IN THE SUPREME COURT OF IOWA

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

TSB HOLDINGS, L.L.C. and
911 N. GOVERNOR, L.L.C.,
Plaintiffs-Appellants,

vs.

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

APPEAL FROM THE DISTRICT COURT OF JOHNSON COUNTY
HONORABLE JUDGES MITCHELL TURNER (MOTION TO AMEND) AND
CHAD KEPROS (FINAL RULING)

APPELLANTS' FINAL REPLY BRIEF

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ARGUMENT

The underlying facts related to TSB's appeal are not seriously disputed. Resolution of the issues presented thereby involves application of legal principles to the underlying facts related to the trial court's construction of Kempf and the Remand Order.[1] Also pending is the BOA's cross-appeal of the trial court's denial of its (the BOA's) Motion to Amend its Answer to raise various affirmative defenses which it filed five days before the deadline for the close of written discovery. TSB first addresses the BOA's cross-appeal. TSB next addresses the BOA's arguments on the merits of the trial court's ruling denying the relief sought by TSB.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE BOA'S MOTION TO AMEND

TSB agrees with the BOA that the issue of the denial of the BOA's Motion to Amend was preserved for review and that the standard of review is for clear abuse of discretion. Appellate courts find an abuse of discretion when such discretion is exercised on grounds or for such reasons clearly untenable or to an extent clearly unreasonable. Hutchinson v. Smith Labs., Inc., 392 N.W.2d 139, 141 (Iowa 1986).

[1] TSB's references to the record and parties are the same herein as used in its Appellants' Brief (e.g., "the Remand Order," "TSB," "the BOA").

The BOA sought leave to amend its answer on October 2, 2015 to raise four affirmative defenses: 1) failure to state a claim; 2) "res judicata principles;" 3) an unidentified provision of the statute of limitations under Chapter 614; and 4) laches. App. p. 30. The trial court denied the BOA's Motion for a variety of reasons, including its belief that the BOA was aware of the proposed affirmative defenses when it filed its answer to TSB's Amended Petition on July 29, 2015, the BOA's choice to wait to amend its answer until five days before the deadline for close of written discovery and the resulting prejudice to TSB arising from the possible interjection of new issues and extrinsic evidence. App. p. 40. The BOA argues on appeal that the trial court abused its discretion in denying the BOA's Motion to Amend because, according to the BOA, its Motion was timely. The BOA contends that the issues arising by virtue of the affirmative defenses were "purely legal" and that if TSB wished to discover the underlying facts related thereto and evidence in support thereof, it should have sought permission to conduct discovery. The BOA contends that "nothing would have changed had the BOA been allowed to amend its answer," at least as it concerns the affirmative defenses of laches and the statute of limitations (but apparently not res judicata or failure to state a claim), and therefore the trial court abused its discretion in denying the BOA's Motion to Amend. The BOA urges this Court

to rule that TSB's claims are barred by Iowa Code Section 614.1(6) (20-year limitation on actions based on judgments of courts of record). BOA's Brief at 33-36. The BOA urges this result even though its appeal brief is the first time it identified Section 614.1(6) as applying to TSB's claims.

TSB agrees with the general propositions cited by the BOA related to leave to amend being freely granted, etc. BOA's Brief at 34. The trial court's denial of the BOA's Motion to Amend, however, was within its discretion under this record. See Daniels v. Holtz, et. al., 794 N.W.2d 813, 817 (Iowa 2010) (stating that the denial of a Motion to Amend will be reversed only where a clear abuse of discretion is shown). The premise in the BOA's argument is that its proposed affirmative defenses are purely "legal issues." This premise is false. A statute of limitations defense may involve application of the discovery rule which, in turn, requires the examination of facts not necessarily appearing in the pleadings. See, e.g., Borchard v. Anderson, 542 N.W.2d 247, 250 (Iowa 1996) (discussing the interplay of a statute of limitations defense and the discovery rule).[2] The other affirmative defense mentioned by the BOA, laches, involves inquiries beyond the existing state of

[2] TSB disputes that Iowa Code Section 614.1(6) applies even if the BOA had been permitted to raise the issue. Section 614.1(6) applies to monetary judgments. See, e.g., State ex. rel Holleman v. Stafford, 584 N.W. 2d 242 (Iowa 1998). The BOA cites no authority for its application to court rulings such as Kempf or the Remand Order.

the pleadings and a heightened burden of proof. See Davidson v. Van Lengen, 266 N.W.2d 436, 439 (Iowa 1978) (elements of laches and burden of proof). The trial court found that these affirmative defenses required the presentation of evidence beyond the issues framed in the pleadings at the time the BOA moved to amend its answer and therefore denied the BOA's Motion to Amend. App. p. 40; See Glenn v. Carlstrom, 556 N.W.2d 800, 804 (Iowa 1996) (denying a party's Motion to Amend filed within the time frames set forth in a scheduling order where the proposed amendment altered the issues for trial).

The BOA knew or should have known of its proposed affirmative defenses by the time it filed its answer to TSB's Amended Petition (July 29, 2015). App. p. 40. For reasons known only to it, the BOA decided to wait until five days before the close of written discovery to attempt to raise the affirmative defenses at issue. App. p. 38. The BOA's proposed affirmative defenses would have changed the issues for trial and would have resulted in prejudice to TSB. The trial court was within its discretion in denying the BOA's Motion to Amend. The trial court's denial of the BOA's Motion to Amend should be affirmed.

II. THE TRIAL COURT MISCONSTRUED KEMPF AND THE REMAND ORDER

The key premise for the entirety of the trial court's ruling is that because Kempf was decided based on allowing only Kempf himself to realize his investment-backed expectations, any ability to construct additional apartment buildings on the Property was personal to Kempf. App. p. 68. The significance of this premise cannot be overstated. This premise leads the trial court to question the appropriateness of the Remand Order's use of the language related to owners or owners and their successors and assigns as being contrary to the intent of Kempf. App. p. 69. This premise also leads the trial court to consider evidence extrinsic to the language in Remand Order to conclude that TSB does not qualify as a "successor" to any ability to construct apartments on the Property. App. p. 70. TSB suggests that trial court misconstrues the basis for Kempf and that Kempf and the Remand Order can be harmonized.

A. The Kempf court did not intend to allow only Kempf himself the ability to construct apartments on the Property.

Both the trial court and the BOA believe that the Kempf court intended to allow only Kempf himself to construct additional apartment buildings on the Property because, according to the trial court and the BOA, the basis for the Kempf decision was Kempf's own personal expenditures to prepare the

Property for development (vested rights analysis), and the purpose of Kempf was to allow only Kempf to recover for the frustration of his investment-backed expectations arising by virtue of the downzoning of the Property. App. p. 68 ("...The court agrees with Defendant's statement that the purpose of the right granted to Mr. Kempf...was to allow Kempf the opportunity to realize his investment-backed expectations by completing his development plan..."). TSB suggests this reading of Kempf is flawed and the incomplete. While Kempf's personal investment was discussed in Kempf, the Court specifically declined to develop the vested rights principle as the basis for its holding. As the Kempf court stated itself, a more limited test controls; the basis of Kempf was not the vested right principle but rather the inability to improve the relevant 2.12 acres of the Property with any economically feasible development because of 1978 downzoning. Kempf, 402 N.W.2d at 400. Two of the cases cited in Kempf, Business Ventures, Inc. v. City of Iowa City, 234 N.W.2d 376 (Iowa 1975) and Petersen v. City of Decorah, 259 N.W.2d 553 (Ct. App. Iowa 1977) involved successful property owner takings-related challenges to a devaluing zoning ordinance without reliance on any development costs incurred by the property owner for the result. As in those cases, the focus in Kempf was on the harm to the property itself.

Even if Kempf's expenditures or the investment-backed expectations analysis was the basis for the Kempf holding, it does not follow that the sole purpose of Kempf was to allow only Kempf himself the ability to construct apartments, nor does it follow that because Kempf stopped building apartments in 1990 his investment-backed expectations were realized. This analysis ignores the only undisputed evidence about Kempf's investment-backed expectations which is Kempf's trial testimony. Kempf testified that he intended to construct four additional apartment buildings and up to 100 additional units. App. pp. 460-461. Based on the lack of any economically viable use of the remaining 2.12 acres, the Kempf court authorized development of the Property with apartments as shown in the uncontroverted record in the case, i.e. Kempf's testimony. Kempf, 402 N.W.2d at 401. There is no evidence to support the trial court's conclusion that Kempf's investment-backed expectations were realized by constructing only one 12-unit building just because Kempf himself declined to construct further apartment buildings. The trial court's rationale is just another way of saying that the ability to construct apartments was personal to Kempf.[3]

[3] Notwithstanding its analysis thereof, the trial court's view of the personal nature of Kempf colors its view of the Remand Order and makes it meaningless. App. p. 70, ("The Court agrees with Defendant's statement that

Kempf's personal decision to stop constructing apartment buildings must be read in context. When Kempf ceased constructing apartment buildings in 1990, both he and the City were aware that the City's zoning of the Property still permitted construction of apartments on the undeveloped parts thereof by Kempf himself or any other owner regardless of the language in Kempf or the Remand Order. The City's 2008 comprehensive plan mentions the Property's "obsolete" R3B zoning. App. p. 431. In 2012, the BOA's counsel wrote Barkalow and informed him that part of the Property was zoned R3B. App. pp. 325-326. Tallman (the City's regulation specialist) testified that the City's zoning map showed Lots 10, 49, 51 and part of 50 (described in the Remand Order) as zoned R3B. App. pp. 115-121. (Tallman testimony); The zoning was not changed to prohibit construction of apartment buildings until 2013. App. pp. 203-205, (rezoning ordinance designating parts of the Property as zoned R3B). Kempf's decision to stop building apartments himself does not mean that he realized his investment-backed expectations by building one 12-unit building; it meant he decided to sell the Property made more valuable his winning a 10-year battle with the

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'Kempf fulfilled his plans and any special development rights that existed under the rulings ceased before he sold the properties...").

City.[4] Similarly, the granting of the utility easement in 1990 to get power to the 12-unit building means nothing about Kempf's investment-backed expectations. It could be moved at any time, without interference with the City, to accommodate apartment buildings on the parts of the Property zoned therefor by the City and protected by the Remand Order. App. pp. 109-122 (Tallman testimony).

The trial court's investment-backed expectations analysis also assumes that only Kempf's investment-backed expectations are relevant. The undisputed testimony shows that Barkalow and his appraiser contacted the City prior to his 2009 purchase of Lots 49-51 to verify that additional apartments could be constructed thereon. Tr. p. 103 (Barkalow testimony); App. p. 257 (December, 2008 e-mail confirming conversation about R3B zoning of the Property). Barkalow contacted city officials, verified the ability to construct apartments on Lots 49-51 and paid $3,400,000 in reliance thereon. Barkalow's investment-backed expectations were based on Kempf, the Remand Order and the City's statements.

Finally, given the Kempf court's reliance on a lack of an economically viable use for the remaining 2.12 acres of the property, it is difficult to imagine

[4] The value of the Kempf ruling is demonstrated by the dramatic increase in the total sales price thereof over time. App. pp. 400-410 (sales price of the Property per the assessor's records).

that the Kempf court envisioned the potential windfall the BOA advocates for the City. The Kempf court contemplated four additional apartment buildings and possibly 100 units after its rendering. Id. ("Kempf shall be permitted to proceed with development of apartment buildings, as shown in the record in this case..."). Only one 12-unit building exists. Now the BOA argues that since only Kempf himself could build apartments Kempf and the Remand Order mean nothing. This leaves the majority of the 2.12 acres at issue lacking economically viable development per Kempf. Such a zoning windfall to the City is inappropriate under this record.

B. The Remand Order does not violate the intent of Kempf.

The trial court viewed the Remand Order as being at odds with Kempf. App. pp. 68-69 ("It is this Court's belief that the ruling by the Iowa Supreme Court in Kempf was personal to Mr. Kempf...The difficulty, however, lies in the fact that the Johnson County district court, on remand, added language regarding successors and assigns of the owner or owners of the properties..."). As far as the BOA is concerned the Remand Order is void for this reason. BOA Brief at 8. The trial court's belief in the personal nature of Kempf led it to consider extrinsic evidence to conclude that TSB was not a "successor," as that term is used in the Remand Order, for purposes of constructing apartment buildings on the Property. App. p. 70.

TSB concedes that Kempf contains a discussion of investment-backed expectations and Kempf's personal expenditures in preparing the Property for development although, as explained, the investment-backed expectations analysis did not serve as the basis of the Kempf ruling. TSB concedes that Kempf is mentioned in the singular when the Kempf court discusses development of apartments and the injunction. Kempf, 402 N.W.2d at 401. This does not end the analysis. Decrees are construed like any other written instrument; the determinative factor in construing a court decree is the intent of the court which is derived from all parts of the judgment. Waters v. State, 784 N.W.2d 24, 29 (Iowa 2010). Judgments should be construed consistent with the language used. Id. In the case of ambiguity, resort may be had to the pleadings or other proceedings to clarify the ambiguity. Id. The court seeks to give effect to those matters that are implied as well as express. Id. In the context of construing contracts, the practical construction placed on a contract of doubtful meaning by the parties themselves will usually be adopted by the courts. Gilbrech v. Kloberdanz, 107 N.W.2d 574, 576-77 (Iowa 1961).

The Remand Order should be read to shed light on the meaning of Kempf and must be considered in historical context. The Remand Order was issued approximately five months after Kempf. The attorney who represented the City was fully aware of the language therein upon which the trial court and

the BOA focus. App. p. 215. With this knowledge the City attorney approved its language. Id. Surely the City attorney, who fought for 10 years to stop construction of apartments on the Property, would have objected to the language of the Remand Order had he read Kempf the way the trial court and the BOA read it nearly 30 years after its entry. For nearly 26 years prior to the 2013 downzoning of the Property, every outward manifestation by the City indicated that any owner thereof, and not just Kempf himself, could construct apartments thereon. TSB's Brief at 30, 31 (discussing the City's statements regarding the zoning of the Property being R3B). See Gilbrech, 107 N.W.2d at 576-77 (discussing the relevance of the conduct of the parties in determining the meaning of a contract). When the City evaluated TSB's site plan it never claimed that TSB did not qualify as an owner, successor or assign under the Remand Order. The facts and circumstances surrounding the creation of the Remand Order and the parties' conduct thereafter for nearly 28 years shed more light on the meaning of Kempf than the selective quotation of isolated language therein. The failure to challenge the terms of the Remand Order also speaks volumes as to what the City understood Kempf to mean. See In Re Robert's Estate, 251 Iowa 1, 131 N.W.2d 458, 461 (1964). Even if the Remand Order's choice of words was inappropriate, which is not the case, it cannot be challenged 28 years later by the BOA. The parties, including TSB, relied on

how the City acted after entry of the Remand Order. It is not for the trial court to substitute its judgment about the meaning of these rulings nearly 30 years after their rendition.

III. TSB IS AN OWNER, SUCCESSOR OR ASSIGN ENTITLED TO CONSTRUCT APARTMENT BUILDINGS PURSUANT TO THE REMAND ORDER

The authority relied on by the BOA to support the notion that TSB is not a successor under the Remand Order is not applicable under these circumstances. TSB's brief addressed why it was a successor under the Remand Order and is so doing distinguished this case from the facts and circumstances which lead the Anderson Court to conclude that the appellant was not a successor.[5] Further, Kempf was not a case decided on investment-backed expectations and the BOA's focus thereon in concluding that TSB was never in the same position as Kempf himself is misplaced.

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[5] The Anderson Court found that the individual appellants asserting that they were successor developers pursuant to the covenant documents at issue were not successors because there was a separate entity which "took the place" of the developer and said finding was consistent with the development covenant documents. See Sun Valley Iowa Lake Ass'n v. Anderson, 551 N.W.2d 621, 640 (Iowa 1996) (It was Sky View, not Clinton and Sollars, that took the place of Patten as to the whole development when Patten left. And it was Sky View, not Clinton and Sollars, that "sustain[ed] the like part or character" Patten had relative to the whole development). In this case there can be no other entity or individual other than Appellants who can be argued to be the successor under the Remand Order.

The BOA's argument that a successor or assign is limited to a successive owner who took title to all parcels subject to the Remand Order at the same time, from the same seller, and with the necessary intent to construct apartment buildings, is a specious one. The Remand Order references individual parts of the Property for construction of apartments as opposed to one comprehensive tract. The individual lots did not need to be conveyed as a comprehensive tract for successor owners to construct apartment buildings pursuant to the Remand Order as a successor or assign to Kempf. The ultimate result of this suggestion is that the term "successor" can have different meanings based on the alleged intent of an intervening purchaser. TSB is not aware of any authority supporting this proposition of property law. Under this theory the meaning of the term "successor" can change at some unknown point of time. Those relying on the rulings and the City's statements, such as TSB, could never know when the meaning of the term "successor" changes. In any event an intervening purchaser's intent is irrelevant if, as here, the zoning of the property itself allowed construction of apartment buildings at the time of the purchase. The BOA's proposition of property law is untenable.

TSB's brief further noted that the trial court ignored consideration of whether TSB was an owner or assign within the meaning of the Remand

Order. See App. pp. 69-70. The BOA makes little mention of the fact that TSB is an assign under the Remand Order and appears to conflate the terms successor and assign. The only passing reference the BOA makes to address TSB's contention that it is an assign under the Remand Order is in a footnote wherein the BOA claims that TSB is not an assign because no assignment was ever produced by TSB. BOA Brief at 13 n. 3. In alleging that TSB is not an assign, the BOA appears to suggest that additional documentation beyond a deed is required for a subsequent property owner to qualify as such. The clear and unambiguous meaning of the term assign is not so limited.[6] An

[6] TSB is entitled to assert whatever development rights its predecessors would have had. See E. Cape May Assocs. v. State, New Jersey Dep't of Envtl. Prot., 693 A.2d 114, 120 (N.J. App. Div. 1997); Nollan v. California Coastal Comm'n, 483 U.S. 825, 825, (1987) (holding that the present owners of the property are the transferees of their predecessors' full rights in the property so that the owners' rights are not diminished by their having acquired it after adoption of the regulation which effects the taking).

Authorities to the contrary are differentiated from the facts and circumstances surrounding this case and are not based on a final order, or injunction which has been in place for over 28 years. See Larkin v. City of Burlington, 772 A.2d 553, 557 (2001) (Additional contract between the parties incorporated into judgment concerned the personal rights of the developer which did not run with the land and successor developer was attempting to ascribe development rights for the entire development to a parcel subdivided subset to the judgment); Farm & Home Sav. Ass'n v. Strauss, 671 S.W.2d 682, 684 (Tex. App. 1984) (Parties took care to make known that building restrictions were personal to original contracting parties by affirmatively stating that they shall not run with the land); Oquirrh Assocs. v. First Nat. Leasing Co., 888 P.2d 659,

"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;* Spencer's Case, 5 Rep. 16. (emphasis added). The meaning of assign has never been confined only to those who receive by contract. Reichard v. Chicago, B. & Q.R. Co., 1 N.W.2d 721, 733 (Iowa 1942). TSB's argument that the Remand Order applies to future land owners is further supported by the fact that Kempf and the Remand Order narrowly focused on development rights for the properties in question as opposed to litigation of a contract which contemplated a broad expanse of obligations amongst the parties. The terms successor and assign

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663 (Utah Ct. App. 1994) (Looking at the intent of the parties and focusing on contract language limiting the rights/liabilities assumed).

are meaningless under the Remand Order if the terms do not include future land owners.

Although it is unclear what the BOA's position is for why TSB is not an assign under the Remand Order, the deed transferring the property to TSB did not need to include specific language pertaining to the assignment of the Kempf "development rights" in order for TSB to qualify as an assign under the Remand Order. This position is consistent with the transfer of an established nonconforming use. See City of Clear Lake v. Kramer, 789 N.W.2d 165 (Iowa Ct. App. 2010) (A nonconforming use is not personal to the current owner or tenant, but attaches to the land itself, and is not affected by the user's title, or possessory rights in relation to the owner of the land). It is also important to remember that when all of the transfers of the Property or parts thereof occurred, the City was of the opinion that the zoning of the Property permitted construction of apartments thereon.

The trial court, after stating that the term assign comprehended all those who take remotely from or under the assignor by conveyance, then ignored the issue of whether TSB was an assign and seemed to focus solely on whether TSB was an successor to Kempf in concluding that TSB does not qualify as such. The trial court erred in failing to consider whether TSB was an assign pursuant to the remand order and despite the BOA's assertion to the

contrary, TSB was not required to show an additional assignment beyond record title. Whether as an owner, successor or assign, the clear language of the Remand Order conferred Kempf's development rights upon successive owners of the parcels.

IV THE TRIAL COURT ERRED IN CONCLUDING THAT A USE HAS BEEN DEVELOPED OR ESTABLISHED ON THE RELEVANT PARTS OF THE PROPERTY

The BOA believes there is no difference between how the relevant parts of the Property are being "used" and what constitutes a "use." TSB does not claim, as the BOA suggests, that the only "use" intended by the Remand Order was apartments. BOA Brief at 16. TSB contends that the term "use" contemplates some type of structure or economically productive activity. Had Kempf or any owner erected a structure on, for example, Lot 51, such a structure would constitute a "use." A use was developed or established on the relevant part of Lot 50 when Kempf constructed the 12-unit building.

The Kempf court found a taking of 2.12 acres of the Property because the 1978 zoning ordinance prohibited any economically feasible development thereon. Kempf, 402 N.W.2d at 400. The purpose of Kempf was to allow economically development thereon which is why it invalidated the 1978 rezoning thereof. The 2.12 acres are identified in the Remand Order as Lots 10, 49, 51 and part of Lot 50. The relevant part of Lot 50 now has

economically viable development thereon (the 12 unit building). Lots 10, 49 and 51 do not; they are in exactly the same condition they were, in terms of parking and infrastructure, as they were when the Kempf rulings came into existence, other than the electrical easement across parts of Lots 10, 49 and 50.[7] If the trial court's construction of the term "use" is correct the whole purpose of the Kempf rulings is frustrated. See Waters, 784 N.W.2d at 28 (stating that rulings are to be construed give them full effect). It is impossible to conclude that economically viable development, as contemplated by Kempf, now exists when the relevant parts of the Property are in virtually the same condition as they were in 1987. The trial court's conclusion that the type of use contemplated by the Kempf rulings has been developed or established on the relevant parts of the property should be reversed.

V. THE TRIAL COURT ERRED IN CONCLUDING THAT TSB'S PROPOSED CONSTRUCTION CONSTITUTES "FURTHER DEVELOPMENT OR REDEVELOPMENT" UNDER THE REMAND ORDER.

TSB briefly addresses the BOA's comments about whether TSB's proposed construction constitutes "further development or redevelopment" under the Remand Order. TSB never claimed that it knew its proposed site

[7] TSB previously set forth its argument about why the 1990 electrical easement is not the type of "use" contemplated by Kempf and the Remand Order.

plan complied with Kempf. TSB can say that it attempted to comply with Kempf and the Remand Order in terms of locating apartment buildings. App. 106-108 (Barkalow testimony). TSB sought guidance from the City on whether its proposed development complied with the Kempf rulings but the City summarily denied its 3-building site plan based solely on the zoning. Id. App. p. 206 (denial letter).

The BOA attempts to avoid analyzing the distinct parts of the Property subject to the Remand Order by arguing that, essentially, doing anything different from how Kempf himself "used" the Property in its entirety as of 1990 automatically constitutes redevelopment subject to current zoning. Accordingly, the BOA focuses on how TSB's site plan reflects "redevelopment of the entire area" or the Property "as a whole" to reach its conclusion that TSB proposes "redevelopment." BOA Brief at 15-17. The BOA finds significance in the undisputed fact that TSB's plan calls for the removal and relocation of parking and sewer/utility lines installed by Kempf and in doing so suggests that these pre-existing lines and parking constitute a "developed or established use," and to do anything with them therefore constitutes "redevelopment." Id. The trial agreed. App. p. 70. If true the Kempf rulings are meaningless for the reasons previously stated. The individual parts of the Property subject to the Remand Order must be evaluated thereunder, not "the

property as a whole." The trial court's decision not to respond to TSB's Motion to Enlarge makes review of its conclusions about whether TSB's proposed construction constitutes "further development or redevelopment" more difficult. App. p. 79-82. To the extent the trial court concluded that construction which results in any different "use," as defined by the trial court, requires compliance because it is "further development or redevelopment," its conclusion should be reversed.

VI. THE TRIAL COURT ERRED IN HOLDING THAT TSB'S REQUEST FOR DECLARATORY RELIEF VIOLATES PUBLIC POLICY

The trial court concluded that TSB's request for declaratory relief violates public policy by indefinitely postponing the City from enforcing a valid zoning ordinance on the Property. App. p. 74. The arguments made in the BOA's brief with respect to the public policy issue merit a response.

A. The BOA lacks standing to raise public policy arguments on behalf of the City of Iowa City or the "general public."

Citing Godfrey v. State, 752 N.W.2d 413, 418 (Iowa 2008), the BOA now argues that the standing requirement applies only to plaintiffs, and since the BOA is not a plaintiff, standing is not an issue. BOA Brief at 22 n. 7. The BOA further claims that, for standing purposes, its public policy argument is not

aimed not at the existence of Kempf and the Remand Order but rather TSB's interpretation of them. Id.[8]

The BOA's argument is without merit. The BOA's public policy argument is an affirmative defense to TSB's request for declaratory relief and the BOA carries the burden of proof. See Smith v. Smith, 646 N.W.2d 412, 415 (Iowa 2002) (defining an affirmative defense as one resting on facts not necessary to support a plaintiff's case); Berkley Intern. Co., Ltd. v. Divine, 423 N.W.2d 9, 12 (Iowa 1988) (stating that issue preclusion is an affirmative defense and the burden of proof is on the party making the assertion). Accordingly, when raising its public policy defense the BOA is no different than a plaintiff making a claim which means the BOA must have standing to do so. Godfrey, 752 N.W.2d at 418 (stating that Iowa parallels federal doctrine on standing). See U.S./Fed. Commc'ns Comm'n v. Cuevas, No. 3:99CV1261 CFD, (D. Conn. Mar. 31, 2000) ("...The defendants have the burden of proving these defenses and, as such, are in the same situation as a plaintiff making such claims in his case in chief. Accordingly, the defendants must demonstrate their standing to assert these affirmative defenses...").

The BOA has not alleged, let alone shown, that it has or will suffer any injury related to any alleged infringement on the City's ability to enforce its

[8] The BOA does not explain the legal significance of this alleged distinction.

zoning ordinance. See Alons v. Iowa District Court, Woodbury County, 698 N.W.2d 858, 864 (Iowa 2005) (stating requirements for a party to have standing).[9] If the BOA is truly an independent body as it suggests, it cannot pick sides on the validity of zoning. As far as its allegation that it represents the "general public," BOA Brief at 22 n. 7, the BOA also cites no authority for the proposition that it has standing because it represents the "general public." The BOA cannot represent the general public. The Board of Adjustment is an appointed body, not a body voted on by the "general public." Iowa Code Sections 414.7, 414.8. The trial court erred in concluding that the BOA had standing to raise the City's public policy argument.[10]

B. TSB's request for declaratory relief does not violate any clearly articulated public policy recognized under Iowa law.

The BOA argued, and the trial court agreed, that TSB's request for declaratory relief violated public policy because the City would allegedly be indefinitely prohibited from enforcing valid zoning of the Property. App. p. 71; BOA Brief at 22-29. Even assuming the BOA has standing to defend the City, this argument has many flaws.

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[9] The city attorney's office recognized the problems inherent with providing representation to the BOA while being in litigation with TSB over the Property and recused itself from representing the BOA. App. p. 195.

[10] The trial court impliedly concluded the BOA had such standing by failing to address the issue in its ruling on TSB's Motion to Enlarge.

To succeed on a public policy argument the BOA must first demonstrate the existence of a "clearly defined" public policy which has been violated. Lloyd v. Drake University, 686 N.W.2d 225, 228 (Iowa 2004) (employment case). Neither the trial court nor the BOA cite to any authority where a public policy defense applied to enforcement of court rulings as sought by TSB, or to what essentially amounts to a zoning dispute. The case cited by the BOA, Jasper v. H. Nazim, Inc., 764 N.W.2d 751 (Iowa 2009) is a wrongful discharge case. It has no application here.

The trial court, the BOA and the City appear to ignore certain undisputed facts which TSB believes are significant. TSB asks to develop the Property as permitted by two court orders (Kempf and the Remand Order). Both court orders contain injunctions prohibiting the City from interfering with the development contemplated thereby. Kempf, 402 N.W.2d at 401; App. 246 (Remand Order injunction). Notwithstanding the trial court's decision to ignore it,[11] the injunction is still of full force and effect. Apparently the BOA/City believes its zoning power prevails over court rulings.

The trial court's conclusion that somehow TSB's request permanently prohibits the City from enforcing allegedly valid zoning is erroneous. Even if

[11] App. p. 69 ("...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...")

everything Howard stated in her testimony is true,[12] the City has always had the right, if not the legal obligation, to move to modify or dissolve the injunction based on the change in circumstances Howard alleged existed.[13] Notwithstanding its knowledge of the injunction the City never did so. It is factually and legally incorrect to claim TSB's request for declaratory relief results in any impairment of the City's ability to zone until the City avails itself

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[12] TSB notes that many of the circumstances about which Howard testified were proffered as the justification for the downzoning of the Property in 1978. Kempf, 402 N.W.2d at 401 (Wolle, J. dissenting) (discussing the years of planning and goals of limiting incompatible land uses and neighborhood stabilization as justification for the 1978 rezoning of the Property). The same circumstances articulated by Howard were apparently articulated in 1978. The BOA's claims about public morals, safety and welfare are hyperbole. And the BOA's comments about "unworkable zoning situations" merely beg the question of whether the Kempf rulings or the 2013 zoning ordinance govern the development of the Property. The only real change is the City's desire to control development through its zoning code. Zoning restrictions are strictly construed to favor the free use of property. Ernst v. Johnson County, 522 N.W.2d 599, 602 (Iowa 1994).

[13] To support Howard's testimony about changing community circumstances, the BOA cites Meilak v. Town of Coeymans, 225 A.D.2d 972 (N.Y. App. Div 3rd Dep't 1996). However, when the Remand Order was drafted the City had the opportunity to protect itself from what it alleges is an indefinite prohibition on its zoning power. See Pleasant View Mobile Home Park, Inc. v. Town of Mechanic Falls, 538 A.2d 273 (Me. 1988) (owner's failure to pursue project for 13 years after initial approval was not abandonment; "...[w]e will not impose a specific time limit on the validity of the approval granted, especially when the Town did not see fit to apply such a limit when it gave its approval to the project..."). But the key difference between Pleasant View and the case cited by the BOA, Meilak v. Town of Coeymans, 225 A.D.2d 972 (N.Y. App. Div 3rd Dep't 1996), is that in the pending case there exists an injunction prohibiting interference with development that is not present in those cases.

of this process. Because TSB's request violates no recognized public policy and since the City never availed itself of a known remedy, the trial court erred in concluding that TSB's request for declaratory relief violates public policy. The trial court's conclusion in this regard should be reversed.

SUMMARY

The trial court's view of the personal nature of Kempf was incorrect. This view led the trial court to adopt a construction of the Remand Order's terms that is at odds with the plain meaning thereof. A plain reading of Kempf and the Remand Order shows that TSB qualifies thereunder to construct apartment buildings on the Property as an owner, successor or assign..

The trial court's conclusion related to developed or established uses should be reversed. The trial court inappropriately saw no distinction between how property is "used" and the type of "use" contemplated by the Kempf rulings. The type of "use" contemplated thereby has not been "developed or established." The trial court's conclusion that TSB's site plan constitutes "further development or redevelopment" should be reversed because the premise thereof is based on its "developed or established use" analysis. The trial court also inappropriately considered the Property as a whole in its "developed/established use" and "redevelopment" analysis.

The trial court's conclusions related to public policy should be reversed. The BOA does not have standing to raise the argument and even if it did the argument fails. The only violation of public policy violation was by the City when it decided to ignore the injunctions in the Kempf rulings. If the City believed these rulings to be of no force and effect because of changing conditions, the City should have moved to dissolve the applicable injunctions.

CONCLUSION

TSB asks that this Court sustain its Petition for Writ of Certiorari and hold that the BOA acted illegally in denying TSB's site plan. TSB asks that the court grant declaratory relief and state that the Kempf rulings govern the development of the Property.

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I certify that the actual cost of reproducing the necessary copies of Plaintiff-Appellant's Final Reply Brief consisting of 39 pages was in the sum of $0.00.

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I, Charles A. Meardon, certify that on February 27, 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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