

IN THE SUPREME COURT OF IOWA

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Supreme Court No. 16-0988  
Johnson County No. CVCV076128

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TSB Holdings, L.L.C. and  
911 N. Governor, L.L.C.  
Plaintiffs-Appellants,

vs.

BOARD OF ADJUSTMENT FOR THE CITY OF IOWA CITY,  
Defendant-Appellee.

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APPEAL FROM THE DISTRICT COURT OF JOHNSON COUNTY  
HONORABLE CHAD KEPROS

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APPELLANTS' FINAL BRIEF

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911 N. GOVERNOR, L.L.C.

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## **ROUTING STATEMENT**

This case presents substantial constitutional questions regarding the validity of a statute, ordinance, and court or administrative rule and therefore the Supreme Court retention of the case is appropriate. Iowa R. App. P. 6.1101(2)(a).

## **STATEMENT OF THE CASE**

This appeal stems from the Iowa Supreme Court's ruling in Kempf v. City of Iowa City, 402 N.W.2d 393 (Iowa 1987). In Kempf, the plaintiff property owners successfully challenged the downzoning of their property ("the Property") by the City of Iowa City ("the City") and won the right to construct apartment buildings "as shown by the record in this case..." Id. at 401. Both the Iowa Supreme Court and the trial court on remand enjoined the City from interfering with the construction of apartment buildings thereon. Kempf, 402 N.W.2d at 401; App. pp. 213-215 ("Remand Order"). The current dispute centers around Appellants' TSB Holdings, LLC and 911 N. Governor, LLC's (collectively "TSB") attempt to construct the apartment buildings it believes are permitted by Kempf and the order on remand.

In 2013 TSB, as owner of the Property, sought to construct apartment buildings thereon. In response the City again downzoned the Property to

prevent their construction. App. pp. 203-204 (2013 downzoning ordinance).<sup>1</sup> Based on the zoning, a city official denied TSB's site plan to construct apartments on the Property. App. pp. 202, 206 (denial letters). TSB appealed the denial of its site plan to the City's Board of Adjustment ("BOA"), the Appellee herein. App. p. 209. The BOA affirmed the denial of TSB's site plan based solely on the zoning of the Property. App. pp. 392-394 (BOA ruling). TSB filed a Petition for Writ of Certiorari on January 9, 2014 to challenge the BOA's denial of its site plan. App. pp. 1-2. TSB amended its Petition to seek declaratory relief that Kempf and the Remand Order, rather than the 2013 downzoning ordinance, governed the development of the Property. App. pp. 8-11.

The case was tried to the Court on January 5 and 6, 2016. On March 28, 2016 the trial court entered its decision annulling the previously-granted Writ of Certiorari and denying TSB's request for declaratory relief. App. p. 72. TSB filed a Motion to Enlarge, Modify or Amend pursuant to Iowa R. Civ. P. 1.904(2) on April 12, 2016. App. pp. 74-77. The trial court denied TSB's Motion on May 13, 2016. App. pp. 79-82. This appeal followed.

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<sup>1</sup>TSB challenged the downzoning of the Property. The challenge is pending before the Iowa Court of Appeals in consolidated cases captioned TSB Holdings, LLC and 911 N Governor, LLC v. the City of Iowa City, Iowa, Supreme Court No. 15-1373.

## **STATEMENT OF THE FACTS**

This dispute presents questions of law based on undisputed facts resulting from the Iowa Supreme Court's decision in Kempf v. City of Iowa City, 402 N.W.2d 393 (1987). Resolution of this appeal requires the Court to construe the language in Kempf and the order on remand based on the undisputed facts. TSB will attempt to set forth the relevant facts and proceedings in chronological order.

### **A. Matters established under Kempf v. City of Iowa City, 402 N.W.2d 393 (1987) and the Order on Remand**

TSB begins with a review of Kempf v. City of Iowa City, 402 N.W.2d 393 (1987) and the undisputed events occurring prior to TSB's 2013 attempt to develop the Property. In Kempf the named plaintiffs (collectively "Kempf") purchased the Property with the intent of developing it with an office building and five apartment buildings.<sup>2</sup> Kempf, 402 N.W.2d at 396. After Kempf built the office building and one of the contemplated apartment buildings, in 1978 the City downzoned the Property to prevent further apartment building construction. Id. at 397-98. Kempf sued to invalidate the downzoning and claimed the downzoning constituted a taking. Id. at 398. After a 10-year

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<sup>2</sup> The Property is approximately 4 acres consisting of assembled lots in Iowa City bordered by Dodge Street on the west (Lots 49-51) and Governor Street on the east (Lots 8-10). App. p. 216 (diagram of the Property). TSB refers to the Property by its lot number or numbers where appropriate.

battle the Iowa Supreme Court agreed that the imposition of the 1978 downzoning ordinance constituted a taking of the undeveloped parts of the Property and invalidated its application thereto. Id. at 400. The Kempf court stated:

We agree with the trial court that application of the June 28, 1978 zoning ordinance to Kempf's underdeveloped lots and portions of lots would be unreasonable and therefore invalid . . . [W]e hold that ordinances numbered 78-2901 through 78-2906 may apply to the Kempf property, provided, however, that Kempf shall be permitted to proceed with development of apartment buildings, as shown by the record in this case, to the extent that such buildings conform to the ordinances in effect prior to the 1978 rezoning . . . The City shall be enjoined from prohibiting this use of the property by Kempf. Further development or redevelopment of the property beyond that contemplated by Kempf as shown in this record and noted in this opinion, whether carried out by Kempf or future owners, will be subject to the amended ordinances above designated . . .

Kempf, 402 N.W.2d at 401.

The Kempf court permitted construction of apartment buildings on the undeveloped 2.12 acres of the Property "as shown by the record in this case." Kempf, 402 N.W.2d at 400-01. At the time of trial Kempf had already constructed an office building (the DHS building) and the first of five contemplated apartment buildings (a 29-unit building on part of Lot 50). Id.

at 395; App. p. 461 (original Kempf trial testimony). The remaining apartment development contemplated by Kempf is reflected in Kempf, the exhibits submitted in Kempf and the trial testimony therein. During construction of the DHS building Kempf extended services to the possible locations of additional apartment buildings. Kempf, 402 N.W.2d at 396; App. p. 457 (Kempf trial testimony). The R3B zoning in effect prior to the 1978 downzoning allowed approximately 123–129 total apartments to be constructed on the Property in addition to the office building. Kempf, 402 N.W.2d at 398; App. pp. 460-461 (Kempf trial testimony). The water and sewer lines that traverse the Property were installed around the time of the construction of the DHS Building. App. p. 461. The apartment building aspect of Kempf's development remaining after trial contemplated a possible four additional apartment buildings and up to an additional 100 units. App. pp. 460-461. Kempf had not prepared a site plan nor had any engineering analysis done on the Property because the City had imposed a moratorium against granting any building permits for construction of apartments on the Property. App. pp. 470-471.

The Kempf court directed the trial court to enter an order in conformance with its (the Iowa Supreme Court's) opinion as it concerned the undeveloped 2.12 acres. Kempf, 402 N.W.2d at 401. On remand, the trial

court entered an order (the "Remand Order") which sets forth specific legally-described undeveloped parts of the Property over which the 1978 zoning ordinance was invalidated and where the construction of apartment buildings was allowed. The Remand Order states:

The owner or owners of said properties [Lots 10, 49 part of 50 and all of 51], and their successors and assigns, shall be permitted to develop these properties with multiple dwellings (apartments) in accordance with the provisions applicable to the R3B zone in effect on May 30, 1978 . . . The City is enjoined from interfering with development of those properties as herein provided . . . Once a use has been developed or established on any of the above-described properties, further development or redevelopment of that property shall be subject to the zoning ordinances in effect at the time such further development or redevelopment is undertaken.

App. p. 214.

The terms of the Remand Order warrant close examination. The Remand Order does not apply to the Property in its entirety but only to specific individual lots. The ability to construct apartment buildings on any of these specific lots is not limited to Kempf himself nor is the injunction prohibiting the City from interfering with development. There is no time limit on the injunction nor a date by when apartment buildings must be constructed. The "developed or established use"/"further development or redevelopment" restriction requires an individual lot inquiry on whether it

applies ("that property"). Most significantly, however, the language therein was considered and approved by Richard Boyle ("Boyle"), the attorney representing the City, prior to its entry. App. p. 215 (Remand Order stating "approved" by Boyle).<sup>3</sup>

In 1990 Kempf finished construction of a 12-unit apartment building at 906 North Dodge Street with parking on the west side of part of Lot 50. App. p. 424 (GIS photograph of the Property). In connection with the construction of the 12-unit building Kempf granted an easement for electrical service for the Property which crossed and crosses Lots 10, 49 and 50. App. p. 451 (easement diagram). After construction of the 12-unit building Kempf himself built no more apartment buildings on the Property. Kempf and his partners entered into a series of transactions in which the Property was sold in parts, first to Kempf-related entities and subsequently to entities owned by a local family (the Clark family) prior to the Property's consolidation with TSB. App. pp. 400-410 (assessor's records). Dodge Street Apartments, LTD, Governor-

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<sup>3</sup> TSB believes it is helpful at this point to discuss summarily some of the issues involved herein. Among other issues the trial court was tasked with construing Kempf and the Remand Orders to determine whether TSB qualifies as an "owner or owners of said properties, their successors and assigns," entitled to construct apartment buildings whether a "use" of the type contemplated by Kempf and the Remand Order had been "developed or established" on each relevant lot and whether TSB's proposed site plan constitutes "further development or redevelopment" subject to current ordinances.

Dodge Street Rentals and AB Investments, LLC are all entities in which one of the original Kempf plaintiffs, Ken Albrecht, had an ownership interest. Main Street Partners, LLC, Iowa-Illinois Square, LLC and 911 N. Governor, LLC are Clark family entities. In 2003 Dodge Street Apartments sold Lots 49–51 (the west "half" of the Property accessed from Dodge Street where the 12-unit and 29-unit apartment buildings stand) to AB Investments, LLC for \$851,812. App. p. 402. In August 2005, AB Investments, LLC sold Lots 49-51 to Main Street Partners, LLC for \$2,414,000. Id. In May 2009, Main Street Partners, LLC conveyed Lots 49–51 to a related entity, Iowa-Illinois Square, LLC for no consideration. Id. In June 2009, Iowa Illinois Square sold Lots 49-51 to TSB for \$3,400,000. Id. In September 2005, Governor-Dodge Street Rentals sold Lots 8–10 (the east "half" of the Property accessed from Governor Street) to AB Investments, LLC for \$350,000. App. p. 409. In March 2012, AB Investments, LLC sold Lots 8–10 to 911 N. Governor, LLC for \$200,000. Id. In 2013, TSB acquired 911 N. Governor, LLC, and thus Lots 8-10, for between \$220,000 and \$240,000. App. p. 142 ll. 1-4 (Jeff Clark testimony).

Other than the 12-unit building on part of Lot 50 and the previously-mentioned electrical easement from 1990, the Property is in the same condition as it was since Kempf was decided and the Remand Order entered of record. There are no buildings or other improvements on Lots 10, 49, and 51.



The water and sewer lines on the Property are in the same location as they were when originally installed in the 1970s. The office building on Lots 8 and 9 still stands. The parking surfaces on Lots 10, 49 and the east side of Lot 50 are in the same locations as they were when Kempf was decided and the Remand Order entered of record. App. pp. 411-420 (aerial photographs of the Property); App. pp. 125-128 (Musser testimony).

### **B. TSB's Attempt to Develop the Property**

TSB owned and owns the same property owned by Kempf. App. pp. 90-93 (Barkalow testimony). While TSB was preparing site plans to submit to the City to construct apartment buildings, the City was in the process of attempting to downzone the Property to stop their construction notwithstanding its knowledge of Kempf, the Remand Order and the injunctions therein prohibiting interference with development and without first moving to modify or dissolve the injunctions before taking the actions described below. App. pp. 323-324 (city attorney memo to city council discussing Kempf and advising to move forward "notwithstanding the Iowa Supreme Court's ruling"). On November 12, 2012, the City approved an amendment to its comprehensive plan in anticipation of downzoning the Property. App. p. 200 (comprehensive plan amendment). Before the downzoning, however, on January 10, 2013 TSB submitted a site plan for

construction of a 30-unit apartment building (the "30-unit plan") on Lots 49 and 50 as TSB believed was permitted by the Remand Order. App. p. 399 (diagram of 30-unit plan); App. p. 94-98 (Barkalow testimony). Julie Tallman ("Tallman"), the City's regulation specialist working in the building division, conducted the initial review of the 30-unit plan with TSB's manager, Tracy Barkalow ("Barkalow"). Id. Tallman's handwriting appears throughout on Plaintiffs' Exhibit 6. App. p. 399. Tallman wrote "R3B 1987" on the parts of the Property subject to the Remand Order. Id. Tallman made this notation after consulting with a zoning map for the Property which showed the parts of the Property subject to the Remand Order to be zoned R3B. App. pp. 109-122 (Tallman testimony). Tallman's handwriting shows that the 30-unit plan was analyzed for compliance with the ordinances in effect in 1977 as required by Kempf and the Remand Order. App. p. 399 (handwriting related to R3B bottom right). Tallman prepared a more extensive analysis of the 30-unit plan under the 1977 zoning code. App. pp. 305-307. The 30-unit plan was routed to other city departments for their review. Tallman noted various deficiencies with the plan. Id.

Based on the "R3B 1987" notations on the 30-unit plan and conversations with Tallman, on January 23, 2013, TSB submitted a revised site plan showing proposed apartment buildings on three of the lots specifically

reserved therefor under the Remand Order (Lots 10, 49 and 51). App. p. 395; App. p. 422 ("the January plan"); App. p. 97-100 (Barkalow testimony). At the time of the January plan's submission, the City had scheduled a public hearing on the proposed downzoning of the Property, which triggered a 60-day moratorium prohibiting the issuance of building permits inconsistent with the proposed rezoning. App. pp. 203-204 (2013 zoning ordinance).<sup>4</sup> Tallman denied the January plan based solely on the City's zoning of parts of the Property where TSB proposed to construct apartment buildings. App. p. 202 (Tallman February 7, 2013 denial letter). TSB submitted a plan in April 2013 ("the April plan"), which again showed proposed apartment buildings on Lots 10, 49 and 51. App. p. 397; App. p. 421. Tallman determined the April plan was not materially different from the January plan and denied the April plan based solely on the 2013 zoning of the Property. App. p. 206 (Tallman April 29, 2013 denial letter). Tallman did not conduct any analysis of the January or April plan under Kempf as she had with the 30-unit plan. Trial Tr. at 133-34 (Tallman testimony).

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<sup>4</sup>The City proposed to downzone Lots 10 and 49 to RS-12, a classification that does not permit apartment buildings. The City proposed to downzone Lot 50 except the south 186 feet thereof to RM-20, a classification whose density allowed the existing 12 and 29-unit apartment buildings but prohibited any further construction thereof. App. p. 203 (downzoning ordinance). The downzoning was effective March 28, 2013. Id.

TSB appealed the denial of its site plan to the BOA. TSB's appeal was considered at the BOA's August and September, 2013 meetings. In the BOA appeal, TSB argued that Kempf and the Remand Order governed development of the Property and that the BOA must consider these rulings as well as the City's 2013 downzoning in evaluating TSB's site plan. App. pp. 366-368 (Affeldt statements). City staff argued that the BOA did not have authority to consider Kempf as TSB had pending litigation to determine its viability. App. p. 379-380 (City Attorney Holecek statements).<sup>5</sup> City staff argued that the BOA should consider only the 2013 zoning of the Property and, based thereon, deny TSB's site plan. Id. The BOA accepted the City staff's argument, determined that it lacked authority to consider Kempf and denied TSB's site plan based solely on the applicable zoning. App. pp. 392-394 (December 12, 2013 BOA Ruling).

### **C. The Litigation Between TSB and the BOA**

TSB filed a Petition for Writ of Certiorari on January 9, 2014 challenging the BOA's denial of its site plan. TSB filed an Amended Petition on June 15, 2015 and alleged that the BOA violated Kempf and the Remand Order in denying TSB's site plan and therefore acted illegally. App. p. 8-11. TSB's

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<sup>5</sup> TSB's consolidated cases, TSB Holdings, LLC and 911 N. Governor, LLC v. the City of Iowa City, Iowa, Supreme Court No. 15-1373.

Amended Petition also sought declaratory relief concerning the BOA's denial of TSB's site plan. TSB contends that Kempf and the Remand Order, rather than the 2013 zoning of the Property, govern its development. Id. Prior to trial the BOA sought to amend its Answer to TSB's Amended Petition to raise the affirmative defenses of failure to state a claim, res judicata, laches and the statute of limitations. October 2, 2015 BOA Motion to Amend and proposed Amended Petition. App. pp. 28-30. Through these affirmative defenses the BOA sought to argue that Kempf was "stale." App. pp. 35-37. The trial court (the Honorable Mitchell J. Turner) denied the BOA's Motion to Amend to present such affirmative defenses as they were not timely raised and their consideration would require presentation of considerable extrinsic evidence. App. p. 40. Notwithstanding this ruling, on the day of the close of discovery and pleadings the BOA filed a Motion for Summary Judgment based on the alleged "staleness" of Kempf but rebranded its affirmative defenses as "abandonment, extinguishment" and "plan completion." The BOA also raised a previously un-pled public policy defense. See BOA Motion for Summary Judgment at 2, Brief in Support thereof at 9-12. Again the trial court (Judge Turner) overruled the BOA's Motion and noted that the BOA's "abandonment" or "extinguishment" arguments were, in reality, un-pled affirmative defenses which the trial court declined to consider. App. p. 47. The BOA's repeated

efforts to inject un-pled affirmative defenses related to the "staleness" of Kempf led TSB to file a Motion in Limine to exclude the presentation of any arguments or evidence related to un-pled affirmative concerning allegations that Kempf development rights were abandoned, extinguished, that a use had been developed/established or that TSB's plan constituted redevelopment. App. pp. 51-54. TSB's Motion was granted in part and denied in part. App. p. 56. The trial court granted TSB's Motion as it related to any un-pled affirmative defenses, including but not limited to laches, res judicata, failure to state a claim and statute of limitations but denied the Motion as it concerned "the principles and limitations contained in Kempf v. City of Iowa City, 402 N.W.2d 393 (Iowa 1987) and resulting order on remand, including proof of developed or established use and claims of redevelopment." App. p. 56.

This action was tried to the Court on January 5 and 6, 2016. The legal issues presented to the trial court, based on undisputed facts, required it to construe Kempf and the Remand Order to determine the following: 1) whether TSB qualified as an "owner or owners, their successors and assigns" as contemplated by the Remand Order; 2) whether the type of "use" contemplated by Kempf and the Remand Order was "developed or established" on the relevant 2.12 acres of the Property; 3) whether TSB's particular development proposal constitutes "further development or

redevelopment" subject to current zoning; 4) whether any plan to construct apartment buildings on the relevant 2.12 acres of the Property contrary to the 2013 zoning ordinance is a violation of public policy; and 5) whether the BOA acted illegally in not considering Kempf and the Remand Order in evaluating TSB's site plan.

The BOA asserted that TSB's request for declaratory relief should be denied for a variety of reasons. See BOA's February 2, 2016 Post-Trial Brief. The key premise in the BOA's argument is its belief that the right to construct additional apartment buildings under Kempf was personal to Kempf himself for reasons discussed in the Argument section herein. Since any right to construct apartments was personal to Kempf, when he ceased building apartment buildings in 1990 his development plan was "complete" such that any ability to construct additional apartments on the Property ceased to exist. As for the Remand Order's terms "owner or owners of said properties, and their successors and assigns" describing those who could construct apartment buildings, the BOA characterized their use as an unauthorized extension of Kempf. The BOA suggested that the definition of the term "successor," as used in the Remand Order, does not include TSB because of the personal nature of any development rights granted in Kempf and based on evidence extrinsic to the Remand Order's language. Concerning the "developed/established use"

and "further development/redevelopment" issues, the BOA again pointed to the personal nature of the Kempf development rights to assert that once Kempf himself quit constructing apartment buildings and granted the electrical easement in 1990, the type of "use," contemplated by Kempf and the Remand Order, was immediately established such that any physical change on any part of the Property constituted "further development or redevelopment" under the Remand Order subject to current zoning ordinances. The BOA claimed that TSB's request for declaratory relief violated public policy as an infringement on the City's ability to rezone property when circumstances justified. Finally, since Kempf and the Remand Order do not govern development of the Property in its view, the BOA asserts it acted legally in applying the 2013 downzoning ordinance when evaluating TSB's site plan.

TSB contended that the ability to construct apartments allowable under Kempf was not personal to him and that the Remand Order's use of the terms "owner or owners of said properties and their successors and assigns" was appropriate and unambiguously includes TSB. Concerning the developed or established use issue, TSB contended that the term "use" contemplates some type of land use or structure on the lots at issue as opposed to how any part of the Property is being utilized (such as for the location of an underground water, sewer or electrical line). TSB asserted since the type of use



contemplated by Kempf and the Remand Order did not currently exist on the parts of the Property where TSB proposes to construct apartment buildings, TSB believed it is had the right to erect such buildings thereon. Further, since a Kempf-contemplated use did not exist on the parts of the Property subject to the Remand Order, TSB argued that its proposed buildings did not constitute further development or redevelopment subject to the 2013 zoning ordinance. As far as the BOA's public policy argument is concerned, TSB contended that, assuming its presentation did not violate the trial court's ruling on TSB's Motion in Limine, the BOA lacked standing to raise arguments on behalf of the City, and even if the BOA had such standing TSB's request for declaratory relief did not violate any stated public policy. TSB contended that the BOA acted illegally in failing to consider Kempf and the Remand Order in evaluating TSB's site plan. See TSB's Post-Trial Brief, February 2, 2016.

On March 28, 2016 the trial court entered its ruling. App. pp. 58-73. The trial court agreed with the BOA's arguments in their entirety. The trial court construed Kempf to allow only Kempf himself to construct apartment buildings and suggested the Remand Order's use of the terms "owner or owners and their successors and assigns," to describe those who were permitted to construct apartment buildings, was inappropriate. App. p. 68. From this premise the trial court concluded that TSB was not a "successor" to

Kempf's "right" to construct apartment buildings based on evidence extrinsic to the language in the Remand Order itself and Sun Valley Iowa Lake Ass'n v. Anderson, 551 N.W.2d 621 (Iowa 1996) (contract case defining the term "successor" in the context of homeowner association covenants). App. p. 70. The trial court concluded a "use" had been established because: Kempf and his partners built an apartment building in 1989, granted an easement in 1990, and the buildings and the parking lots on the property "were used by Kempf and his partners throughout this time." Id. The trial court also found it significant that Kempf sold the property in parts (different from how Kempf held it) and that no site plans were submitted to the City for development from 1989 until 2013. Id. The trial court further concluded that TSB's proposed plan amounted to "development or redevelopment" subject to current zoning because a use had been established over the entire property and that TSB's proposal contemplated demolition of the DHS building, relocation of utilities and removal of parking surfaces that were originally installed by Kempf himself. The trial court stated "...this is a different use of the property than what Mr. Kempf had planned...," Id. The trial court concluded that to grant TSB's request for declaratory relief and allow TSB's proposed development violated public policy by indefinitely prohibiting the

City from enforcing what it believed to be valid zoning of the Property.<sup>6</sup> The trial court denied TSB's request for declaratory relief and annulled the previously-granted Writ of Certiorari. App. p. 71.

TSB filed a timely Motion to Enlarge, Amend or Modify pursuant to Iowa R. Civ. P. 1.904(2) on April 12, 2016 ("Motion to Enlarge"). App. pp. 74-78. TSB asked the trial court to elaborate on what it believed to be "Kempf's plans" and state whether its reference to "special development rights" were rights separate and distinct from ownership of the Property itself. App. pp. 74-75. TSB asked the trial court to clarify whether it relied on the passage of time (abandonment/extinguishment/laches) in violation of the trial court's ruling on TSB's Motion in Limine related to unpled affirmative defenses, as a part of its "plan completion" analysis. Id. TSB asked the trial court to state whether TSB qualified as an "assign" under the Remand Order as its ruling appeared to focus only on the term "successor." Id. TSB asked the trial court

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<sup>6</sup> The injunction prohibiting interference with development, which the trial court acknowledged had not been modified or dissolved, posed little problem for the trial court; the trial court ignored it. App. pp. 69-70 ("...It may have been prudent for the City to move to have the injunction dissolved, but no such request is before the Court at this time..." "...The considerations given to neighborhood stabilization, transportation/traffic, and commercial development for this particular area are decisions the city has the power to make, and are given a strong presumption of legality, in spite of the fact that the Johnson County District Court utilized injunctive language in its remand order regarding this property...").

to specify the "use" it concluded was developed or established on each part of the Property subject to the Remand Order and state when and how it was established. Id. TSB asked the trial court to state whether infrastructure existing on the Property prior to Kempf and the Remand Order was the "developed or established use" it concluded existed on the Property. Id. TSB asked the trial court to address its standing and Motion in Limine arguments as it concerns the BOA's public policy defense. Id. On May 13, 2016, the trial court entered its ruling on TSB's Motion to Enlarge. App. pp. 79-82. The trial court denied TSB's Motion in its entirety other than to state that it relied on the passage of time as a factor in determining that "the plan put in place by Kempf was completed." App. p. 81. TSB filed a timely Notice of Appeal. Other relevant facts will be addressed in TSB's argument.

### **SUMMARY OF ARGUMENT**

The premise of the trial court's construction of Kempf and the Remand Order is its view that the Kempf court intended to grant only Kempf himself the ability to construct apartments on the Property. The trial court's view of the personal nature of Kempf led it to question the Remand Order's existence and permeated its construction of the relevant terms thereunder. TSB asserts that the trial court's reading of Kempf is erroneous and its construction of the relevant terms of the Remand Order is erroneous as well. TSB asserts that the

trial court erred in concluding that TSB's request to develop the Property pursuant to Kempf and the Remand Order violates any public policy. TSB asserts that the BOA's refusal to apply Kempf and the Remand Order in evaluating TSB's site plan is an illegality for certiorari purposes.

TSB filed a Petition for Writ of Certiorari claiming the BOA acted illegally in denying its site plan and in failing to apply Kempf and the Remand Order when analyzing TSB's site plan. Illegality exists, for certiorari purposes, when an inferior tribunal fails to apply the appropriate law. Aladdin Inc. v. Black Hawk County, 522 N.W.2d 604, 607 (Iowa 1994). TSB also seeks declaratory relief that Kempf and the Remand Order, rather than the 2013 downzoning ordinance, govern development of the Property. TSB bears the burden to show that the Kempf rulings prevail. Owens v. Brownlee, 610 N.W.2d 860, 866 (Iowa 1994).

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED IN CONCLUDING THAT TSB WAS NOT AN OWNER, SUCCESSOR OR ASSSIGN ENTITLED TO CONSTRUCT APARTMENT BUILDINGS PURSUANT TO THE REMAND ORDER.**

A. Preservation of Error: The trial court erred in concluding that TSB did not qualify as an "owner or owners and their successors and assigns" for purposes of constructing apartment buildings as allowed by the Remand Order. The issue was raised in pretrial briefing, the evidence presented at

trial, post-trial briefing, the trial court's March 28, 2016 ruling, TSB's April 12, 2016 Motion to Enlarge, the trial court's May 12, 2016 ruling thereon, and was raised properly in TSB's Notice of Appeal and combined certificate filed herein.

B. Standard of Review: The trial court's construction of Kempf and the Remand Order, based on undisputed facts, is a legal question. The Supreme Court reviews the trial court's legal conclusions for correction of errors at law. Nevadacare, Inc. v. Dep't of Human Services, 783 N.W.2d 459, 465 (Iowa 2010). The Supreme Court may inquire into whether the district court's ultimate conclusions were materially affected by improper conclusions of law. Fausel v. JRJ Enterprises, Inc., 603 N.W.2d 612, 617 (Iowa 1999).

C. Argument: The trial court concluded TSB was not an "owner or owner of said properties, and their successors and assigns," as those terms appear in the Remand Order, for purposes of constructing apartments as permitted thereby. The premise for the trial court's conclusion, and many others related to the meaning of the terms of the Remand Order, is its view that the Kempf court intended to allow only Kempf himself to construct apartment buildings on the Property after its rendition and the Remand Order's entry. App. p. 68 ("It is this Court's belief that the ruling by the Iowa Supreme Court in Kempf was personal to Mr. Kempf..."). Since the trial court's

view of the personal nature of Kempf serves as its basis for evaluating the entirety of the Remand Order, TSB believes it is critical to address the trial court's key premise first.

The trial court, and this Court on appeal, is tasked with construing Kempf and the Remand Order to determine their meaning. Court decrees are construed and interpreted like any other written instrument. Dairyland, Inc. v. Jenison, 207 N.W.2d 753, 754 (Iowa 1973). "The determinative factor is the intention of the court as gathered from all parts of the judgment." In Re Marriage of Lawson, 409 N.W.2d 181, 182 (Iowa 1982). In construing a judgment, force and effect should be given to every word, if possible, to give the judgment as a whole a consistent, effective and reasonable meaning. Id. at 182-83 (citing Batliner v. State, 254 Iowa 561, 118 N.W.2d 552, 554 (1962)). Words are given their plain and ordinary meaning. Tom Riley Law Firm, P.C. v. Tang, 521 N.W.2d 758, 759 (Iowa 1994) (contract case).

A. The Ability to Build Apartments on the Property Under Kempf was not Personal to Kempf Himself.

The trial court construed Kempf to allow only Kempf to construct apartments on the Property because it believed the holding of Kempf was based on Kempf's personal monetary expenditures in preparing the Property for development. App. p. 68 ("...The facts in Kempf were exclusive to the

actions Mr. Kempf took on the subject property..."). The trial court believed that the purpose of Kempf was to allow Kempf "the opportunity to realize his investment-backed expectations by completing his development plan." App. p. 68 (citing Defendant's Post-trial Brief). In so concluding the trial court appeared to believe that Kempf was decided on a "vested rights" taking analysis which focuses on a developer's expenditures in preparing property for development as a basis for relief. See Kempf, 402 N.W.2d at 400 (discussing "vested rights" and Kempf's expenditures in developing the Property). The trial court also noted the Kempf court's use of the word "Kempf" in the singular when discussing the ability to build and the injunction against the City from prohibiting the apartment use granted thereunder. App. p. 68.

TSB concedes that the Kempf court used the name "Kempf" in the singular, noted Kempf's personal investment in the Property and discussed vested rights analysis. The Kempf court, however, specifically declined to base its decision on "vested rights" analysis. The Kempf court stated:

Under this record, however, we are not required to develop that [vested rights] analysis because a more limited test controls our determination. The overwhelming evidence discloses that lots in the remaining 2.12 acres of the Kempf tract cannot be improved with any development that would be economically feasible. For this reason we find that



application of the downzoning ordinance to the lots in the 2.12 acres would be unreasonable.

Kempf, 402 N.W.2d at 400. The basis of Kempf was the devaluing effect of the downzoning ordinance on the Property, not the personal expenditures of Kempf. Stated another way, the result in Kempf would have been the same regardless of any personal expenditures by Kempf. See Palazzolo v. Rhode Island, 533 U.S. 606, (2001) (discussing regulatory takings and the transfer of rights with property). Since the harm that served as the basis for Kempf was to the Property itself, the trial court's view of the basis for Kempf is incorrect as is its view that the Kempf court intended to allow only Kempf to construct apartment buildings on the relevant 2.12 acres of the Property. Had the Kempf court intended to allow only Kempf to have the ability to construct apartment buildings on the Property after its rendition, it would have used language which was not susceptible to any other interpretation.

When the Kempf court remanded the case to the trial court "for a disposition in conformance with this opinion," Kempf, 402 N.W.2d at 401, the district court on remand was tasked with determining what the Kempf court intended by the language it used:

The first task of the district court, when presented with a mandate on remand, is to determine the precise action directed to be done by the appellate court. Often, as in this case, the appellate mandate

will simply instruct the district court to proceed consistently with the appellate court decision. In such cases the district court must not read the mandate in a vacuum, but must consider the full opinion of the appellate court and the circumstances the opinion embraces. The rationale of the appellate court opinion must be examined to uncover the intent of the appellate court. The "letter and spirit" of the mandate must be observed and implemented. The critical objective of the district court is to proceed "in accordance with the mandate and the law of the case as established on appeal.

City of Okoboji v. Iowa District Court, Dickinson County, 744 N.W.2d 327 (Iowa 2008) (internal citations omitted). The circumstances under which a decree was issued are also relevant to show its meaning. US Bank Nat. Ass'n, NA v. Allen, 2003 WL 23008290 (Iowa Ct. App. 2003). 29 years ago, when the trial court on remand was directed enter an order in conformance with Kempf, it was intimately familiar with the facts, circumstances and evidence considered by the Kempf court. In 1987 district court on remand did not read Kempf to allow only Kempf to construct apartments on the Property. Equally if not more significant, however, neither did the city attorney as he considered and approved language ultimately used in the Remand Order. App. p. 215 (Remand Order approved by Boyle). The City's participation in the drafting of the language in the Remand Order is the best evidence that the Kempf court did not intend to limit the ability to construct apartments to Kempf himself.

See In Re Roberts' Estate, 257 Iowa 1, 131 N.W.2d 458, 461 (1964) (construing divorce decree and stating: "...certainly the aggrieved party could appeal or, upon a change of circumstances, ask for a modification. Defendant took no such course and it is a fair presumption the terms of this decree as rendered were satisfactory..."). If any party believed the Remand Order did not accurately represent the Kempf court's intent, which was not the case, the remedy was to appeal the Remand Order or request Certiorari relief to correct the alleged impropriety therein. See City of Okoboji, 744 N.W.2d at 330 (discussing remedies when remand orders do not implement appellate court mandate). The failure to challenge the language of the Remand Order shows the City itself believed Kempf allowed others than Kempf himself to construct apartments on the Property.

While the trial court's ruling contains a brief analysis of the terms "owner or owners, their successors and assigns" from the Remand Order, the reality is that the trial court's construction of Kempf reads the Remand Order out of existence under the guise of "plan completion." The trial court held that "Kempf fulfilled his plans and any special rights that existed under the rulings [plural] ceased before he sold the properties." App. p. 70 (citing the BOA's Post-Trial Brief). If this reading of Kempf is correct, the Remand Order is pointless, as there can never be any "owner or owners, their successors and

assigns" entitled to construct apartment buildings. This view of Kempf and the Remand Order is erroneous. See Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp., 266 N.W.2d 22, 26 (Iowa 1978) (stating that rulings, like written instruments, are interpreted such that all of its terms have meaning).

The trial court's ruling repeatedly makes reference to "plan completion" or Kempf having "completed his development plans" as a basis for denying TSB's requested relief. See App. p. 70. The "plan completion" analysis is simply another way to say that the right to build apartments on the Property was personal to Kempf himself. The passage of time, relied upon by the trial court as a basis to support its "plan completion" theory,<sup>7</sup> is contrary to Kempf's own testimony about his development plan. App. pp. 460-461 (Kempf testimony about possibly four more buildings and 100 units). The trial court's "plan completion" analysis works only if Kempf and the Remand Order are read to grant only Kempf himself the ability to construct apartments on the Property.

Although TSB believes that both Kempf and the Remand Order unambiguously apply to owners of the Property other than Kempf himself, to the extent this Court perceives any ambiguity in the intent of these rulings, see

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<sup>7</sup> TSB asserts that any no matter how phrased, any reliance on the passage of time as a basis for defeating its claims is laches or abandonment in violation of TSB's Motion in Limine.

Bowman v. Bennett, 250 N.W.2d 47, 50 (Iowa 1977) (discussing the use of extrinsic evidence to aid in interpreting a decree), this Court should consider the statements and actions of the City, an actual party to Kempf and the Remand Order, subsequent to their issuance. The City never took the position that only Kempf could construct apartments on the Property. It publically told those who asked that parts of the Property were still zoned R3B, the classification mentioned in the Remand Order that allowed construction of apartment buildings. App. p. 431 (mentioning a "pocket" of R3B zoning); App. pp. 135-136 (BOA counsel's August 16, 2012 e-mail to Barkalow) ("...Without advising you of your rights, I am attaching a map showing the City's determination of the current zoning designations [showing R3B] for the relevant properties..."). Tallman testified that the City's zoning map showed Lot 10, Lot 49, and part of Lots 50 and 51 as being zoned R3B through the time she reviewed the 30-unit plan. App. pp. 109-122 (Tallman testimony). Tallman evaluated the 30-unit plan under Kempf and the Remand Order. Id. Neither the City nor the BOA originally denied TSB's site plans based on the belief that the Kempf allowed only Kempf himself to construct apartments on the Property. The point is that the City's views about Kempf and the Remand Order applying to the Property from 1987 into 2013, as demonstrated by the City's own actions, are consistent with the view that the Kempf rulings applied

to Property generally. The City's outward manifestations in this regard negate the idea that Kempf himself made any conscious decision to take any action that would foreclose the ability to erect additional apartment buildings on the Property, as presumably he was aware of the terms of the Remand Order and the City's position on constructing additional apartment buildings discussed above.

When it concluded that any right to construct apartments on the Property was personal to Kempf, the trial court substituted its judgment for that of the district court authoring the Remand Order in 1987, counsel for Kempf, counsel for the City approving the language therein, and the City itself.

B. TSB Qualifies as an "owner or owner of said properties, their successors and assigns" Entitled to Construct Apartment Buildings on the Property.

The trial court's view of the personal nature of Kempf permeates its construction of the Remand Order. Nowhere is this more apparent than its analysis of whether TSB qualifies as an "owner or owner of said properties their successors and assigns" under the Remand Order. While not specifically addressing the terms "owner(s)" or "assigns," after analyzing the term "successor" within the framework of Sun Valley Lake Iowa Ass'n v. Anderson, 551 N.W.2d 621 (Iowa 1996), which the trial court viewed as requiring any subsequent owner to "sustain the like part or character of Mr. Kempf's

interest in the Property" to be able to construct apartments thereon, the trial court concluded that TSB did not qualify as such because: 1) Kempf fulfilled his plans, 2) an intervening purchaser, a Clark family LLC bought part of the property without the intent of ever building apartment buildings; and 3) "the property was not sold as one tract which is how Mr. Kempf purchased the property and considered his development of the property." App. p. 70. Accordingly, the trial court concluded that since TSB cannot "sustain the like part or character of Mr. Kempf's interest in the Property," it cannot be a successor to any ability to construct apartments thereon. Id.

Anderson has no application here. Anderson dealt with meaning of contractual restrictive covenants. The Anderson Court held that individual lot purchasers were not "successor developers" within the meaning of the covenants which exempted such developers from dues assessments. Anderson, 626 N.W.2d at 640. Anderson does not stand for the proposition that remote purchasers of property somehow lose the benefit of a court ruling related to the property they purchase.

If this Court is to give the terms of the Remand Order their plain and ordinary meaning, see Tang, 521 N.W.2d at 759, the trial court's interpretation of these terms cannot stand. As already discussed, the trial court's "plan completion" basis for its interpretation of the term "successor"

reads the Remand Order itself out of existence. Additionally, focusing on its analysis of a Clark family purchasing the Property without the intent to construct apartment buildings, and assuming the Remand Order's terms are sufficiently ambiguous to warrant considering extrinsic evidence as the trial court did, see Bowman, 250 N.W.2d 47, 50 (Iowa 1977), the trial court's use of the intent of intervening purchasers to define terms in the Remand Order is impossible in application. If the trial court is correct, had the Clark family bought the Property with the intent to construct apartment buildings but then decided to sell it to a party without such intent, the meaning of the term "successor" changes. The meaning of the terms of the Remand Order cannot change at some unknown point in time at the whim of a purchaser. It also makes little sense that the terms of the Remand Order, which applies to separately legally-described parts of the Property, can change because Lots 49-51 were sold separately from Lots 8-10. There is no authority cited for this novel property proposition. The trial court's analysis focuses on the Property as a whole as opposed the 2.12 acres at issue in Kempf. This view is erroneous.

TSB believes the terms "owner or owners and their successors and assigns" have commonly-understood meanings. The term "assigns" is well defined. See Reichard v. Chicago B & Q R. Co., 1 N.W.2d 721, 732 (Iowa 1942)



("The deed also uses the word 'assigns.' It is a term of well-known meaning. We may assume that the parties knew that meaning. It does not mean just a single person, but also comprehends a line or succession of persons. It is often written 'assignees.' An 'assignment' has been defined as 'a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.' (1 Bouvier's Law Dict., Rawles Third Rev., p. 260.) A frequently quoted definition of the word 'assigns' is that stated in Bailey v. DeCrespigny, 4 Court of Queens Bench, Law Reports, 178, 185, where the court said: "The word "assigns" is a term of well-known signification, *comprehending all those who take immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law...*") (emphasis in original).<sup>8</sup> TSB acknowledges that the term "successor" may vary depending on the legal context. Hawkeye Land Co. v. Iowa Utilities Board, 847 N.W.2d 199, 211 (Iowa 2014). However, as stated, the trial court's construction of the term results in the meaning changing at any particular point in time.

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<sup>8</sup> TSB believes that being an "assign" is sufficient in and of itself as the Remand Order applies to "owner or owners of said properties and their successors and assigns" and speaks in terms of ownership of properties giving rise to the right to build as opposed to requiring a conveyance of "separate development rights " to do so.

If extrinsic evidence is at all relevant, such as the possibly unknown intent of remote purchasers or the sale of the Property in parts, TSB suggests that the City's own manifestation of its understanding of the terms, as demonstrated by its words and actions, already highlighted, are far better indicators of the meaning of the terms "owner or owners, their successors or assigns" than any of the extrinsic evidence relied upon by the trial court. The trial court erred in concluding that TSB does not qualify as an owner, successor and assign under the Remand Order.

**II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE TYPE OF USE CONTEMPLATED BY KEMPF AND THE REMAND ORDER, HAD BEEN "DEVELOPED OR ESTABLISHED" ON THE RELEVANT PARTS OF THE PROPERTY.**

A. Preservation of Error: The trial court erred in concluding that type of use contemplated by Kempf and the Remand Order had been developed or established on the relevant parts of the Property. The issue was raised in pretrial briefing, TSB's Motion in Limine, the evidence presented at trial, post-trial briefing, the trial court's March 28, 2016 ruling, TSB's April 12, 2016 Motion to Amend, Enlarge or Modify, the trial court's May 12, 2016 ruling thereon, and was raised properly in TSB's Notice of Appeal and combined certificate filed herein.

B. Standard of Review: The trial court's conclusion that a use had been developed or established within the meaning of the Remand Order, based on the undisputed facts, is a legal question. The Supreme Court reviews the trial court's legal conclusions for correction of errors at law. Nevadacare, Inc. v. Dep't of Human Services, 783 N.W.2d 459, 465 (Iowa 2010).

C. Argument: Focusing on the language in the Remand Order, the trial court concluded that a use had been developed or established on the Property in its entirety. The trial court did not state the use it held was developed or established on the parts of the Property identified in the Remand Order nor when such use became developed or established. The trial court concluded a use had been developed or established because: 1) Kempf "took steps to complete his plan for a proposed building; 2) Kempf granted an electrical easement in 1990; 3) Kempf and his partners "used" the buildings and parking lots on the Property in the same manner for years; 4) Kempf sold the Property separate parts (presumably Lots 49-51 and subsequently Lots 8-10); and 5) no site plans were submitted for development between 1989 and 2013. March 28, 2016 Ruling at 13; App. p. 70.<sup>9</sup> The trial court's analysis

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<sup>9</sup> TSB asked the trial court to enlarge its March 28, 2016 Ruling to identify what use it concluded was developed or established on the relevant parts of the Property and explain when and how the use was developed or established. TSB specifically asked the trial court whether infrastructure existing on the

appeared to focus on the Property as a whole, as opposed to the parts of the Property identified in the Remand Order, and events having nothing to do with the physical characteristics of the relevant parts of the Property.

The key issue is what constitutes a "use" as contemplated by the Remand Order. If the type of "use" contemplated by the Remand Order does not exist on the relevant parts of the Property, such a use by definition cannot have been developed or established. Given the trial court's silence on the issue, TSB is left to assume that the infrastructure on the relevant parts of the Property (the water lines, sewer lines and parking surfaces existing on the Property prior to Kempf and the Remand Order, as well as the electrical easement granted in 1990) are the Kempf-contemplated uses which the trial court believes were developed or established. TSB concedes that if previously-existing infrastructure running through the Property or an electrical easement granted in 1990 on Lots 10, 49 and 50 are they types of "uses" contemplated by Kempf and the Remand Order, TSB loses.

The 10-year Kempf litigation was a zoning dispute to determine the appropriate land use for the Property, whether it be apartments as originally

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Property prior to the Remand Order's entry (existing water/sewer lines and parking surfaces). App. pp. 74-78. The trial court declined to do so. App. pp. 79-81.

zoned, or single family/duplex as rezoned in 1978. Both Kempf and the Remand Order define apartment buildings as the "use" at issue. Kempf, 402 N.W.2d at 401 ("Kempf shall be permitted to proceed with the development of apartment buildings...The City shall be enjoined from prohibiting this *use* by Kempf..." (emphasis added); App. p. 214 (Remand Order stating: "The owner or owners of said properties, and their successors and assigns, shall be permitted to develop those properties with multiple dwellings (apartments)..."). These rulings and Tallman's testimony show that the term "use" means some type of structure which can be regulated through zoning. Tallman testified that water lines, sewer lines and utility lines are all components of infrastructure existing to support improvements on property and have nothing to do with the use that is going to be on property, nor does the City have land use classifications called "sewer line, water line" or "utility easement." App. pp. 121-122 (Tallman testimony). If the intent of Kempf and the Remand Order was to allow an economically viable "use" of undeveloped parts of the Property, construing these rulings to mean that infrastructure necessary for any development constitutes a "use" renders them meaningless. Such a construction is especially meaningless under these circumstances as the storm water, storm sewer, sanitary sewer and parking surfaces on the relevant parts of the Property already existed in their current condition prior

to Kempf and the Remand Order, and were known to exist by the courts entering their respective rulings.

TSB recognizes that the electrical easement on Lots 10, 49 and 50 was granted after Kempf and the Remand Order. For the reasons previously stated, however, an electrical line is not the type of use contemplated thereby. The City is not a party to the electrical easement and such easements can be relocated with minimal, if any, input from the City. App. p. 121-122 (Tallman testimony). "The basic aim and ultimate purpose of zoning is to confine certain classes of buildings and uses to specified localities." Bd. of Sup'rs of Gordo County v. Miller, 170 N.W.2d 358, 362 (Iowa 1969). Zoning does not exist to confine water, sewer or utility lines, all of which are necessary regardless of the type of development at issue, to specified localities. The failure to submit site plans and the sale of the Property in parts are irrelevant to the "use" analysis. The trial court failed to recognize the legal distinction between a Kempf-contemplated "use" and how the Property is "used" at a specific point in time. The trial court failed to evaluate the relevant 2.12 acres set forth in Kempf and the Remand Order when concluding that the type of use contemplated thereby and been developed or established. The trial court erred in concluding that a Kempf-contemplated use had been developed or established on the relevant parts of the Property.

**III. THE TRIAL COURT ERRED IN CONCLUDING THAT THE CONSTRUCTION CONTEMPLATED BY TSB'S SITE PLAN CONSTITUTED "FURTHER DEVELOPMENT OR REDEVELOPMENT" WITHIN THE MEANING OF THE REMAND ORDER.**

A. Preservation of Error: The trial court erred in concluding that TSB'S proposed construction constituted "further development or redevelopment" within the meaning of the Remand Order and thus was required to comply with the 2013 downzoning ordinance. The issue was raised in pretrial briefing, TSB's Motion in Limine, the evidence presented at trial, post-trial briefing, the trial court's March 28, 2016 ruling, TSB's April 12, 2016 Motion to Amend, Enlarge or Modify, the trial court's May 12, 2016 ruling thereon, and was raised properly in TSB's Notice of Appeal and combined certificate filed herein.

B. Standard of Review: The trial court's conclusion that TSB's proposed construction constituted "further development or redevelopment" within the meaning of the Remand Order, based on the undisputed facts, is a legal question. The Supreme Court reviews the trial court's legal conclusions for correction of errors at law. Nevadacare, Inc. v. Dep't of Human Services, 783 N.W.2d 459, 465 (Iowa 2010).

C. Argument: The trial court concluded that TSB's proposed plan amounts to "development or redevelopment" of the Property subject to

current zoning. The trial court stated this to be the case because TSB intended to demolish the DHS building and the parking around it on Lots 9, 10, 49, and 50 as well as relocate utility lines and the electrical easement on the Property. App. p. 70. TSB filed a Motion to Enlarge and asked the trial court to explain the significance of the demolition of the DHS building as it was located on part of the Property not subject to the Remand Order. App. pp. 74-78. TSB asked the trial court to clarify whether relocation of infrastructure on the Property prior to the Remand Order's entry constituted "further development or redevelopment" as contemplated thereby. App. p. 76. The trial court declined to do so. App. p. 79-81.

The trial court's reasoning for concluding that TSB's plan constitutes further development or redevelopment is flawed for the same reason as its analysis on the "use" issue. Before reaching the "further development or redevelopment analysis, the appropriate "use" must exist. The already-existing water/sewer lines and the parking to which the trial court makes reference are not the type of land uses contemplated by Kempf and the Remand Order, especially since they predate these rulings. The electrical easement, admittedly granted after the rulings, still does not qualify as a Kempf-contemplated "use." If this infrastructure is not the type of "use"



contemplated by the rulings, the "further development or redevelopment" language does not apply.

The gist of the trial court's ruling on this issue is revealed when it states: "This [demolishing the DHS building, relocating the already-existing infrastructure and moving the electrical easement] is a different use of the property than what Mr. Kempf had planned, and constitutes further development or redevelopment." App. p. 70. The trial court saw no distinction between how property is used and what constitutes a Kempf-contemplated use. The trial court saw no need to analyze the individual parts of the Property identified in the Remand Order because it believed that changing any physical feature on any part of the Property as it existed in 1990 would be a "different use" of the property than how Kempf himself "used" it. This conclusion cannot withstand scrutiny. If true the Kempf court's mentioning of 2.12 acres is pointless. The Remand Order's identification of separate parts of the Property, for purposes of the developed/established use and further development/redevelopment analysis, is pointless. See In re Marriage of Lawson, 409 N.W.2d 181, 182 (Iowa 1982). If a change to already-existing infrastructure is further development or redevelopment (which means such infrastructure must be the developed or established use contemplated by the Kempf rulings) the Remand Order's use of such language

is pointless. Construction of any type, whether done in 1990 or 2016, involves disturbing the surface of the Property and installing additional infrastructure to support the type of development contemplated by Kempf and the Remand Order. The trial court's conclusion in this regard is erroneous and should be reversed.

**IV. THE TRIAL COURT ERRED IN CONCLUDING THAT TSB'S REQUEST FOR DECLARATORY RELIEF VIOLATES PUBLIC POLICY.**

A. Preservation of Error: The trial court erred in concluding that TSB's proposed construction violates public policy. The issue was raised in pretrial briefing, the evidence presented at trial, TSB's Motion in Limine, post-trial briefing, the trial court's March 28, 2016 ruling, TSB's April 12, 2016 Motion to Amend, Enlarge or Modify, the trial court's May 12, 2016 ruling thereon, and was raised properly in TSB's Notice of Appeal and combined certificate filed herein.

B. Standard of Review: The trial court's conclusion that TSB's proposed construction violates public policy is a legal conclusion. The Supreme Court reviews the trial court's legal conclusions for correction of errors at law. Nevadacare, Inc. v. Dep't of Human Services, 783 N.W.2d 459, 465 (Iowa 2010).

C. Argument: The trial court concluded that TSB's request for declaratory relief violated public policy by indefinitely prohibiting the City from enforcing valid zoning of the Property. App. p. 71. The trial court's conclusion was based on the City's general ability to rezone property and the testimony of Karen Howard ("Howard") about how the circumstances justified the rezoning in this case. Id. The trial court believed that restricting the City in this regard was of paramount importance, even to the point of disregarding court-ordered injunctions in both Kempf and the Remand Order. Id. The trial court did not cite any authority articulating any public policy stating that a city's zoning power justified failing to follow court rulings. See Borshel v. City of Perry, 512 N.W.2d 565, 567 (Iowa 1994) (employment case stating that for a discharge to be actionable there must be a violation of a clearly expressed public policy). Assuming the BOA's presentation of its public policy defense does not violate the trial court's ruling on TSB's Motion in Limine, the BOA bears the burden to prove a violation of public policy.<sup>10</sup> See Cogley Clinic v. Martini, 112 N.W.2d 678, 682 (Iowa 1962) (contract case

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<sup>10</sup> TSB contended, among other things, that the BOA's presentation of a public policy defense violated the trial court's ruling on TSB's Motion in Limine related to presenting unpled affirmative defenses and that the BOA lacked standing to raise a public policy, related to appropriate zoning determinations, on behalf of the City. TSB asked the trial court to address these arguments in its Motion to Enlarge. App. p. 76. The trial court declined to do so. App. pp. 79-82.

stating that the person alleging a violation of public policy bears the burden of proof).

The public policy defense should be rejected for a variety of reasons. The BOA cannot raise public policy arguments on behalf of the City because it lacks standing to do so. To have standing a party must demonstrate a specific personal or legal interest in the litigation and be injuriously affected thereby. Alons v. Iowa District Court, Woodbury County, 698 N.W.2d 858, 864 (Iowa 2005). These are separate inquiries. Id. The focus is on the party and not the claim. Id. The BOA cannot demonstrate any personal or legal interest in the outcome of the public policy claim, nor can it establish it would be injured by its denial. The Iowa Supreme Court has articulated the appropriate role for a Board of Adjustment:

Boards of zoning adjustment are quasi-judicial bodies having quasi-judicial powers, functions, and duties, essentially fact-finding and discretionary in nature ... [n]o authority would appear to be necessary to support the conclusion that in the performance of [a zoning board of adjustment] adjudicatory function, the parties whose rights are involved are entitled to the same fairness, impartiality and independence of judgment as are expected in a court of law. Although procedures and rules of evidence are less rigid in quasi-judicial bodies than in courts, there can be no difference, under our concept of justice, between the two tribunals in respect of these fundamental requirements.

Martin Marietta Materials, Inc. v. Dallas Cnty., 675 N.W.2d 544, 553 (Iowa 2004) (quotations omitted). Zoning is a legislative function and a board of adjustment has no role in determining the propriety thereof. Boomhower v. Cerro Gordo Cnty. Bd. of Adjustment, 163 N.W.2d 75, 77 (Iowa 1968) ("[A board of adjustment] is to help make workable the ordinances and not sit as a judicial body to determine the propriety of their adoption."). As an independent quasi-judicial fact-finding body without the authority to consider policy or legislative matters, the BOA does not have the requisite "personal or legal interest" in whether TSB's request for declaratory relief would or would not impede the City's ability to faithfully perform its zoning powers or otherwise interfere with the City's policy decisions, nor can the BOA demonstrate any injury resulting from an adverse ruling, as it would continue to perform its statutory duties. See Molinaro v. City of Waterloo, 2013 WL 2145983(Iowa Ct. App. 2013). The BOA has no stake in the outcome. Even Howard, a City Planner, testified that it was unusual for a Board of Adjustment to advocate public policy arguments related to zoning, which is consistent with the BOA having no standing to do so. App. p. 182 (Howard testimony). The BOA was not a party to the Kempf rulings yet it seeks to relieve the City of its burdens.

As the trial court noted the injunctions are still viable. App. p. 69 ("It may be prudent for the City to move to have the injunction dissolved, but no such request if before the Court at this time). The trial court should not have ignored the injunctions as it did. The trial court cited no authority identifying a "clearly articulate public policy" which would justify ignoring Kempf, the Remand Order and the injunctions therein. The mere passage of time does not invalidate a permanent injunction. Bear v. Iowa Dist. Court for Tama Cnty., 540 N.W.2d 439, 441 (Iowa 1995) (citations omitted). A court that rendered an injunction may modify or vacate the injunction if, over time, there has been a substantial change in circumstances in the facts or law. Id. Until stayed or set aside, an injunction must be obeyed. Id. Even erroneous, improvidently-granted or irregularly-obtained injunctions must be obeyed until modified or dissolved. See Opat v. Ludeking, 666 N.W.2d 597, 607 (Iowa 2003) (citations omitted); In re Inspection of Titan Tire, 637 N.W.2d 135, 142 (Iowa 2001) (noting that disagreeing with court order does not excuse failing to comply with it); Hatlestad v. Hardin Cnty. Dist. Court, et al., 114 N.W. 628, 630 (Iowa 1908) (stating that an injunction entered with proper jurisdiction, until set aside by motion or reversed on appeal or by other proper proceedings, must be respected).

The City has always had a remedy for the litany of issues raised by Howard. If the City believes that the ability to construct apartments or the injunction resulting from Kempf and the Remand Order are no longer appropriate based on all the reasons articulated by Howard, the City's remedy is to move to modify or dissolve the injunction. Bear, 540 N.W.2d at 441; see, e.g., Helmkamp v. Clark Ready Mix Co., 249 N.W.2d 655 (Iowa 1977) (example of a court dissolving a previously-granted injunction based on changes in circumstances). Since the City has always had this remedy, it is inappropriate, premature and inaccurate to say that TSB's request to develop the Property, as permitted by two court orders, violates any public policy. If any recognized public policy was violated, the public policy violated relates to allowing a quasi-judicial neutral body taking policy positions in violation of its mandate to remain neutral on such issues and ignoring court rulings. The public policy argument proffered by the BOA makes the Kempf rulings meaningless. Public policy dictates, and the law requires, that the City itself, the party to the Kempf rulings and the true beneficiary of their demise, must make its own public policy argument and move to dissolve the injunction against it. If a city's zoning power is given the presumption of legality suggested by the trial court "in spite of" court rulings to the contrary, App. p. 71, it is a wonder that the original Kempf case was decided the way it was. TSB asks that the Court

reverse the trial court's conclusion that TSB's request to develop the Property as set forth in its proposed site plan violates public policy.

**V. THE BOA ACTED ILLEGALLY IN DEYING TSB'S SITE PLAN WITHOUT CONSIDERING KEMPF AND THE REMAND ORDER.**

A. Preservation of Error: The trial court erred in denying TSB's annulling TSB's Petition for Writ of Certiorari. The issue was raised in pretrial briefing, the evidence presented at trial, post-trial briefing, the trial court's March 28, 2016 ruling, TSB's April 12, 2016 Motion to Amend, Enlarge or Modify, the trial court's May 12, 2016 ruling thereon, and was raised properly in TSB's Notice of Appeal and combined certificate filed herein.

B. Standard of Review: The trial court's denial of TSB's Petition for Writ of Certiorari is reviewed on errors of law. State v. Iowa Dist. Court, 801 N.W.2d 513, 517 (Iowa 2011).

C. Argument: TSB's request for Certiorari relief stands or falls with the vitality of Kempf and the Remand Order. TSB asserts that the BOA acted illegally in ignoring the mandates of Kempf and the Remand Order when evaluating TSB's site plan. The trial court erred in annulling TSB Petition for Writ of Certiorari. TSB asks this Court to define the parameters of the Kempf rulings, sustain TSB's Petition for Writ of Certiorari and modify the BOA's ruling to require it to analyze TSB's site plans under Kempf and the Remand



Order as interpreted by the Court. Iowa Code Section 414.18 ("...the Court may reverse or affirm, wholly or partly, or may modify the decision brought up for review...").

### **SUMMARY**

The trial court erred in denying TSB's request for declaratory relief and annulling the previously granted Writ of Certiorari. TSB qualifies as an owner entitled to construct apartment buildings on the Property. A Kempf-contemplated use has not been developed or established on the relevant parts of the Property. As such, TSB's plan does not constitute "further development or redevelopment" subject to current zoning. TSB's request to develop the Property as permitted by two valid court orders does not violate public policy. The BOA acted illegally in failing to consider Kempf and the Remand Order when evaluating TSB's site plan.

### **CONCLUSION**

TSB asks this Court to reverse the trial court's ruling on TSB's request for declaratory relief and declare that development of the parts of the Property identified in the Remand Order is governed by Kempf and the Remand Order. TSB asks that this Court sustain its Petition for Writ of Certiorari and reverse the BOA's denial of TSB's site plan.

**REQUEST FOR ORAL ARGUMENT**

Notice is hereby given that Appellant requests oral argument on this matter.

Respectfully submitted,

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**ATTORNEY'S COST CERTIFICATE**

I certify that the actual cost of reproducing the necessary copies of Plaintiff-Appellant's Final Brief consisting of 60 pages was in the sum of \$0.00.

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 11,566 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Font Cambria.

Dated this 27th day of February, 2017.

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**PROOF OF SERVICE AND CERTIFICATE OF FILING**

I, Charles A. Meardon, certify that on February 27th, 2017, I served this document by filing an electronic copy of this document with the Electronic Document Management System to all registered filers for this case. A review of the filers in this matter indicates that all necessary parties have been and will be served in full compliance with the provisions of the Rules of Appellate Procedure.

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