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IN THE IOWA SUPREME COURT

No. 16-0988

TSB HOLDINGS, L.L.C.
and **911 N. GOVERNOR, L.L.C.**

Plaintiffs-Appellants,

v.

BOARD OF ADJUSTMENT FOR THE CITY OF IOWA CITY,

Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
THE HONORABLE CHAD KEPROS, JUDGE (FINAL RULING), AND
MITCHELL TURNER, JUDGE (MOTION TO AMEND)

DEFENDANT-APPELLEE'S FINAL BRIEF

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ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals because it requires the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

TSB Holdings, L.L.C. and 911 N. Governor, L.L.C. (hereinafter collectively "TSB" or "Barkalow") claim they have the right to develop a tract of land in Iowa City in a manner that indisputably violates Iowa City's valid zoning regulations. TSB bases its claim on its interpretation of *Kempf v. Iowa City*, 402 N.W.2d 393 (Iowa 1987) and the Iowa district court remand order that followed *Kempf*. The Iowa City Board of Adjustment ("BOA") and the district court both concluded TSB does not have the special rights they claim because (1) TSB failed to show that it has any rights under the *Kempf* orders; (2) even if it did have rights under the *Kempf* orders, TSB failed to show that its development complied with those orders; and finally, (3) TSB's attempt to develop property pursuant to a zoning designation that has been obsolete for over thirty years violates public policy.

TSB appeals from the district court's final order (Judge Chad Kepros) denying it declaratory relief and annulling its petition for a writ of certiorari. (Kepros 3-28-16 Ruling; App. pp. 58-73). The BOA cross-appeals from an interlocutory ruling of the district court (Judge Mitchell Turner) denying the

BOA's motion to amend its answer to add affirmative defenses. (Turner 10-26-15 Order; App. pp. 38-41).

STATEMENT OF THE FACTS

Tracy S. Barkalow is a local realtor and the principal owner of both TSB Holdings, L.L.C. (TSB) and 911 N. Governor, L.L.C. (Tr. Trans. p. 21, lines 16-21; App. p. 90). In the time since the *Kempf* rulings, Kempf and his partners disassembled the properties subject to the *Kempf* orders, and sold various lots separately to third-party owners, divesting themselves of any ownership in the property. (Exhs. G1, G2; App. pp. 436-447). Barkalow reassembled the properties through acquisitions made in 2009 and 2013. (Tr. Trans. p. 21, lines 16-21, p. 23, lines 4-7; App. pp. 90, 92). Barkalow came into possession of the two Dodge Street properties (locally known as 902 and 906 N. Dodge Street) in 2009 when TSB purchased them. (Tr. Trans. p. 21, lines 16-21; App. p. 90). He came into possession of the adjacent 911 N. Governor Street property, where the former Johnson County DHS Building stands, in 2013 when he became the sole member of 911 N. Governor, LLC, the company that already owned the property. (Tr. Trans. p. 23, lines 4-7; App. p. 92).

Barkalow purchased the Dodge Street properties from Main Street Partners, LLC/Iowa Illinois Square, LLC, an entity with no relation to Kempf or his

partners, which had held the properties solely as rental properties. (Exh. G1; Tr. Trans. p. 216, lines 23-25, p. 224, lines 12-12; App. pp. 436-443, 147, 151). Barkalow purchased all of the assets owned by 911 N. Governor, LLC, which had purchased the property as commercial property. (Tr. Trans. p. 225, lines 15-21; App. p. 152). No development had occurred on any of these properties since Kempf constructed the apartment building located at 906 N. Dodge Street in 1990. (Exh. G1, G2; App. pp. 436-447).

Barkalow, though, wanted to redevelop the entire tract into a new, unified apartment complex. (Exh. 1, pp. 21, 22; App. pp. 207-208). In Barkalow's words, he planned to "demo and remove all of it and redevelop the property in that area-redevelop the entire area." (Tr. Trans. p. 70, lines 1-15; App. p. 106). [1]

In January 2013, Barkalow submitted site plans for the new development to the City of Iowa City. (Exh. 1, p. 21; App. p. 207). The development consisted of three additional twenty-four unit apartment buildings and a large new surface parking lot. (Exh. 1, p. 21; App. p. 207). The site plan showed development that crossed property lines and involved all of land Barkalow had assembled as a cohesive development. (Exh. 1, p. 21; App. p. 207). The portions of the lots upon which TSB proposed new apartment buildings do not currently have *buildings* on

[1] While the two existing Dodge Street apartment buildings would remain standing under TSB's proposed development, certain site work integral to and necessary for the new apartment buildings encroaches onto the lots containing the existing apartments. (Exh. A3).

them. (Exh. 1, pp. 21-22; Exh. C (Sketch of April 2013 Site Plan by Mr. Barkalow on GIS Aerial Photo); App. pp. 207-208, 426). However, TSB's redevelopment plan required an overhaul of the existing Kempf improvements. (Exh. 1, pp. 21-22; Exh. C (Sketch of April 2013 Site Plan by Mr. Barkalow on GIS Aerial Photo); App. pp. 207-208, 426). The DHS building would be demolished for a common driveway. (Exh. 1, pp. 21-22; Exh. C (Sketch of April 2013 Site Plan by Mr. Barkalow on GIS Aerial Photo); App. pp. 207-208, 426). The Kempf-built DHS parking lot would be demolished for a new, bigger parking lot. (Exh. 1, pp. 21-22; App. pp. 207-208). An electrical easement Kempf granted to MidAmerican Energy in 1990 would be renegotiated and relocated. (Exh. A3[2]; Tr. Trans. p. 220, lines 11-15; App. pp. 421, 150). Existing storm and sanitary sewer lines would be moved. (Exh. A3; Tr. Trans. p. 218, lines 20-25; App. pp. 421, 149). (Tr. Trans. p. 219, lines 1-13). The site would be regraded and retaining walls built. (Tr. Trans. p. 173, lines 14-25, p. 174, lines 1-7; App. pp. 131-132). In short, the tract of land would be transformed from "Kempf's plans" to "Barkalow's plans".

The City building official denied Barkalow's site plans because they did not comply with the applicable zoning designations which did not allow multi-family uses. (Exh. 1, pp. 16, 20; App. pp. 202, 206). Barkalow, though, alleged he could develop the property the same way Wayne Kempf could have developed it, had

[2] Exhibit A3 is a large-format version of the April 2013 site plan found on Appendix page 421, and is available to the court in the district court record.

Kempf chosen to do so. (Exh. 1, p. 25; App. p. 211). Barkalow alleged TSB could develop the tract at "R3B" density—an obsolete Iowa City zoning designation from the 1970s that permitted very dense apartment dwellings. (Exh. 1, p. 25; App. p. 211). In 1987 the Iowa Supreme Court granted Kempf the right to finish his apartment plans pursuant to R3B zoning, which was the zoning on the tract of land when Kempf began his development. *Kempf*, 402 N.W.2d at 401. The City of Iowa City had rezoned the tract to less intense zoning designations in 1978. *Kempf*, 402 N.W.2d at 398.

Barkalow appealed the building official's denial to the Iowa City Board of Adjustment (BOA). On appeal, the BOA determined the building official acted reasonably in denying the site plans because they did not comply with the current zoning. (Exh. 1, pp. 199-200; App. pp. 393-394). The BOA further held it did not have the authority to determine "whether a court order issued in [1987] preserves the right of the property owner to develop the properties according to R3B zoning . . ." (Exh. 1, p. 200; App. p. 394).

Additional facts will be mentioned as necessary.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD TSB IS NOT A "SUCCESSOR OR ASSIGN" TO KEMPF'S DEVELOPMENT RIGHTS.

The BOA agrees with TSB that the issue of whether TSB is a successor or assign to Kempf's development rights was preserved for review and that the standard of review is for correction of errors at law. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 313 (Iowa 1998).

Under neither the supreme court's *Kempf* opinion nor the remand order does TSB qualify as Kempf's "successor or assign."

A. The Plain Language of the Iowa Supreme Court's *Kempf* Decision Limited the Development Rights It Granted to Kempf and His Partners.

The district court's conclusion that TSB is not Kempf's successor or assign is supported by the plain language of the supreme court's holding in *Kempf*, which explicitly limited the development rights it granted to Kempf himself. The court stated, in relevant part:

> [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 the 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 by 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 (emphasis added). The development rights did not attach to "the Kempf property"—in fact the supreme court distinguished between "Kempf" and "the Kempf property" by stating that Iowa City's zoning ordinance *would* apply to the property, but that Kempf could develop in contravention to them. Moreover, there is no mention of "successors or assigns" in the supreme court opinion. The closest the supreme court's opinion comes to mentioning successors or assigns is to state that further development or redevelopment beyond Kempf's plans that is carried out by "future owners" is subject to the City's current zoning regulations. *Id.* This not an extension of Kempf's development rights to future owners—it is an express limitation of such rights.

The supreme court's limitation makes sense in the context of the *Kempf* case, as it was Kempf and his partners that invested in the property in the 1970s to prepare it for development. *See Kempf*, 402 N.W.2d at 396 (cataloging Kempf's improvements on the property and stating "In all, Kempf invested a total of approximately $114,500 in land purchase price and preliminary site improvements."). Kempf acted in reliance on the City's publicized desire to have high density development in this area. *Id.* at 395-96. TSB has not made similar investments in the property to advance development, and even when Barkalow began to reassemble the properties with his first purchase in 2009, the City's

expressed comprehensive plan goal was to decrease density on these properties. (Trial Trans. p. 24, lines 23-25, p. 25, lines 1-6; Exh. D, p. 60; App. pp. 93-94, 432).

In the supreme court's factual recitation, discussion of legal principles, rationale, and holding, it focused on Kempf's investments in the property and how the city's rezoning had frustrated his investment-backed expectations. *Id.* at 400-01. *Kempf*, 402 N.W.2d at 400 ("Although a property owner does not necessarily have a remedy if the police regulation merely deprives the owner of the most beneficial use of his or her property, frustration of investment-backed expectations may amount to a taking."). The *Kempf* court therefore tailored its remedy to Kempf's situation. It was fair for the supreme court to grant Kempf special development rights given what he had put into the property. *Kempf*, 401 N.W.2d at 396. It would not have been fair for the court to insulate the Kempf property from valid zoning laws in perpetuity for reasons discussed below. This is what TSB asked the district court to do by interpreting the supreme court order as preserving a 1970s zoning designation for not only Kempf, but for future owners.

B. TSB Is Not a Successor or Assign Under the *Kempf* Remand Order, Either.

As evidenced by its appeal brief, TSB's claims rest upon its interpretation of the *Kempf* remand order, which the district court correctly recognized expanded the supreme court's *Kempf* holding. (Kepros 3/28/16 Order, p. 12; App. p. 69).

The remand order broadened the scope of Kempf's development rights—under certain conditions—to Kempf's "successors and assigns." (Exh. 1, pp. 62-63 (Remand Order); App. pp. 249-250). To the extent the remand order is in conflict with the Iowa Supreme Court's *Kempf* mandate and opinion, it is void. *City of Okoboji v. Iowa Dist. Ct.*, 744 N.W.2d 327, 331 (Iowa 2008) (sustaining a writ of certiorari where the district court failed to follow the supreme court's mandate; discussing the importance of a district court following an appellate mandate as "fundamental to the effective operation of our multi-tiered judicial system"; and stating "the district court is only vested with jurisdiction on remand 'to the extent conferred by the appellate court's opinion and mandate.'") (Quoting 5 Am. Jur. 2d Appellate Review § 784).

Even assuming the *Kempf* remand order's expansion of Kempf's development rights to "successors and assigns," is valid, TSB is neither. The *Kempf* remand order states, in pertinent part, as follows:

> The owner or owners of said properties, and their successors and assigns, shall be permitted to develop those properties with multiple dwellings (apartments) in accordance with the provisions applicable to the R3B zone in effect on May 30, 1978, prior to the rezoning of said real estate which was finalized on June 28, 1978.
>
> It is further ORDERED that the City's Large Scale Residential Development Ordinance shall not apply to development of those properties. The City is and shall be 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.

(Exh. 1, pp. 62-63 (Remand Order); App. pp. 249-250).

Being an owner in the same chain of title is not enough to make one a "successor." There is "no single definition of 'successor' which is applicable in every legal context." *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 263 n.9 (1974) (franchisor who acquired all of the assets of its franchisee was not a successor to a collective bargaining agreement entered into between the franchisee and a labor union despite language in the agreement purporting to bind the parties' successors in interest). In order to determine whether a party is a successor in interest, the court must analyze the policies of the applicable laws in light of the facts and the particular legal obligation at issue.[3] *Id.*

The Iowa Supreme Court stated as follows:

> [T]he exact meaning of the word "successor" as applied to a contract must depend largely on the kind and character of the contract, its purpose and circumstances, and the context. The term "successor" has also been defined as "one who takes the place that another has left, and sustains the like part or character." *Enchanted Estates Comm.*

[3] TSB suggests that it is Kempf's "assign" under the Remand Order, although no assignment was ever produced by plaintiffs and Barkalow testified he did not know what an assignment was. (Tr. Trans. p. 57; App. p. 103). Regardless, if TSB is equating "successors" and "assigns," they nonetheless failed to show that given the context and purpose of the *Kempf* rights, they qualify as assignees.

Assoc. v. Timberlake Improvement Dist., 832 S.W.2d 800, 802 (Tex. Ct. App. 1992).

Sun Valley Iowa Lake Ass'n v. Anderson, 551 N.W.2d 621, 640 (Iowa 1996). For example, in *Sun Valley,* a developer established covenants that exempted the developer and "any successor developer" from homeowner association levies, but the covenant did not define "successor". *Id.* The supreme court held that individuals who took title to over one-hundred undeveloped lots from an *intermediary* developer were not successors to the rights and obligations afforded to the original developer, or the intermediary "successor developer". *Id.* at 640. It ruled the individuals did not 'sustain the like part or character' the original developer had in the development, despite the fact that they intended to construct homes on the lots for sale to the public just as a developer would, and even made some improvements to the land.[4] *Id*. *See also Town of Carolina Shores v. Continental Ins. Co v. Wells Fargo Bank*, No. 7:10-CV-13-D 2010 U.S. Dist.

[4] TSB dismisses the supreme court's discussion of a "successor" in *Sun Valley Lake Ass'n v. Anderson*, 626 N.W.2d 621, 640 (Iowa 1996), alleging that the case "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." (Plaintiff's Brief, p. 15). Defendant agrees with this statement. However, *Sun Valley* does stand for the proposition that there is no universal meaning to "successor," and that whether an owner in the chain of title is also a successor to all of a prior owner's rights must be considered in light of the kind and character of those rights, the purpose and circumstances of those rights, and the context. *Id.* at 640. TSB fails to establish that it is Kempf's successor to those rights given the kind, character, purpose, and circumstances of the development rights granted to Kempf in the *Kempf* decision.

LEXIS 114017 (E.D. NC, October 26, 2010) (finding a construction loan lender who obtained title to a subdivision under development through foreclosure proceedings was not a successor in interest to the developer's bond obligations because a lender was not a developer and did not agree to act like a developer).

The kind and character of the interest created by the supreme court's *Kempf* ruling, and the remand order, was the right to complete development of planned apartment buildings at a density in contradiction with the zoning code. The purpose of this right was to allow Kempf the opportunity to realize his investment-backed expectations by completing his development plan. The court provided this right to Kempf while at the same time refusing to invalidate the City's zoning on the property, which it recognized would have been an improper assumption of legislative functions.

The circumstances and context in which TSB now desires to construct apartment buildings are vastly different that the circumstances and context in which Kempf was seeking to develop. Barkalow did not purchase the property directly from Kempf. He purchased the property, in disparate pieces from intermediary owners who simply held the property for property management and commercial purposes, and had no intent to further develop the tract.[5] (Tr. Trans. p.

[5] TSB alleges that by considering whether Kempf had completed his development plans before he sold the properties, the district court rendered the remand order "pointless" as there could never be any successor or assigns. But had Kempf

216, lines 23-25; p. 224, lines 12-12; p. 225, lines 15-21; App. pp. 147, 151-152). Kempf or his partners owned the Dodge Street properties for an additional 18 years after the remand order was entered, and the Governor Street properties for an additional 22 years. (Exh. G1, G2; App. pp. 436-447). The only development action they took in all of those years was to construct an apartment building located at 906 N. Dodge Street in 1990. (Exh. G1, G2; App. pp. 436-447). In the four years each of the intermediary owners owned their respective properties, the only action they took was to perform ordinary maintenance. (Exh. G1, G2; Tr. Trans. p. 214; App. pp. 436-447, 145).

Moreover, by the time Kempf and his partners sold the properties to intermediary owners in 2005 and 2009, they had completed his development of the tract. They had realized their investment-backed expectations. The purpose for the Kempf ruling had been achieved. They had not built *any* structure for at least fifteen years. Kempf had granted an easement across the remaining buildable land. (Exh. I: App. pp. 448-451). Kempf sold the tract off to separate entities in pieces, which was different than how he had purchased the tract. The *Kempf* rulings were

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actually transferred the property to developers that intended to develop the property in the same manner he did, they may have qualified as "successors." That is not, however, the case here. Jeff Clark testified that Main Street Partners/Iowa Illinois Square had no intention of developing the Dodge Street properties. (Tr. Trans. p. 224; App. p. 151). Mr. Clark further testified that 911 N. Governor, L.L.C. acquired the Governor Street properties for commercial uses. (Tr. Trans. p. 225, lines 15-21; App. p. 152).

not recorded and did not appear within the properties' abstracts. (Exhs. F1, F2 and F3). (Exh. F4; App. pp. 433-435). There was no assignment of development right recorded upon Kempf's sale of the property or when Barkalow purchased the properties. (Exhs. F1, F2 and F3) (Exh. F4; Tr. Trans. p. 212; App. pp. 433-435, 143). There is no mention in any of the property abstracts of ongoing R3B zoning. (Exhs. F1, F2 and F3). (Exh. F4; App. pp. 433-435). Barkalow's attorney wrote in a pre-closing title opinion that TSB obtained for the Dodge Street properties that "The . . . real estate is subject to the Iowa City zoning ordinances." (Exh. F4; App. pp. 433-435).

Furthermore, TSB is not a successor to any development rights that were nonconforming to the zoning code even at the time they were granted some 30 years ago because of the particular nature of the zoning power. The legislature and courts have long recognized the importance of zoning to protect public health, safety and welfare of the community, and have long given cities great deference in exercising this power, as discussed below.

Thus, there was *no* successor that sustained Kempf's "like part or character." *Sun Valley*, 551 N.W.2d at 640. TSB was never in the same position as Kempf, and therefore was not his successor or assign.

II. THE DISTRICT COURT CORRECTLY HELD TSB FAILED TO PROVE THAT A USE HAD NOT ALREADY BEEN "DEVELOPED OR ESTABLISHED" ON THE PROPERTY.

The issue of whether a use was developed or established on the Kempf property is only relevant if TSB qualifies as Kempf's "successor or assign." The district court held if TSB was a Kempf successor, it still did not have Kempf's development rights because a use was established on the property that TSB sought to redevelop. (Kepros 3/28/16 Order, p. 13; App. p. 70).

The BOA agrees that the issue of whether a use was developed or established on the property was preserved for review, and that the standard of review is for correction of errors at law. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 313 (Iowa 1998).

The building history of the Kempf tract shows that a use was long established on the property before Mr. Barkalow sought to redevelop it. The tract is in the exact condition as it was in 1990, when Kempf finished his last apartment building at 906 N. Dodge Street. After 1989, no one submitted a site plan to the City of Iowa City until TSB's 2013 submittals. (Exh. G1-G2; Tr. Trans. p. 217; App. pp. 436-447, 148). Kempf granted an underground electrical utility easement to MidAmerican Energy across the remaining buildable space—conveying away rights to part of the property he allegedly planned to build on. (Exh. I; App. pp. 448-451). The intermediary owners used the property in the same way—never

building, just maintaining what was already there. (Tr. Trans. p. 48; App. p. 102). These are the "uses" that the owners of this tract put the property to prior to Mr. Barkalow, and none of these facts were in dispute.

TSB claims a "use" has not been established on the property because the only "use" intended by the *Kempf* remand order was for additional multi-family apartment buildings on the 2.12 acres that remained undeveloped. The remand order makes no such distinction. It did not require the property be put to any *particular* use—it stated that "once *a use* had been established . . ." any further development or redevelopment must comply with the City's current zoning. (Exh. 1 (Remand Order); App. pp. 213-215). It is unreasonable to suggest that when a property is used for nearly two decades for parking, open space, and commercial purposes that a use has not been "developed or established."[6] The district court correctly held TSB failed to prove that no use had been established on the property.

III. THE DISTRICT COURT CORRECTLY HELD TSB SOUGHT TO REDEVELOP THE PROPERTY.

The district court held TSB does not have Kempf's development rights because it seeks to redevelop the property, and the *Kempf* remand order expressly states current zoning will apply to the property upon its redevelopment.

[6] Mr. Barkalow himself implicitly acknowledged that a use has been developed on the property by testifying that he "planned to redevelop the property in that area-redevelop the entire area." (Tr. Trans. p. 70, lines 1-15; App. p. 106).

The BOA agrees that the issue of whether TSB sought to redevelop the property was preserved for review, and that the standard of review is for correction of errors at law. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 313 (Iowa 1998).

The following facts are undisputed:

- TSB planned to redevelop "the entire area" that was the Kempf tract. (Tr. Trans. p. 70, lines 1-15; App. p. 106).

- TSB sought to redevelop the properties as one unified tract, not individually. (Exh. A1-A3; Exh. C; App. pp. 421-422, 425-426).

- TSB planned to demolish the DHS building and its surrounding parking. (Exhs. A1-A3; App. pp. 421-422).

- Utility lines laid by Kempf did not fit TSB's new design, so TSB would move them. (Exh. A3; Tr. Trans. p. 218, lines 20-15, p. 219, lines 1-13; App. pp. 421-422, 149-150).

- TSB planned to regrade the area and build a retaining wall. (Tr. Trans. p. 173, lines 14-25, p. 174, lines 1-7; App. pp. 131-132).

- TSB planned to renegotiate the electrical easement Kempf granted to MidAmerican Energy, since the easement required the servient estate "keep clear from the property within the easement any buildings, plantings or other obstructions . . ." and TSB wanted to put a building where the easement lies (Exh. I; App. pp. 448-451).

- TSB's development would require the physical movement of the electrical lines, the abandonment of the old line and the trenching in of a new line. (Tr. Trans. p. 178, lines 14-25, p. 179, lines 1-7; App. pp. 136-137).

Given these undisputed facts, the district court correctly held TSB seeks to redevelop the property as a whole, and is not entitled to any of Kempf's development rights under the remand order.

IV. THE DISTRICT COURT CORRECTLY HELD TSB'S REQUESTED RELIEF WOULD VIOLATE PUBLIC POLICY BY INDEFINITELY PROHIBITING THE CITY FROM ENFORCING VALID ZONING OF THE PROPERTY, REGARDLESS OF THE PASSAGE OF TIME, THREATS POSED TO PUBLIC HEALTH, SAFETY, AND WELFARE, OR CHANGES IN THE COMMUNITY.

The BOA agrees the issue of whether TSB's requested relief violates public policy was preserved for review, and the standard of review is for correction of errors at law. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 313 (Iowa 1998).

"The concept of public policy generally captures the communal conscience and common sense of our state in matters of public health, safety, morals, and general welfare." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751,761 (Iowa 2009). "We have used public policy to constrain legal principles in many areas of the law, especially contracts." *Id*. Application of the current zoning code is a matter of important public policy, as it relates to the public health, safety and welfare of the Iowa City community.

The Iowa Legislature has expressed the policies of this state by delegating zoning power to municipalities "for the purpose of promoting the health, safety,

morals, or the general welfare of the community." Iowa Code § 414.1 (2015).[7] The Iowa Supreme Court has interpreted a municipality's zoning power "liberally and flexibly," both before the *Kempf* ruling and after. *Neuzil v. City of Iowa City*, 451 N.W.2d 159, 165 (Iowa 1990). Prior to *Kempf*, the Iowa Supreme Court ruled that:

> We are of the opinion the governing body of a municipality may amend its zoning ordinances anytime it deems circumstances and conditions warrant such actions, and such an amendment is valid if the procedural requirements of the statute are followed and it is not unreasonable or capricious nor inconsistent with the spirit and design of the zoning statute. The burden is upon the plaintiffs attacking the amendment to establish that the acts of the council were arbitrary, unreasonable, unjust and out of keeping with the spirit of the zoning statute.

Keller v. City of Council Bluffs, 66 N.W.2d 113, 116-17 (Iowa 1954) (city had discretion to amend its zoning ordinance consistent with zoning laws and policies). In *Anderson v. City of Cedar Rapids*, 168 N.W.2d 739 (Iowa 1969), the court declared "courts will not substitute their judgment as to wisdom or propriety of action by a city or town council, acting reasonably within the scope of its

[7] The BOA has standing to assert a public policy defense, to the extent standing is required. Standing is a doctrine applicable to plaintiffs. *See Godfrey v. State*, 752 N.W.2d 413, 418 (Iowa 2008) (requiring a *plaintiff* to show a specific personal or legal interest in litigation and that the *plaintiff* will be injuriously affected). Moreover, the Board of Adjustment properly asserts for itself, and for the benefit of the public, that it is Plaintiffs' *interpretation* of the *Kempf* orders that violates public policy, not the orders themselves.

authorized police power, in the enactment of ordinances establishing or revising municipal zones." *Id.* at 742.

A. TSB's Request to Build at R3B Density Poses Threats to the Public Health, Safety and Welfare.

To grant TSB's requested relief the district court would have been required to find that regardless of Iowa City's Comprehensive Plan; properly enacted zoning; changes in the surrounding area; and threats to the community's general welfare, TSB can develop pursuant to development rights granted to a previous owner nearly 30 years ago under very different circumstances. This would violate the public policy set forth by the Legislature in Iowa Code section 414.1 empowering municipalities to enact zoning ordinance for the protection and benefit of their communities.

1. Community Conditions Have Changed.

In the thirty years since the *Kempf* orders were entered, Iowa City has recognized the need to stabilize the mix between apartment housing and single-family homes in the area where TSB's property is located. (Exh. D, p. 13-14; App. pp. 429-430). At trial, Iowa City City Planner Karen Howard testified that in 2005, the City adopted an entirely new zoning code that included detailed site development standards to address concerns raised by the community over the years. (Tr. Trans. p. 259; App. p. 172). These site development standards regulate parking lots, parking spaces, access standards, standards for how buildings and parking

spaces relate to each other, screening standards, and pedestrian safety standards. (Tr. Trans. p. 259; App. p. 172). Howard explained that these standards are different depending on the zoning classification. (Tr. Trans. p. 260; App. p. 173).

Additionally, in 2008, the Iowa City City Council amended the City's Comprehensive Plan to include a Central District Plan, which "establishes planning principles, goals and objectives that relate specifically to the history and existing conditions of the Central District." (Exh. D, p. 1; App. p. 428). The Central District Plan was adopted after a multi-year public participation process that included a community workshop; six focus group sessions; and a final community workshop. (Exh. D, p. 1; App. p. 428). TSB's properties are located within Subarea "A" of Iowa City's Central District. (Exh. D, Central District Plan; App. pp. 427-432). Subarea A is "an area of older neighborhoods that surround downtown Iowa City and the University campus, with the greatest diversity of housing types and the widest range of zoning designations." (Exh. D; App. pp. 427-432). The area "includes the majority of the current historic and conservation overlay districts." (Exh. D, p. 2; App. p. 428). The Central District Plan states:

> a. "While this mix creates a vibrant and interesting living environment, **it has been an on-going challenge to maintain a balance between the different housing types and mix of residents within Subarea A.** With **absentee landlords** and a large number of inexperienced young renters, **problems with property maintenance, loud and disorderly conduct, yard upkeep, and snow removal** are more prevalent."

> b. In an effort to identify and address **on-going nuisance issues in older neighborhoods**, the City formed neighborhood relations task force in 2001, adopted a neighborhood nuisance ordinance in 2003 as a result, published a "neighborhood calming guide."
>
> c. "**A second important element of stabilizing older neighborhoods** in the district is to provide incentives or programs to **maintain, improve and generally reinvest in the older housing stock and in neighborhood infrastructure,** such as parks, streets, alleys and other shared public spaces."
>
> d. Concerns were expressed at the planning workshops about the lack of on-site management in what have been characterized as **"unmanaged dorms."**

(Exh. D, p. 14; App. p. 430).

The Central District Plan also included a map showed a future land use designations for the properties within the District. (Exh. D, p. 60; App. p. 432). Even in 2008, the map showed low to medium density multi-family uses appropriate for TSB's Governor Street and Dodge Street properties, except Lot 51, which is shown as appropriate for open space uses. (Exh. D, p. 60; App. p. 432). This designation allowed an island of low to medium density multi-family uses- all of the land surrounding Plaintiffs' properties was shown as appropriate for single family and duplex residential or open space. (Exh. D, p. 60; App. p. 432).

This map was amended in 2012 to show single-family and duplex residential uses were appropriate for the entire tract, except 902 and 906 N. Dodge (the existent apartment buildings). (Exhibit 1, p.14; App. p. 200). The 2013 rezoning

of Plaintiffs' properties followed in accordance with the change to the City's comprehensive plan. (Exh. 1, pp. 17-19; App. pp. 203-205).

In light of these changes that have developed over the nearly thirty years since the *Kempf* rulings, it is unreasonable to declare that TSB need not comply with the current zoning designations because of the allegedly unrealized development rights granted to a previous owner twenty-eight years ago arising from a zoning designation that was already obsolete when the rulings were entered. There are no properties in the City zoned R3B. (Tr. Trans. pp. 252-253; App. pp. 165-166). In fact, Howard testified that there was no comparable designation in the current zoning code because zoning has "evolved quite extensively" since the R3B zoning designation was valid. (Tr. Trans. p. 254; App. p. 167).

Conditions have changed since the *Kempf* rulings were entered, and the public welfare was served by the City's 2013 rezoning, as evidenced by the City's comprehensive planning process. Allowing high-density development now would undo the community's collective decisions about how to best serve the public welfare. *Cf. Meilak v. Town of Coeymans*, 225 A.D.2d 972, 973 (N.Y. App. Div. 3d Dep't 1996) ("In any event, even if a permit had been granted in 1969, we agree with Supreme Court that the 25-year lapse in the furtherance of the project renders the approval meaningless. In our view plaintiff's failure to act over such a long period of time constitutes an abandonment per se of the rights granted in the

alleged permit; *the factors affecting the welfare, quality of life and safety of the community which were considered by planning boards 25 years ago have changed markedly in focus, intensity and in number throughout the State*. To require plaintiff to seek a new permit, under the circumstances of this case, is not unreasonable. In the absence of any issue of fact, defendants' cross motion for summary judgment was properly granted."). (Emphasis added).

2. The Density of TSB's Proposed Development Threatens the Public Health, Safety, and Welfare.

The threats posed by TSB's interpretation of the *Kempf* rulings have been matters of public concern for decades. They are expressly detailed in the Central District Comprehensive Plan. (Exh. D, p. 15; App. p. 431). City Planner Howard testified that the density at which TSB proposes to build is incompatible with the surrounding single-family neighborhood; would increase traffic on the sloping, one-way Governor Street with poor visibility and access; would result in an increase in calls for service to the police department; and would increase nuisance concerns. (Tr. Trans. p. 257; Exh. D; App. pp. 170, 427-432). These threats are the very reason the City eliminated the R3B zoning designation over thirty years ago. (Tr. Trans. 254; App. p. 167). The district court correctly decided granting TSB's requested relief would violate public policy.

B. The District Court Correctly Held TSB's Requested Relief Would Create and Unworkable Zoning Scheme on the Property.

Moreover, the practicalities of developing a tract of land that includes properties zoned R3B and RS-12 creates an untenable situation. (Tr. Trans. pp. 264-266 (Howard Testimony); App. pp. 177-179). It must be noted that while Barkalow claimed at trial, and now on appeal, that only certain areas are "protected areas" under the remand order for R3B zoning, (Tr. Trans. pp. 95-96; App. pp. 107-108), Barkalow instructed his engineer to submit a site plan to the City that assumed R3B zoning applied to the entire tract. (Tr. Trans. pp. 176-77, 181-82; App. pp. 134-135, 139-140).

Even if TSB's position was that only Lots 10, 49 and 51 are developable according to the R3B density, and that Lots 8, 9 and 50 are governed by the City's current zoning designations, this interpretation results in an unworkable hybrid of incompatible zoning codes be applied to the proposed site plans. The City's zoning code governs more than just density. (Tr. Trans. p. 259; App. p. 172). It governs site development standards such as building setbacks, parking requirements, lighting, and other site specific standards in order to mitigate such incompatible uses as a high-density apartment building from a single family home. (Tr. Trans. p. 259; App. p. 172). One simply cannot ignore zoning boundaries when submitting a site plan for a tract of land. Each lot within the tract shown on site plan must comply with the applicable zoning designation for that lot. (Tr. Trans. p. 265; App. p. 178). Howard testified that she did not recall ever reviewing a tract development

plan with multiple zoning designations. (Tr. Trans. pp. 264-265; App. pp. 177-178). Engineer Duane Musser admitted he had never prepared a site plan that contained multiple zoning designations for a development. (Tr. Trans. p. 181; App. p. 139). Howard further testified that if a tract included a multi-family zoning designation (i.e., R3B) and a single family designation (i.e., RS-12), the parking for the two uses could not be shared; additional landscaping would be required; building set back limitations would apply; and the parking configuration would be different for the two zones. (Tr. Trans. p. 265; App. p. 178). The proposed site plans meet none of those standards. (Tr. Trans. pp. 265-266; App. pp. 178-179). This unworkable combination of an obsolete high density zoning designation and valid single family zoning designations illustrates why TSB's request violates public policy.

The district court correctly held it would violate public policy to grant TSB the relief it sought.

V. THE BOA ACTED LEGALLY IN APPLYING CURRENT ZONING TO TSB'S SITE PLANS.

The BOA agrees that the issue of whether the BOA acted legally affirming the application of the City's current zoning to TSB's property was preserved for review, and that the standard of review is for correction of errors at law. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 313 (Iowa 1998).

TSB alleges the BOA erred by not performing an analysis of the *Kempf* rulings to determine their applicability.

Simply put, the BOA did not make such an analysis because it determined there was a fundamental flaw with the site plans: they violated the zoning code. (Exh. 1, pp. 199-200; App. pp. 393-394). No further analysis of the *Kempf* orders, or any other component of the site plans was necessary to determine that they could not be approved. The BOA's decision was reasonable, given that a board of adjustment generally has no authority "to sit in appellate review of the action of the [zoning authority] in adopting or amending the zoning ordinance." *Boomhower v. Cerro Gordo County Bd. of Adjustment*, 163 N.W.2d 75, 77 (Iowa 1968). The district court, though, did analyze the continued viability of the *Kempf* rulings, as this is an issue of legal interpretation appropriate for the judicial system, not City administrators. The Board acted legally in applying existing zoning.

CROSS-APPEAL

I. THE DISTRICT COURT CLEARLY ABUSED ITS DISCRETION IN DENYING THE BOA'S MOTION TO AMEND ITS ANSWER TO ADD AFFIRMATIVE DEFENSES.

On October 2, 2015, the BOA moved to amend its answer to TSB's amended petition. (Motion to Amend Answer; App. pp. 28-30). The BOA filed its motion to amend before pleadings closed on November 6, 2015, and approximately three months before trial. The BOA sought to add the affirmative defenses of failure to state a claim, statute of limitations, laches, and res judicata.

The district court denied the BOA's motion to amend. (Ruling on Defendant's Motion to Amend Answer; App. pp. 38-41). The issue of whether the district court should have granted the BOA's motion to amend its answer was therefore raised and decided and is preserved for review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Review is for a clear abuse of discretion. *Chao v. Waterloo*, 346 N.W.2d 822, 825 (Iowa 1984).

The BOA contends the district court clearly abused its discretion by denying its motion to amend its answer. Leave to amend should be freely granted. Iowa R. Civ. P. 1.402(4). Allowance of amendments is the rule, not the exception, provided there is no material change in the issues involved, or if a party is not unfairly prejudiced or unfairly surprised. *See Medicine Silos v. Wasson*, 215 N.W.2d 494, 497 (Iowa 1974); *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 767 (Iowa 2002). Indeed, the district court had granted TSB's motion to amend its petition just six months before trial, over the BOA's objection. (Ruling on Motion to Amend Petition). TSB's amendment had actually added an entirely new cause of action (declaratory judgment to a certiorari action), yet it was granted.

The issues facing the district court were purely legal. That would not have changed even if the BOA's motion to amend its answer were granted. The Plaintiffs were well aware of all facts related to the *Kempf* litigation and the circumstances of the denial of their site plans by the City of Iowa City and the

BOA's affirmance of the denial. Indeed, by the time the BOA filed its motion to amend its answer, TSB's related lawsuit against the City of Iowa City had already been resolved in favor of the City. *See TSB v. City of Iowa City*, CVCV075457 (Johnson County, June 3, 2015). Though TSB complained that it would need to conduct discovery if the amendment were allowed, TSB never asked to extend the discovery deadline; never pointed out what facts it allegedly needed to rebut the BOA's affirmative defenses; and never attempted to conduct any depositions. In short, nothing would have changed had the BOA been allowed to amend its answer, except the district court could have considered and analyzed how a statute of limitations defense or laches defense would impact this case.

The statute of limitations doctrine would have been particularly helpful to Court, as the age of the *Kempf* judgments then could have been considered. *See* Iowa Code § 614.1(6) (establishing a twenty-year statute of limitations for actions "founded on a judgment of a court of record . . . ."). In particular, no additional facts were necessary for the Court to consider the statute of limitations issue. "It is well-settled that a trial court has broad discretion to permit an answer to be amended so as to set up the statute-of-limitations defense. Indeed such an amendment should be permitted with great liberality." *Borchard v. Anderson*, 542 N.W.2d 247, 249 (Iowa 1996).

A statute of limitations defense can be raised in a motion to dismiss when the necessary facts appear on the face of the pleadings. *Harden v. State,* 434 N.W.2d 881, 883 (Iowa 1989). The district court clearly abused its discretion by denying the BOA's motion to amend. Even TSB recognized in its resistance to the BOA's motion to amend its answer that "the sole issue for trial in this matter is whether the BOA acted illegally in denying TSB's site plan in light of the Iowa Supreme Court's ruling in *Kempf*. . . ." (10/12/15 Resistance to Motion to Amend Answer; App. pp. 31-34). As recognized by TSB, the facts supporting the BOA's statute of limitations defense were apparent from the pleadings: the age of the *Kempf* rulings and the fact that TSB relied upon them for its claims.

In the event that this Court reverses the district court judgment on TSB's appeal, it should likewise reverse on the BOA's cross-appeal. This court should then decide, without remand, that TSB's claims are barred by Iowa Code § 614.1(6) because they were brought more than twenty years after the *Kempf* orders were entered in 1987. Alternatively, the court should remand for further consideration by the district court on the statute of limitations issue.

CONCLUSION

The district court properly rejected TSB's expansive interpretation of the *Kempf* rulings. TSB's interpretation is inconsistent with the plain language of the supreme court's opinion; frustrates the rationale and holding of the *Kempf* decision

by functionally rezoning the property; violates the *Kempf* remand order by allowing redevelopment of the property; and constrains the Iowa Legislature's public policy empowering cities to protect and promote the public health and welfare through zoning. The district court made no error of law in dismissing TSB's request for declaratory relief and annulling the writ of certiorari, and its judgment should be affirmed in its entirety. However, should this court reverse the district court's final judgment, it should likewise reverse the district court's denial of the BOA's motion to amend its answer, which prevented the BOA from asserting a statute of limitations defense, and dismiss TSB's claims as time-barred under Iowa Code § 614.1(6), or remand for further consideration of the issue.

REQUEST FOR ORAL ARGUMENT

The BOA requests oral argument.

Respectfully submitted,

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*/s/ Elizabeth J. Craig*_____
Elizabeth J. Craig

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I hereby certify that on February 27, 2017, I electronically filed the foregoing Proof Brief of Defendant-Appellee City of Iowa City with the Clerk of the Iowa Supreme Court by using the EDMS system.

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Elizabeth J. Craig