit residential apartment building.[3] Applicant seeks to alter interior walls and upgrade unit layout.[4] Applicant's proposed interior remodeling plan would maintain 2304 Knapp's nonconforming use as a four-unit residential apartment building.[5]

From the onset, this dispute has primarily turned on an issue of law, statutory interpretation regarding the Ames Municipal Zoning

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[1] JA 121-123, 176-183.

[2] The Ames Municipal Zoning Code defines pre-existing:

> "Pre-existing" means a legally established use that was a permitted use existing on a site at the time of adoption of Ordinance No. 3557, Enacting a New Chapter 29 (Zoning) in the year 2000 . . . .

Ames Mun. Code § 29.201(160.1) (JA 237).

[3] JA 115-116, 121-123, 125-128,131-133, 140-153, 168-169, 173, 176-183.

[4] JA 116, 118-119, 122-123, 125-126, 129, 140-141, 147-153, 168-169.

[5] JA 115-116, 118-119, 121-123, 125-128, 131-133, 147-153, 176-183.

Code ("Code"), that this Court reviews de novo. *See Lauridsen v. City of Okoboji Bd. of Adjustment*, 554 N.W.2d 541, 543 (Iowa 1996); *Jersild v. Sarcone*, 149 N.W.2d 179, 184 (Iowa 1967). More specifically, the parties dispute whether an "increase[] in intensity" occurred. The Code defines "intensity" in plain language, without ambiguity, to resolve this dispute. Under the Code, "intensity" is inapplicable to a residential use, such as an apartment building:

> (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). Applying the statute's plain meaning renders unnecessary an extended analysis regarding the ordinary and common meaning of "intensity."

Before the Ames Zoning Enforcement Officer, Ames ZBA, and the district court, the disputed statutory-interpretation issue pivoted on whether the Code requires or prohibits issuance of a building

permit for the proposed interior-remodeling plan.[6] Applicant interprets the Code to require issuance of the interior-remodeling permit.[7] Ames ZBA interprets the Code to prohibit issuance of the remodeling permit.[8]

Ames ZBA contends that as to statutory interpretation, Applicant only preserved error on the "argument that Zoning Board of Adjustment improperly interpreted Ames Municipal Code Section 29.307(2)(a)(ii) as permissive as opposed to mandatory."[9] Aside from that, Ames ZBA is unwilling to concede that Applicant preserved any statutory-interpretation argument.[10] Ames ZBA appears to contend that because Applicant did not cite the Ames Municipal Zoning Code's definition of "intensity" in its district court brief, the Court

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[6] *See, e.g.*, JA 11-13, 14-16, 17-34, 115-116, 118-119, 121-123, 125-128, 129-133, 139-154, 168-173, 176-179, 185-205, 206-218.
[7] *See, e.g.*, JA 11-13, 17-28,116, 118-119, 125-129, 131-133, 147-153, 168-169, 180-183.
[8] *See, e.g.*, 14-16, 115-116, 118-119, 125-127, 130-133, 141-144, 169-173, 185-206.
[9] Ames ZBA Brief 13.
[10] Ames ZBA Brief 13-14.

should strike its entire statutory-interpretation argument and excise the "intensity" definition from the Code.[11] Ames ZBA's position is absurd. And the record belies it.

The Court should apply the Code's plain language to conclude that Applicant is entitled to the interior-remodeling permit. The district court erred in annulling the writ.

I. Applicant adequately preserved error on the issues of law raised in this appeal.

Ames ZBA generally contends that Applicant only preserved error on the argument that Ames Municipal Code Section 29.307(2)(a)(ii) is permissive rather than mandatory.[12] Additionally, Ames ZBA contends that Applicant did not cite the Ames Municipal Zoning Code's definition of "intensity" in its district court brief, so this Court should "strike" Applicant's argument.[13] Aside from these general statements, Ames ZBA offers no explanation regarding how

[11] Ames ZBA Brief 24-25.
[12] Ames ZBA Brief 13-14.
[13] Ames ZBA Brief 24-25.

its error-preservation argument could be (or should be) implemented. Ames ZBA fails to identify the sentences, paragraphs, or pages of Applicant's brief that it contends contain preserved (or unpreserved) arguments. The lack of specificity in Ames ZBA's argument places Applicant at a disadvantage in responding.

For several reasons, Applicant adequately preserved the statutory-interpretation issue raised in this appeal. The Court should reject Ames ZBA's effort to evade the plain language of the Ames Municipal Zoning Code that it is duty-bound to apply.

First, Applicant adequately preserved error by arguing the same position throughout the course of this dispute. Ames ZBA contends that under Ames Municipal Code Section 29.307(2)(a), the increase in bedrooms is a prohibited "increase[] in intensity" of the pre-existing, nonconforming use. (JA 115-119, 121, 123, 126-127, 129-134, 141-144, 147-153, 169-173, 188-205). Throughout the course of this dispute, since April 2016 (when the Ames Zoning Enforcement Officer first denied Applicant's permit request), Applicant has

disagreed with that interpretation. (JA 11-13, 17-34, 116, 118-119, 121-123, 125-134, 147-153, 168-169, 176-183). The district court's rationale in annulling Applicant's writ of certiorari was consistent with the parties' arguments. The district court reasoned that "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 206-218) (emphasis added).

Applicant argued that the Code's "increase[] in intensity" language was inapplicable to the remodeling permit request, and that no "increase[] in intensity" would occur if the proposed interior remodeling is permitted. (JA 20-28). Before the district court, Applicant argued "[Applicant's] proposed interior remodeling does not increase the intensity of any nonconforming use." (JA 25). Before this Court, Applicant argues "[t]he proposed interior-remodeling plan was not an increase in 'intensity.'" (Ames 2304 Brief 42.)

This dispute turns on statutory interpretation. That's the point Applicant has repeatedly raised. Applicant preserved error on the statutory-interpretation issue presented in this appeal.

Second, under the pretense of error preservation, Ames ZBA asks the Court to sidestep the Code's plain statutory text. Ames ZBA proposes a new error-preservation rule that, if accepted, would render the statutory text defining "intensity" nonexistent. The Court should decline Ames ZBA's invitation to ignore the Code and fundamental principles applicable to statutory interpretation.

Both parties agree that a "statute or ordinance must be assessed in its entirety and not just through isolated words or phrases." *See* Ames 2304 Brief 52; Ames ZBA Brief 19 (each citing *State v. Romer*, 832 N.W.2d 169, 177 (Iowa 2013)). This is hardly a novel concept. Courts "must give effect, if possible, to every clause and word of a statute." *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 464 (Iowa 2017) (internal quotation marks omitted). *See also Miller v. Marshall Cty.*, 641 N.W.2d 742, 749 (Iowa 2002)

(declining to "concentrate on just one part of a statute, and to consequently ignore our rules of statutory interpretation").

When a term—such as intensity—is defined by statute, the statutory definition controls. "[T]he legislature may act as its own lexicographer." *The Sherwin-Williams Co. v. Iowa Dep't of Revenue*, 789 N.W.2d 417, 425 (Iowa 2010) (citations and internal quotation marks omitted). "When it does so, [courts are] are normally bound by the legislature's own definitions." *Id*. *See also Jersild v. Sarcone*, 149 N.W.2d 179, 187 (Iowa 1967) (reviewing certiorari action to correct errors at law, "[the appellate court] cannot rewrite the [ordinance] provision . . . ."); *Meduna v. City of Crescent*, 761 N.W.2d 77, 80 (Iowa Ct. App. 2008) ("*Absent a definition in the ordinance* or an established meaning in the law, words in the ordinance are given their ordinary and common meaning by considering the context within which they are used.") (emphasis added).

Although neither party cited the Code's definition of "intensity" before the district court, the Code's definition persists.

"[W]hen the district court sits to review actions of a lower tribunal in which an ordinance constituted the law of the forum, the ordinance becomes part of the law to be applied in the district court even though not introduced or established there." *Weldon v. Zoning Bd. of Des Moines*, 250 N.W.2d 396, 399 (Iowa 1977) (citing *Town of Grimes v. Bd. of Adjustment, Polk Cty.*, 243 N.W.2d 625, 627 (Iowa 1976)). "[T]he ordinance remains a matter of law in the appellate court." *Weldon*, 250 N.W.2d at 300. The unambiguous Code should be applied as written.

Third, Ames ZBA implicitly seeks to amend the Code and invites lawmaking. Both the Iowa Code and the Ames Municipal Code restrain Ames ZBA's authority to legislate. Iowa Code § 414.12(1) (2017); Ames Mun. Code § 29.1403(7)(a) (JA 372); Ames Mun. Code § 29.1508(1) (JA 388). Ames ZBA seems to treat error preservation as a tool to manipulate statutory text.

"[W]here a legislative body establishes standards in advance, the application of those standards is" a quasi-judicial act. *Depue v. City of Clinton*, 160 N.W.2d 860, 864 n.5 (Iowa 1968). The Ames City

Council enacted the Ames Municipal Zoning Code. Ames ZBA, as a quasi-judicial body, cannot amend the Code, change the Code, declare the Code unconstitutional, or grant relief contrary to the Code. *See Greenawalt v. Zoning Bd. of Adjustment*, 354 N.W.2d 537, 544 (Iowa 1984); *Johnson v. Bd. of Adjustment*, 239 N.W.2d 873, 886 (Iowa 1986).

Legislatively prescribed standards provide stability and allow property owners to know what to expect. *See Chicago R.I. & P.R. Co. v. Liddle*, 112 N.W.2d 852, 854-55 (Iowa 1962). These standards operate to constrain a board of adjustment's quasi-judicial authority. *Id*.

Yet Ames ZBA seeks an outcome that it could not accomplish on its own: to invalidate of the Code's "intensity" definition. The Court should not allow Ames ZBA to accomplish, by legal maneuvering, what it is unable to do on its own.

Fourth, Ames ZBA should not be permitted to either overlook or ignore its own ordinance, then disclaim it on appeal. Ames ZBA appears to have made an informed decision to ignore the "intensity"

definition. During the June 22, 2016 Ames ZBA hearing, one Board member asked Mark Lambert, Ames ZBA's legal counsel at the hearing, "How does the code define single family unit? Is there a definition section?" (JA 153).

This discussion is apparent from the video of the Ames ZBA hearing, (Ames ZBA Hearing DVD), which is part of the record,[14] and that Ames ZBA explains is also accessible at http://ames.granicus.com/MediaPlayer.php?view_id=1&clip_id=642 (accessed November 20, 2017). The "definitions" discussion starts at time marker 25:49 / 59:59. *Id*.

In response to the question from an Ames ZBA member, "Is there a definition section?" Attorney Lambert stated, "Yes . . . ." (JA 153). The Ames Zoning Enforcement Officer stated that she had a copy of the Code, too. (JA 153).

The video reveals that next, both Attorney Lambert and the Ames Zoning Enforcement Officer flipped through pages—

[14] JA 113.

presumably the Code in hard copy form—to find the requested definition, contained in Ames Municipal Code Section 29.201. *See* Ames ZBA DVD, also available at http://ames.granicus.com/MediaPlayer.php?view_id=1&clip_id=642 (time marker 25:49 / 59:59). As they looked for the definition of "single family dwelling," Ames Mun. Code Section 29.201(193) (JA 239), they could have mentioned, but did not mention, the definition of "intensity" contained in Section 29.201(109) (JA 234). The "single family dwelling" definition was then read aloud. *See* JA 80, Ames ZBA DVD; available at http://ames.granicus.com/MediaPlayer.php?view_id=1&clip_id=642 (starting at time marker 25:49 / 59:59).

Instead of applying the Code's "intensity" definition, Ames ZBA and the Ames Zoning Enforcement Officer relied on "general policy" and "staff interpretation." (JA 123, 126-127, 131-133, 140-144, 173). Before the district court, Ames ZBA argued that Ames Municipal Code Section 29.307(2)(a) was "ambiguous." (JA 191-192,

195). Yet Ames ZBA never disclosed, to Applicant or the district court, the material and relevant "intensity" definition contained in the same Code that Ames ZBA attempted to interpret and is duty-bound to apply. *See generally* JA 185-205.

Ames ZBA persists in arguing ambiguity. As already discussed, Section 29.307(2)(a) is not ambiguous. Under the Code, the plain meaning of "intensity," defined as "the degree or level of concentration to which land is used for commercial, industrial or any other nonresidential purpose"[15] supports only one conclusion: the provision stating "[a] nonconforming use may not be increased intensity"[16] is inapplicable to a residential use.

Fifth, error preservation rules are not dependent on the thoroughness of a party's research or citations to legal authorities in district-court briefs. *Summy v. City of Des Moines*, 708 N.W.2d 333, 338

[15] Ames Mun. Code § 29.201(109) (JA 234).
[16] Ames Mun. Code § 29.307(2)(a)(i) (JA 248).

(Iowa 2006).[17] Ames ZBA's error-preservation argument contemplates that on appeal, a party must do nothing more than regurgitate—in appellate-brief format—the party's district-court brief. In that sense, error preservation rules are not designed to be hypertechnical. *Griffin Pipe Prods. Co. v. Bd. of Review*, 789 N.W.2d 769, 772 (Iowa 2010); *see also In re Det. of Anderson*, 895 N.W.2d 131, 138 (Iowa 2017).

Ames's ZBA's proposed error-preservation rule contradicts common sense and serves no reasonable purpose. Error-preservation rules ensure that the appellate court has a fully-developed record to review. *In re Det. of Anderson*, 895 N.W.2d at 138. Here, the record is fully developed. Ames ZBA fails to identify or describe any evidentiary material it would have submitted to the district court if Applicant cited the Code's "intensity" definition before the district court. From a practical standpoint, it would have had no impact on the evidentiary record.

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[17] Overruled in part on other grounds by *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707-08 (Iowa 2016).

Error-preservation rules also even the playing field, by providing notice to the opposing party for the purpose of developing the record. *In re Det. of Anderson*, 895 N.W.2d at 138. Surely Ames ZBA is not caught off guard by a citation to a definition in the Ames Municipal Zoning Code that it is charged with applying. Ames ZBA does not argue prejudice from the alleged failure to preserve.

Perhaps Ames ZBA argues error preservation because it has nothing substantive to present. Ames ZBA didn't articulate its view regarding how the Court might apply error-preservation argument. Moreover, Ames ZBA cites no authority that recognizes either Ames ZBA or the Court may ignore the plain statutory text. The Court should apply the Code as written, reverse the district court's order annulling the writ, and direct Ames ZBA to issue the remodeling permit to Applicant.

II. The district court made an error of law because it concluded that Ames ZBA correctly interpreted the Code and did not act illegally in denying the interior remodeling permit.

Applicant will not restate the many statutory interpretation arguments presented in its opening brief. For most, Ames ZBA has not presented a substantive response.

Ames ZBA argues that the Court should interpret the Code to apply the definition of "intensity" to residential uses based on the Code's text stating that its definitions apply "[e]xcept as otherwise defined in this Ordinance or unless a context may otherwise require." Ames Mun. Code § 29.201 (JA 229). That is an accurate, but incomplete, quotation. The "Definitions" section, read in its entirety, states:

> Except as otherwise defined in this Ordinance or unless a context may otherwise require *the following words are defined for the purpose of this Ordinance as follows*: . . . .

Ames Mun. Code § 29.201(JA 229) (emphasis added).

Ames ZBA cites no statutory text that hints "intensity" is "otherwise defined" in Section 29.307(2)(a). And the context supports

Applicant's interpretation that the definition of "intensity" applies to Section 29.307(2)(a). In one subsection addressing nonconforming structures, the Ames City Council chose to expressly apply "intensity" to residential use. *See* Ames Mun. Code § 29.307(3)(c)(i) (JA 250) (cited at Ames 2304 Brief 51). If the Ames City Council had intended a "intensity" in Section 29.307(2)(a) to have a different meaning than the definition of "intensity" in Section 29.201(109), it would have said what it meant.

Additionally, Ames ZBA contends that applying the definition of "intensity" would result in "virtually no regulation" to a residential nonconforming use.[18] That's not a fair interpretation. The Code imposes restrictions on nonconforming uses, and it is the province of the Ames City Council, the legislative body charged with enacting zoning ordinances in Ames (subject to constitutional and statutory limitations), to decide how much regulation to impose. Ames ZBA may criticize those restrictions as inadequate, but it is not

[18] Ames ZBA Brief 22-23.

Ames ZBA's role to second-guess, modify, or amend those legislative decisions. *See Greenawalt*, 345 N.W.2d at 544; *Johnson*, 239 N.W.2d at 881-82; *Deardorf v. Bd. of Adjustment*, 118 N.W.2d 78, 83 (Iowa 1962).

Contrary to what Ames ZBA argues, the Ames City Council does not seem to believe that the Code contains a restriction on adding bedrooms to an apartment building. After Applicant submitted its opening brief in this appeal, the City Council approved a moratorium on certain rental permits while it considers options to amend the Ames Municipal Code regarding occupancy restrictions. In that discussion, the City Council passed a motion, with a 5-1 vote, "to direct for staff to bring back to Council over the period of the moratorium options for limiting the addition of bedrooms." Minutes of the Regular Meeting of the Ames City Council, October 24, 2017, p. 10, available at

http://www.cityofames.org/home/showdocument?id=40966

(accessed November 20, 2017). If the Ames City Council thought the Code, as currently written, already limited the addition of bedrooms

to an apartment building, then it would not have directed staff to consider "options for limiting the addition of bedrooms."

Ames ZBA takes the position that the ordinance is ambiguous, which Applicant disputes. Yet when interpreting zoning ordinances, the "rule of strict construction of restrictions on the free use of property is applicable where the wording of the restriction is ambiguous." *Johnson*, 239 N.W.2d at 881 (citing *Jersild*, 149 N.W.2d at 185; *Chicago R.I. & P.R. Co. v. Liddle*, 112 N.W.2d 852 (Iowa 1962)). If Ames ZBA is correct that the Code is treated as ambiguous, then the rule of strict construction on restraints to the free use of property should apply. *See Johnson*, 239 N.W.2d at 881; *Jersild*, 149 N.W.2d at 185. In failing to issue the remodeling permit, Ames ZBA interfered with Applicant's free use of its property at 2304 Knapp. Applicant's request to remodel 2304 Knapp's interior would continue the structure's nonconforming use as a four-unit residential apartment building.

Applicant's proposed interior-remodeling plan would convert two one-bedroom apartments to two studio apartments.[19] (JA 125, 129, 131, 140-141, 168-169, 180-183). Also, the proposed interior remodel would convert the other first floor one-bedroom apartment to a one-bedroom apartment, with an expanded kitchen and living area, and a den. (JA 180-181). The other second floor one-bedroom apartment would be converted to a three-bedroom apartment. (JA 182-183).

Ames ZBA hasn't shown an enlargement, expansion, or extension of the existing nonconforming use. Consequently, the permit must issue. Ames Mun. Code § 29.307(2)(a) (JA 248-249). The proposed remodel preserves the existing nonconforming use as a four-unit residential apartment building. In Iowa, "the body of law governing nonconforming uses of property recognizes [l]andowners

[19] The Code classifies a studio apartment as an "efficiency," which is a "dwelling unit consisting of not more than one habitable room" and a kitchen and sanitary facilities. Ames Mun. Code § 29.201(65) (JA 232). (JA 125, 129, 131, 140-141, 168-169).

are given some latitude . . . and may change the original nonconforming use if the changes are not substantial and do not impact adversely on the neighborhood." *City of Okoboji v. Okoboji Barz, Inc.*, 746 N.W.2d 56, 60 (Iowa 2008) (internal quotation marks omitted). *See also City of Jewell Junction v. Cunningham*, 439 N.W.2d 183, 186 (Iowa 1989).

Ames ZBA failed to demonstrate that under the Code, the proposed remodel would change the pre-existing, nonconforming use. As discussed, these interior remodeling changes are not substantial and would not impact adversely on the neighborhood, or the community as a whole. Some area residents expressed concerns about parking and parties in a college town, but there is no evidence connecting those general concerns to 2304 Knapp. And since the other side of Knapp Street (with condominiums, high rise apartment buildings and undergraduate housing) is zoned High Density Residential, the record does not demonstrate any specific parking concern associated with 2304 Knapp. The Code addresses parking

separately, and the configuration parking is not at issue in this appeal.

The Code's provisions on nonconforming uses are intended, in part, to "recognize the interest of property owners in continuing to use their property," and "promote reuse and rehabilitation of existing buildings." Ames Mun. Code § 29.307(1)(a)(i)-(ii) (JA 248). Ames ZBA focuses on a subpart stating one other statement of intent, to "place *reasonable* limits on the expansion of nonconformities that have the potential to adversely affect surrounding properties and the community as a whole." Ames Mun. Code § 29.307(1)(a)(iii) (JA 248) (emphasis added). Yet Ames ZBA cites no evidence that establishes the proposed remodel either (a) would have the potential to adversely affect surrounding properties, or (b) would have the potential to adversely affect the community as a whole. Furthermore, Ames ZBA also presents no evidence to demonstrates that denying this interior remodeling permit is a *reasonable* limit on the expansion of this nonconforming use, particularly given the rule of strict

construction of restrictions on the free use of property. *See Johnson*, 239 N.W.2d ta 881. In short, the record contains no evidence regarding 2304 Knapp to support Ames ZBA's argument.

2304 Knapp is across the street from a Residential High Density base zone that includes condominiums, "undergrad housing," and "high story apartment buildings." (JA 157, 160, 164-168). *See also* Ames Mun. Code § 29.704(1) (JA 305). The proposed remodel would not change the nonconforming use of 2304 Knapp to Residential High Density or any other use that is difference from its current use as a four-unit residential apartment building. Indeed, Ames ZBA has yet to identify any change in 2304 Knapp's use category that would result from the proposed remodel.

The record confirms that 2304 Knapp's apartments are not home base for the Delta-house partiers portrayed in the movie *Animal House*. To the contrary, members of the public acknowledged that "for many decades" area residents had "lived compatibly" with 2304 Knapp tenants. (JA 154-155, 159-160). One 2304 Knapp neighbor

commented that in the sixteen years that he has resided nearby, "only once" did he encounter a noise problem from 2304 Knapp tenants. (JA 159-160).

Based on the evidence in the record, the Code's other two considerations, to recognize the interest of property owners and continuing to use the property, and to promote reuse and rehabilitation of existing buildings, outweigh the factor that Ames ZBA cites. *See* Ames Mun. Code § 29.307(1)(a) (JA 248). The record demonstrates that a change in unit configuration—one that maintains the structure's existing nonconforming use as a four-unit residential apartment building—has no potential "to adversely affect surrounding properties or the community as a whole."

Ames ZBA's remaining arguments on statutory interpretation do not truly respond to Applicant's arguments. Ames ZBA devotes considerable effort reciting and criticizing the phrasing of Applicant's district court brief, even though Applicant has not included the

quoted material in its appellate brief.[20] The Court should reverse the district court and direct Ames ZBA to issue the interior remodeling building permit to Applicant.

III. The record lacks substantial evidence to support the district court's conclusion that the proposed remodeling would result in an increase in intensity under the Ames Municipal Code.

Generally, the parties do not dispute the material facts. The primary dispute in this matter has always been statutory interpretation. Before the district court, through arguments of counsel presented in its trial brief, Ames ZBA persuaded the district judge to make two factual findings: (1) 2304 Knapp is currently three apartment units and the proposed remodel would expand it to four units; and (2) 2304 Knapp's nonconforming use is "four units" with four total occupants in the entire building. (JA 212-214, 215-216, 196-198, 200-202). These factual findings are internally inconsistent. Moreover, they do not constitute substantial evidence to support Ames ZBA's decision. These two factual findings contradict the

[20] Ames ZBA Brief 26-28.

position of Ames ZBA's own Decision & Order, and they contradict the Ames Zoning Enforcement Officer. (JA 131-133). These two findings also lack evidentiary support in the record.

Ames ZBA believes the "first, and most relevant, evidence came from the City of Ames' Department of Planning and Housing." Ames ZBA Proof Brief 8. Those findings by the Ames Zoning Enforcement Officer include:

- 2304 Knapp is an existing, nonconforming residential apartment use. (JA 115-116).
- 2304 Knapp is "currently configured as *four-one bedroom apartment units, with two units occupying each of the floors in the two-story home*." (JA 116) (emphasis added).
- Applicant sought a building permit to remodel the interior space in a manner that would not increase or change the number of apartment units in the building. (JA 116).

Despite these findings, Ames ZBA persists in contending that 2304 Knapp is currently a three-unit apartment building, and the proposed interior remodeling would change it to a four-unit

apartment building.[21] As support, Ames ZBA cites a note on the second floor "after renovation" remodel plan, between Unit 3 and Unit 4, referencing "install door with keyed deadbolt to separate units." (Ames ZBA's Brief 9). (JA 182-183). Yet Applicant's first floor remodeling plan contains a similar note between Unit 2 and Unit 1: "install door with keyed deadbolt to separate units." (JA 180-181). Also, Ames ZBA overlooks the note and diagram for the second floor proposed remodel that states "add wall," showing the extension of a wall to separate the two units and convert a bedroom that was part of Unit 4 "before renovations" to Unit 3 "after renovations." (JA 182-183). The "before renovation" and "after renovation" remodeling plans contain a qualifying note: "approximation not to scale." (JA 180-183).

Ames ZBA repeatedly characterizes its determination over the alleged "discrepancy between the plans and the findings of fact" as an example of Ames ZBA's purported high-minded approach to this

[21] Ames ZBA Brief 9-10, 34-36.

dispute.[22] There was no "discrepancy" for Ames ZBA to resolve. Ames ZBA's Decision & Order states the "single family home was converted to a *4 unit* apartment building in 1928, as determined from a building permit record, to allow for *four one-bedroom apartment units*." (JA 131) (emphasis added). It concluded 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) (emphasis added). The transcript and minutes from Ames ZBA's June 22, 2016 hearing contain no discussion regarding an alleged "discrepancy between the plans and the findings of fact." (JA 125-174). The only evidence from the hearing, including the statements from the Ames Zoning Enforcement Officer, Applicant's representative, and other persons, describes the current configuration of 2304 Knapp as four one-bedroom apartment units. (JA 125-128, 131-133, 147-153, 162, 176-183).

[22] Ames ZBA Brief 9-10, 35-36.

Ames ZBA first raised this point in its district-court brief. (JA 196-197). Ames ZBA has never presented a record citation reflecting any discussion by Ames ZBA about an alleged "discrepancy" in the number of apartment units, or that Ames ZBA resolved an alleged "discrepancy" in Applicant's favor. Not only does the record contain no facts to support the district court's findings or Ames ZBA's argument on this point, but instead, the only facts in the record regarding the number of units directly contradict the district court's findings and Ames ZBA's argument. (JA 125-128, 131-133, 147-153, 162, 176-183). The unsupported assertion that the property has only three units is simply argument of counsel, which the district court adopted nearly verbatim, without relying on any record support for

it. *Compare* Order at JA 212-213[23] with Ames ZBA Trial Brief at JA 196-197.[24]

The district court's finding on this point, which contains no factual support in the record, illustrates a concern Iowa appellate courts have raised regarding a nearly "verbatim adoption" of a

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[23] The District Court's Order stated in part:

> On the second floor the plan would split one unit into two units. The newly created Unit 4 would be a studio apartment. 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.

(JA 212).

[24] Ames ZBA's District Court Trial Brief stated:

> On the second floor the plan would split one unit into two units. [internal citation omitted]. The newly created Unit 4 would be a studio apartment. [internal citation omitted]. According to the plan Unit 3 would consist of: (1) a smaller kitchen; (2) a living room; (3) three bedrooms as opposed to the 2 bedrooms currently existing.

(JA 196).

party's proposed ruling or trial brief. *See, e.g., Rubes v. Mega Life and Health Ins. Co., Inc.*, 642 N.W.2d 263, 266 (Iowa 2002).

Moreover, the district court's other unsupported factual finding, that the nonconforming use was "four units with four occupants," contradicts the first. 2304 Knapp either has three apartment units or four—but both cannot be true.

Before the district court, Ames ZBA argued that "the actual non-conformity at the time of the ordinance's adoption, 4 units with 4 occupants, is the full extent of permissible extent of the non-conformity." (JA 198). Ames ZBA argued that "petitioner could not expand the use of the building beyond 4 occupants in 4 different units because such an expansion would increase the intensity of the nonconforming use." (JA 198).

The district court adopted this interpretation nearly verbatim, even though it has no factual support in the record, or legal support in the Code. (JA 213-214). The district court stated:

> Specifically, the actual nonconformity at the time of the ordinances' adoption-for the 4 units with 4 occupants-is

> the extent of the permissible nonconformity. Under that interpretation, Petitioner could not expand the use of the building beyond the 4 occupants in 4 different units; otherwise such an expansion would increase the intensity of nonconforming use.

(JA 213-214).

Ames ZBA's Decision & Order described 2304 Knapp's use, stating: "[u]nder the current Zoning Ordinance, the property is determined to have a legal non-confirming use, as the *apartment use* was established prior to the current ordinance . . . ." (JA 131) (emphasis added). The only other evidence in the record regarding occupancy within each apartment unit is the Code itself. S*ee* Ames Mun. Code § 29.201(72)(b) (JA 232) (defining "family," in part, as three unrelated people).

At the June 2016 Ames ZBA hearing, the parties discussed the Code's "three unrelated persons" occupancy restriction, which limits the occupants of an apartment to a family or three unrelated persons. Ames Mun. Code § 13.503(5)(e). Because the remodeling plan would maintain 2304 Knapp's status as a four-unit apartment building,

under Section 13.503(5)(e), the number of potential occupants would stay the same. (JA 122-124, 128). The maximum number of unrelated occupants before remodeling was twelve persons; the maximum number of unrelated occupants after remodeling would be twelve persons. (JA 122-124, 128). As for related occupants (a "family"), the maximum occupancy is one family, which would remain the same before and after the remodel. Ames Mun. Code § 13.503(5)(e).

Although the future of the Code's occupancy restriction for unrelated persons is unclear, it is the governing law. And the remodeling plan has no impact on occupancy.[25]

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[25] The Iowa General Assembly amended Iowa law to prohibit ordinances imposing occupancy restrictions on unrelated persons in residential rental properties. Effective July 1, 2017, Iowa Code § 414.1(1)(b) states:

> A city shall not, after January 1, 2018, adopt or enforce any regulation or restriction related to the occupancy of residential rental property that is based on the existence of familial or non-familial relationships between the occupants of such rental property.

Iowa Code § 414.1(1)(b) (2017).

If, as Ames ZBA contends, the nonconforming use is four occupants in the entire building, then 2304 Knapp's nonconforming apartment building residential use would be subject to more restrictive occupancy limitations than other apartment buildings. *See* Ames Mun. Code § 13.503(5)(e) (for apartment buildings in residential low-density areas, occupancy restriction is "one family," which means persons related by blood or "three unrelated persons"). That interpretation is nonsensical, particularly since the occupancy limitation is a rental housing ordinance rather than a zoning ordinance. As Ames ZBA acknowledges, "a court should avoid interpreting a statute in a manner that produces absurd results." Ames ZBA Brief 20 (citing *The Sherwin-Williams Co.*, 789 N.W.2d at 427).

Moreover, Iowa law cannot support the district court's "4 occupant" finding. Iowa law prohibits unfair or discriminatory practices based on "familial status" in rental housing. Iowa Code

§ 216.8 (2017); Ames Mun. Code § 14.9. The Iowa Civil Rights Act defines familial status:

> (9) a. "Familial status" means one or more individuals under the age of 18 domiciled with one of the following:
>
> > (1) A parent or another person having legal custody of the individual or individuals.
> >
> > (2) The designee of the parent or the other person having custody of the individual or individuals, with the written permission of the parent or other person.
> >
> > (3) A person who is pregnant or is in the process of securing legal custody of the individual or individuals.
>
> b. "Familial status" also means a person who is pregnant or who is in in the process of securing legal custody of an individual who is not obtained the age of 18 years.

Iowa Code § 216.2(9) (2017). The Ames Municipal Code contains a nearly identical definition regarding "familial status." Ames Mun. Code § 14.2(9).

Applicant complies with the Iowa Civil Rights Act and the Ames Municipal Code. But if Ames ZBA and the district court were correct and the "extent of the permissible nonconformity" is "4 units with 4 occupants," Applicant would be in an untenable position. In

Ames ZBA's view, the Code would prohibit Applicant from renting an apartment unit to a "family," meaning people related by blood, marriage, adoption, guardianship, or other duly-authorized custodial relationship. This Court should not accept Ames ZBA's or the district court's absurd interpretation.

Ames ZBA's and the district court's decision that the proposed interior remodeling is an enlargement of the nonconforming use that would result in an increase in intensity is not supported by substantial evidence. The district court erred in annulling the writ.

Conclusion

Petitioner-Appellant Ames 2304, LLC, respectfully requests that the Court reverse the judgment of the district court, 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.

/s/ Debra Hulett, AT0003665
NYEMASTER GOODE, P.C.
700 Walnut Street, Suite 1600
Des Moines, IA 50309

Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: dlhulett@nyemaster.com

ATTORNEYS FOR PETITIONER-
APPELLANT AMES 2304, LLC

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December 1, 2017

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Hugh J. Cain
Brent L. Hinders
HOPKINS & HUEBNER, P.C.
2700 Grand Avenue, Suite 111
Des Moines, IA 50312
Telephone: 515-244-0111
Facsimile: 515-244-8935
hcain@hhlawpc.com
bhinders@hhlawpc.com
ATTORNEYS FOR RESPONDENT-APPELLEE

/s/ Debra Hulett