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IN THE IOWA DISTRICT COURT IN AND FOR WARREN COUNTY

CITY OF INDIANOLA,	:	
Plaintiff,	:	**No. CVCV037789**
vs.	:	
BOARD OF ADJUSTMENT OF WARREN COUNTY, IOWA,	:	**RULING and ORDER REMANDING PROCEEDINGS**
Defendant,	:	
MICHAEL STAUDACHER AND RENE STAUDACHER,	:	
Intervenors.	__ : __	

The above matter came on for hearing before the undersigned on July 30, 2019, for hearing on a Petition for Writ of Certiorari related to a decision by the Warren County Zoning Board of Adjustment denying the City of Indianola's application for a special use permit for the construction of a waste water treatment facility in rural Warren County. The Plaintiff (City) appeared by counsel, Doug Fulton. Defendant Warren County Board of Adjustment (Board) appeared by Assistant Warren County Attorney Dawn Bowman. Intervenors, Michael and Rene Staudacher, appeared by counsel, Emily Staudacher. The Court has had the opportunity to consider the arguments of counsel and the briefs submitted by all parties. Also submitted for the Court's review as a part of this case were documents returned by the County in response to the Writ and Exhibits filed by the parties prior to the hearing, as well as both recordings and transcripts for each of three hearings held by the Board of Adjustment. The records before the Court reflect the following.

On or about August 10, 2018, the City of Indianola submitted an application for a special use permit to the Warren County Zoning Board of Adjustment, seeking issuance of a special use permit to allow construction of a waste water treatment facility (WWTF) on a 360-acre parcel purchased by the City in 2001.

As revealed by the application, the proposed project site was originally purchased by the City in March 2002 for the distinct purpose of ultimate relocation of the existing waste water treatment facility to a site "providing adequate separation from surrounding land owners." According to the application, a "Siting Study" was completed by the City in 2014 which evaluated six different alternatives based on both economic and non-economic factors. The application noted a relocation of all treatment processes to the 360-acre "Farm Site" scored the highest in the evaluation process.[1] The application recited the City had submitted paperwork regarding the WWTF to the Iowa Department of Natural Resources and approval from that agency was pending.[2]

Both prior to submission of the application and while the application was pending, the City held a series of meetings with surrounding property owners to obtain feedback regarding the proposed facility. Consistent with the information gained during those meetings, the City designed the proposed facility in an attempt to minimize the impact on surrounding property. The proposed buildings at the site are located so they are minimally visible to surrounding property owners based on the terrain, existing trees at the site and planned berms and screening. As required by DNR regulations, the facility is located more than 1,000 feet from any existing dwellings in the neighborhood. The site was planned with low-level lighting so there would be minimal impact on surrounding properties at night.

The City represented that construction traffic would be controlled to have minimal impact. Furthermore, once constructed, the City represented it would no longer have to transport biosolids by trucks to the site for disposal (as has been the case) because land

[1] While the application noted the Site Study was available "upon request," a copy of the Study was apparently never requested and is not a part of the record now before the Court.
[2] Counsel for the City indicates formal DNR approval was received after denial of the special use permit by the Board.

application of the biosolids will occur on site, thereby actually reducing truck traffic from current levels once the facility is constructed.

The initial hearing before the Board of Adjustment was scheduled for September 13, 2018. Staff review of the application prior to the hearing resulted in a recommendation to the Board of Adjustment to approve the application. On the staff checklist, of the thirteen factors the staff considered in recommending granting a special use permit, all of the factors were checked affirmatively except factor (f), providing: "Will the special use maintain the same or increase the value of adjoining properties." Next to the "no" response was noted: "(Sewer plant is to/for the City – not rural)."[3]

At the September 13, 2018, meeting Jim Rasmussen, associated with HR Green and representing the City, made a PowerPoint presentation highlighting the City's plans for the site. At the outset of his presentation, Rasmussen summarized the plans as designed to "provide necessary services and be good neighbors."

At the conclusion of Rasmussen's presentation, a number of neighboring landowners spoke, all voicing opposition to the City's planned construction. A number of concerns were expressed by those in attendance including concerns related to construction traffic over the several years it would take to build the site as well as odors at the site. The strongest voiced objection was the impact the facility would have on property values of adjacent properties, as well as the impact the facility would have on the use and enjoyment, including scenic views, for adjacent property owners and those with planned home sites.

Based in part on the fact the County Engineer was unable to attend the scheduled meeting, the Board of Adjustment voted to table the permit application.

[3] This particular criteria for evaluation mirrors the requirement contained in the zoning ordinance "that such use shall not diminish or impair established property values in adjoining or surrounding properties." Warren County Zoning Ordinance 41.02(3)(D).

The second public hearing on the City's application was held on October 11, 2018. As reflected in the presentation made at the meeting by Rasmussen, a number of changes were made to the City's plans in an attempt to respond to concerns raised by surrounding property owners. Working in conjunction with the County Engineer, the City moved the entrance to the proposed facility. In addition, details were changed related to construction traffic. The City changed its planned route for construction traffic in a manner the City felt least interfered with local traffic. This changed route also avoided crossing a local bridge of questionable integrity with construction traffic. The City also implemented a method to keep dust from construction traffic to a minimum.

Rasmussen also pointed out the new plant, despite an increased capacity, would result in 60% less biosolids applied to the City's land than has been the case with the existing water treatment facility. Rasmussen suggested that less waste biosolids, combined with an increased storage capacity and the ability to spread the biosolids without having to truck them to an off-site location, will be a significant benefit to local landowners.

Rasmussen also addressed concerns regarding a diminution in adjacent property values as a result of constructing the facility. Rasmussen noted the construction of the water treatment facility will arguably have a beneficial impact on the value of surrounding properties as some adjacent properties may be given the opportunity to connect to the sewer line, eliminating the need for private septic systems. He also highlighted the City's commitment to maintain the balance of the parcel as agricultural land, avoiding the possibility of future animal confinement operations in the area. Rasmussen also pointed out changes to the plan to construct berms and plant coniferous trees to help screen view of the facility during the winter months.

As was the case at the September meeting, following Rasmussen's presentation at the October meeting, a number of individuals who own surrounding homes spoke in

opposition to the plan.[4] A concern was voiced that the City had not adequately evaluated alternatives, including hooking up to the Des Moines Metropolitan Wastewater Reclamation Authority facility, acquiring land adjacent to the existing treatment facility and building a new plant at that site or even simply improving the current facility. As was the case at the first meeting, most often voiced by those in attendance at the meeting was the concern that construction of the plant would have a substantial negative impact on the value of the many homes in the area. In addition, several individuals present at the meeting argued the proposed facility was not in keeping with the comprehensive land use plan that had been adopted by the County in terms of maintaining the rural character of the area.

Several neighboring property owners also expressed concern, both at the September and October meetings, that the City had made certain promises about actions they intended to take but had not taken steps to memorialize those commitments so as to make them binding on the City.

Believing it might be possible for the City and neighboring landowners to further resolve their differences, the Board again tabled the City's request for a special use permit. While not directing that it do so, the Board strongly urged the City to meet with the neighbors affected by the planned facility before the next meeting, which it scheduled for November 14, 2018.

Prior to the November meeting, the City did take action. On November 5, 2018, the Indianola City Council passed a Resolution "confirming" the City's "commitment" to neighboring property owners related to the construction of the treatment facility. In the Resolution the City obligated itself to certain standards related to the facility including

[4] In addition to comments made by members of the public at the meeting, the Board received and reviewed a number of written comments submitted by neighboring property owners as well as attorneys on behalf of the residents. Included in the materials received by the Board were several scholarly publications addressing, among other topics, the impact on the quality of life of living near a wastewater treatment plant, as well as an article on appraising property located near "undesirable land uses."

site placement, design and aesthetics. Included in the City's commitments was a promise to record a covenant limiting use of the balance of the 360-acre parcel owned by the City to non-livestock agricultural purposes.

In a letter to the Board dated November 14, 2018, the City also addressed questions that had been raised related to the City connecting to the Des Moines Metropolitan WRA as an alternative to constructing a new wastewater facility. As noted in the letter, the City rejected this alternative after determining such a move would cost the City, over a thirty-year period, over $64,000,000 more than building a new facility.[5]

Following a comparatively brief voicing of views and opinions by individuals present at the November meeting, Board members freely discussed their concerns regarding the City's application. As had been the case with neighboring home owners, the Board members who ultimately voted against the special use permit shared a common concern as to the impact construction of the site would have on the use and enjoyment of neighboring properties, as well as surrounding property values.

At the conclusion of the discussion by Board members, a motion was made to approve the special use permit application. Following a roll-call vote, the motion was rejected by a three-to-one vote. The City filed this proceeding seeking to challenge the Board's denial of their application for a special use permit.

Pursuant to the statutory scheme in place in Warren County, "Agricultural Districts are intended and designed to preserve the agricultural resources of the County and protect agricultural land from encroachment of non-agricultural uses and activities."[6] As with other districts defined by the zoning ordinance, certain "special uses" are identified for agricultural districts as "permitted" uses, provided certain requirements are

[5] This letter simply summarized the City's conclusion, without providing any of the information upon which the City relied in rejecting the Des Moines Metropolitan WSA option.
[6] Warren County Zoning Ordinance 41.02

met.[7] Specifically identified as a permitted special use are "solid waste disposal facilities."[8] Pursuant to the statute, applications for special use permits must be submitted to the Zoning Board of Adjustment for approval.

The zoning ordinance sets forth criteria that the Board of Adjustment must consider in evaluating a special use permit application. In particular, the ordinance provides the Board shall consider:

A. That the proposed location, design, construction and operation of the particular use adequately safeguards the health, safety, and general welfare of the persons residing or working in adjoining or surrounding property.

B. That such use shall not impair an adequate supply of fresh air and light to surrounding property.

C. That such use shall not unduly increase congestion in the streets or public danger of fire and safety.

D. That such use shall not diminish or impair established property values in adjoining or surrounding property.

E. That such use shall be in accord with the intent, purpose and spirit of the Zoning Ordinance and the Comprehensive Land Use Plan of the County.[9]

The issue before a Court called upon to review action taken by a Board of Adjustment in denying an application is not whether there was substantial evidence presented to justify issuance of the permit; rather, the issue is whether there was substantial evidence before the Board of Adjustment to justify *denial* of the permit. Put another way, if the action taken by the Board of Adjustment is open to a legitimate and fair difference of opinion, this Court should not substitute its own judgment for that of the Board.

Findings made by a Board of Adjustment must be reviewed using a substantial evidence test. "Evidence is substantial if a reasonable person would find it adequate to

[7] Warren County Zoning Ordinance 41.02(2)
[8] Warren County Zoning Ordinance 41.02(2)(D)
[9] Warren County Zoning Ordinance 41.02(3)

reach the given conclusion, even if a reviewing court might draw a contrary inference."[10] "Whether the evidence in a close case such as this one might well support an opposite finding is of no consequence."[11]

In seeking reversal of the Board's denial of its special use permit application, the City urges three grounds for reversal. First, the City argues the Board failed to set forth written findings of fact to support its action. Next, the City argues the Board acted arbitrarily and capriciously, and the decision made by the Board was not supported by substantial evidence. Finally, the City argues that as a governmental entity, it is not bound by the provisions of the Warren County Zoning Ordinance under a "balancing of interests" test.

The Warren County Zoning Ordinance provides that action by the Board of Adjustment "shall not become effective until after the resolution of the Board, setting forth the full reason for its decision and the vote of each member participating thereon, has been filed."[12] Following the meeting at which the Board voted to deny the City's application, a three-page Resolution denying the application was recorded with the Warren County Recorder. The City contends the Resolution fails to adequately set forth the basis for the Board's decision, as required by the ordinance.

Since 1979, Boards of Adjustment have been obligated pursuant to court rule to "make written findings of fact on all issues presented in any adjudicatory proceeding. Such findings must be sufficient to enable a reviewing court to determine with reasonable certainty the factual basis and legal principles upon which the board acted."[13] The Warren County zoning ordinance requiring the filing of a Resolution following Board action merely makes this court-imposed obligation statutory.

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[10] *Bush v. Board of Trustees*, 522 N.W.2d 864, 866 (Iowa Ct. App. 1994)
[11] *Bontrager Auto Serv., Inc., v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483, 497 (Iowa 2008)
[12] Warren County Zoning Ordinance 43.09(1)
[13] *Citizens Against Lewis & Clark (Mowery) Landfill v. Pottawattamie Cty. Bd. of Adjustment*, 277 N.W.2d 921, 925 (Iowa 1979)

While Boards are required to make such written findings, however, "substantial—as opposed to literal—compliance with the written-findings requirement is sufficient."[14] Substantial compliance will be found when a Board's findings are "sufficient to enable a reviewing court to determine with reasonable certainty the factual basis and legal principles upon which the board acted."[15]

Viewed as a whole in the case now before the Court, comments by the Board members made at the public hearings held on the City's application make it clear that the Board properly considered the statutory criteria of the zoning ordinance in evaluating the application and, after considering the criteria, a majority of the Board concluded the requirements for issuance of a special use permit had not been met. As noted by the Board in its Resistance to the City's arguments, at the November 14, 2018, Board meeting, members Walker, Halterman and McPherson all commented on the record that they did not believe the City had met the requirement that its facility would not have a negative impact on the value of adjoining properties. Accordingly, the Court specifically finds the Board's findings are sufficient to determine with reasonable certainty the factual basis and legal principles upon which the Board acted.

The City next argues there was not substantial evidence to support the decision of the Board. "Evidence is substantial 'when a reasonable mind could accept it as adequate to reach the same findings.' "[16] As was noted by the Court in *Bontrager*, "anecdotal evidence," as well as "commonsense inferences drawn from evidence relating to other issues, such as use and enjoyment, crime, safety, welfare, and

[14] *Bontrager*, 748 N.W.2d at 488
[15] *Citizen's*, 277 N.W.2d at 925
[16] *City of Cedar Rapids v. Mun. Fire & Police Ret. Sys.*, 526 N.W.2d 284, 287 (Iowa 1995) (quoting *Norland v. Iowa Dept. of Job Serv.*, 412 N.W.2d 904, 913 (Iowa 1987)

aesthetics" may be considered "to make a judgment as to whether the proposed use would substantially diminish or impair property values in the area."[17]

The record before the Board in the case at bar was replete with both anecdotal evidence and commonsense inferences that could be drawn from other evidence that property values of properties in the vicinity of the City's proposed wastewater treatment facility would be adversely affected by construction of the facility. As noted above, "whether the evidence in a close case such as this one might well support an opposite finding is of no consequence."[18] This Court concludes, therefore, that the City's argument there was not substantial evidence to support the Board's decision is without merit.

The City's final argument, raised in the context of a Declaratory Judgment action, is that the City, as a governmental entity, is not bound by the County's zoning ordinances. A similar argument has been considered only once previously by the Iowa Supreme Court in *City of Ames v. Story County*[19], a case with surprisingly similar facts to those in the case at bar. At the outset of its opinion in that case, the Court noted "[t]he dispute, pitting one local government against another, presents the question of whether city-owned property is subject to county zoning regulations. Our answer is that it might or might not be, the determination to be made upon balancing the conflicting interests of the two local governments."[20] A similar conclusion must be reached in the case at bar.

As in the case at bar, in *City of Ames* the City sought to construct a waste disposal plant outside the city limits, within Story County. The County denied the City's applications for building permits. Litigation followed.

[17] *Bontrager*, 748 N.W.2d at 496
[18] *Bontrager*, 748 N.W.2d at 497
[19] 392 N.W.2d 145 (Iowa 1986)
[20] *City of Ames*, 392 N.W.2d at 146

In evaluating whether the City was immune from the County's zoning ordinance, the Court in *City of Ames* considered, and rejected, other tests used by courts to decide such issues, and concluded the "balancing of interests" test was the appropriate test "to resolve zoning disputes that arise between local governments."[21]

Application of the balancing of interests test requires consideration of a variety of factors.

> "The most obvious and common ones include the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests . . . In some instances one factor will be more influential than another or may be so significant as to completely overshadow all others. No one, such as the granting or withholding of the power of eminent domain, is to be thought of as ritualistically required or controlling. And there will undoubtedly be cases, as there have been in the past, where the broader public interest is so important that immunity must be granted even though the local interests may be great. The point is that there is no precise formula or set of criteria which will determine every case mechanically and automatically."[22]

As noted by the Appellate Division of the New York Supreme Court,

> "A non-exhaustive list of potential factors to be weighed includes 'the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests,' as well as 'the applicant's legislative grant of authority, alternative locations for the facility in less restrictive zoning areas, . . . alternative methods of providing the needed improvement[,] intergovernmental participation in the project development process and an opportunity to be heard.'"[23]

As the Court in *Rutgers* observed, even in situations where the balancing of interests test leads to the conclusion a governmental agency should be immune from a particular zoning restriction, the immunity should not "be exercised in an unreasonable fashion so as to arbitrarily override all important legitimate local interests . . . [E]ven if the

[21] *City of Ames*, 392 N.W.2d at 149
[22] *Rutgers, State Univ. v. Piluso*, 286 A.2d 697, 702-03 (N.J. 1972)
[23] *Town of Fenton v. Town of Chenango*, 937 N.Y.S.2d 677, 681-82 (2012), quoting *Matter of County of Monroe (City of Rochester)*, 72 N.Y.2d 338, 343 (1988)

proposed action of the immune governmental instrumentality does not reach the unreasonable stage for any sufficient reason, the instrumentality ought to consult with the local authorities and sympathetically listen and give every consideration to local objections, problems and suggestions in order to minimize the conflict as much as possible."[24]

A number of courts which have considered application of the balancing of interests test have concluded it is appropriate for the local zoning authority to initially apply the test. "The essential purpose of zoning . . . generally can best be furthered by local zoning authorities which have been established to accomplish that very purpose. Local zoning proceedings also provide for public debate in an administrative hearing which can address the interests of all parties."[25]

As noted above, the Board of Adjustment properly considered the statutory criteria of the zoning ordinance in evaluating, and rejecting, the City's application. The Board did not, however, apply a balancing of interests test to the City's application. While there was some evidence presented to the Board regarding the City's need for the facility, the Board overwhelmingly focused its inquiry on the impact of the facility on surrounding property owners, simply because this is where the language of the zoning ordinance directed the Board to focus.

Because the Board of Adjustment did not specifically undertake a balancing of interests test, the Court finds this matter should be remanded to the Warren County Board of Adjustment for further proceedings. Following presentation of whatever additional evidence the parties before it choose to present, the Board of Adjustment

[24] *Rutgers*, 286 A.2d at 703. The record reflects the City in the case at bar did "sympathetically listen" to concerns of adjacent property owners and made changes to its plans as the application was processed in an attempt to alleviate expressed concerns.

[25] *City of Crown Point v. Lake Cty*., 510 N.E.2d 684, 690 (Inc. 1987); See, also, *Lincoln Cty. v. Johnson*, 257 N.W.2d 453, 458 (S.D. 1977) and *Hillsborough Ass'n. for Retarded Citizens, Inc. v. City of Temple Terrace*, 332 So.2d 610, 613 (Fla. 1976), where the Court noted "local administrative proceedings will provide the forum in which the competing interests of governmental bodies are weighed."

should reconsider the City's application, considering not only the statutory zoning criteria set forth in the zoning ordinance but also specifically balancing the interests of the City in going forward with the project against legitimate local interests. It is anticipated that as a part of the proceedings before the Board, the City will present additional evidence as to alternative locations for the facility in less restrictive zoning areas as well as alternative methods of providing the needed improvement, including specifics of the Des Moines WSA alternative and the Site Study the City undertook before concluding the current plan was the best alternative.

IT IS THEREFORE ORDERED this matter is hereby remanded to the Warren County Zoning Board of Adjustment. On remand the Board shall consider those statutory zoning criteria set forth in the zoning ordinance. In addition, the Board shall specifically evaluate and balance the interests of the City in going forward with the proposed project against the interests of the County and legitimate local interests.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV037789	CITY OF INDIANOLA VS THE BOA OF WARREN COUNTY, IA

So Ordered

Brad McCall, District Court Judge,
Fifth Judicial District of Iowa