IN THE IOWA DISTRICT COURT FOR STORY COUNTY

JAMES W. PALENSKY and TERESA A. SCHEIB-PALENSKY, as Trustees of the PALENSKY 1998 TRUST dated February 25, 1998,	
Plaintiffs,	CVCV052022
vs.	CVCV052023
STORY COUNTY BOARD OF ADJUSTMENT,	
Defendant; and	DECISION
BRADLEY PERKINS,	
Indispensable Party.	

These matters came before the court for trial on August 24, 2021. The plaintiffs,[1] James W. Palensky and Teresa A. Scheib-Palensky, as Trustees of the Palensky 1998 Trust dated February 25, 1998 (collectively the Palenskys or plaintiffs), appeared by their attorney, Gregory G.T. Ervanian. The defendant, Story County Board of Adjustment (the Board), appeared by its attorney, Eric M. Updegraff. The Indispensable Party, Bradley Perkins (Perkins), appeared by his attorney, Joseph B. Wallace, substituting for Chad Schneider.

BACKGROUND FACTS

Bradley Perkins seeks to obtain approval of two conditional use permits (CUPs): the first to build a bed and breakfast inn and a 4400 square-foot event venue capable of hosting events for up to 300 people, and the second to build a

[1] Iowa R. Civ. P. 1.1402(1) provides "the petition shall be captioned in the name of the petitioner as plaintiff, against the inferior tribunal, board or officer as defendant."

commercial campground and travel trailer park. Perkins proposes to build both projects at 5500 240th Street, south of Ames, Iowa, approximately three-quarters of a mile south of U.S. Highway 30. The Palenskys own property immediately west of the proposed project site, at 5600 240th Street. Each of the two CUPs have pursued similar but not identical paths, being first considered by the Story County Planning and Zoning Commission (P&Z), then the defendant Board, then petitions for certiorari to the Story County District Court that resulted in both cases being remanded for findings of fact, then appeals by the Board in both cases, one of which was decided by the Iowa Court of Appeals and the other of which was dismissed. Both CUPs returned to the Board of Adjustment.

The Story County Board of Adjustment published an agenda for its September 16, 2020 meeting including action items to approve findings of fact from previous meetings. (CVCV052022 Record Return (hereafter "Rec. Ret.") part 8, 381; CVCV052023 Rec. Ret. part 5, 381.) On September 16, 2020, the Story County Board of Adjustment met via zoom. (CVCV052022 Rec. Ret. part 8 at 385; CVCV052023 Rec. Ret. part 8, 605.)

At that meeting, Jerry Moore of the Story County Planning and Development Department (CVCV052022 Rec. Ret. part 8, 395; CVCV052023 Rec. Ret. part 8, 615) presented the written findings of fact to the Board. (CVCV052022 Rec. Ret. part 9, 435-36; CVCV052023 Rec. Ret. part 8, 655-656.) Moore explained that the courts required the Board to act on written findings of fact and, therefore, the planning and development staff had prepared written findings for all of the cases decided by the Board, including the two at issue here. (CVCV052022 Rec. Ret. part 9, 436; CVCV052023 Rec. Ret. 656.) The Board approved the staff-written findings of fact for both CUP09-17 and CUP08-17. (CVCV052022 Rec. Ret. part 8, 385-86; CVCV052023 Rec. Ret. part 8, 606.) All five members voted in favor of

adopting the proposed written findings of fact. (CVCV052022 Rec. Ret. part 8, 385-86; CVCV052023 Rec. Ret. part 8, 606.)

Further facts relevant to each case will be set forth below as needed.

PROCEDURAL HISTORY

The findings of fact submitted by Moore and adopted by the Board on September 16, 2020 were intended to support the original decisions of February 21, 2018 and March 21, 2018. The Palenskys then filed the two petitions for certiorari and for declaratory judgment that commenced these two cases. The court will briefly review previous history in more detail.

On March 22, 2018, the Palenskys filed a Petition for Writ of Certiorari in the district court relating to the Board action of February 21, 2018. This was Story docket number CVCV050675. The Palenskys' petition raised seven issues. The seventh issue, which the district court found dispositive, was that the Board failed to make findings of fact on any issues. After a hearing, the district court filed its decision on January 30, 2019.

On April 19, 2018, the Palenskys filed a Petition for Writ of Certiorari in the district court relating to the Board action of March 21, 2018. This was Story County docket number CVCV050724. The Palenskys raised eight issues in this petition. The eighth issue, which the district court found dispositive, was that the Board failed to establish findings of fact on any issues. On July 24, 2019, the district court held a hearing on the petition for writ of certiorari and on September 10, 2019, the court filed its decision.

In order to have a proper understanding of the history, this court and the parties must acknowledge these additional issues beyond the lack of fact finding that the Palenskys raised that were not reached by the district court in the previous

certiorari cases. The district court in the predecessor to CVCV052022 summarized those issues in the January 30, 2019 decision:

> (1) The record lacks substantial evidence to show compliance with Story County Ordinance 90.04(1)(A), requiring proposed buildings to be compatible with the character of the zoning district and immediate vicinity;
> (2) The record lacks substantial evidence to show compliance with Story County Ordinance 90.04(1)(C), requiring the development to provide for adequate ingress and egress with particular attention to vehicular and pedestrian safety and convenience, traffic flow and control, and emergency access;
> (3) The record lacks substantial evidence to show compliance with Story County Ordinance 90.04(1)(F), requiring a showing that the facility will not generate groundwater pollution or other undesirable, hazardous or nuisance conditions;
> (4) The record lacks substantial evidence to show compliance with Story County Ordinance 90.04(2)(A), requiring a showing that the project would adequately safeguard the health, safety and general welfare of persons residing in adjoining properties;
> (5) The record lacks substantial evidence to show compliance with Story County Ordinance 90.04(2)(C), requiring a showing that the project would not unduly increase congestion in the roads, or the hazard from fire, flood or similar damages;
> (6) The record lacks substantial evidence to show the Board appropriately considered the impact of the proposed development on the Ames Urban Fringe Plan.
> (7) The Board failed to establish findings of fact on any issues.

Of course, the district court also noted the single issue on which the court decided the case: whether the Board failed to establish findings of fact on any issues. Order of January 30, 2019, Story County Docket No. CVCV050675, p. 5.

In the predecessor to CVCV052023, the district court presented a similar summary of the issues in its September 10, 2019 decision:

(1) The record lacks substantial evidence to show the Board appropriately considered the impact of the proposed development on the Ames Urban Fringe Plan;
(2) The record lacks substantial evidence to show compliance with Story County Ordinance 90.04(1)(A), requiring proposed buildings to be compatible with the character of the zoning district and immediate vicinity;
(3) The record lacks substantial evidence to show compliance with Story County Ordinance 90.04(1)(C), requiring the development to provide for adequate ingress and egress with particular attention to vehicular and pedestrian safety and convenience, traffic flow and control, and emergency access;
(4) The record lacks substantial evidence to show compliance with Story County Ordinance 90.04(1)(F), requiring a showing that the facility will not generate groundwater pollution or other undesirable, hazardous or nuisance conditions;
(5) The record lacks substantial evidence to show compliance with Story County Ordinance 90.04(2)(A), requiring a showing that the project would adequately safeguard the health, safety and general welfare of persons residing in adjoining properties;
(6) The record lacks substantial evidence to show compliance with Story County Ordinance 90.04(2)(C), requiring a showing that the project would not unduly increase congestion in the roads, or the hazard from fire, flood or similar damages;
(7) Respondent was unduly influenced by comments from the Applicant which occurred following the closure of the official record; and
(8) The Board failed to establish findings of fact on any issues.

Order of September 10, 2019, Story County Docket No. CVCV050724, pp. 3-4.

There were two differences in the issues identified in the two cases. The sixth contention in the first case (regarding the Ames Urban Fringe Plan) gained prominence as the first contention in the second case, and the claim of post-record undue influence (item 7) was unique to the second case.[2] As with the first case, the second district court decided the predecessor to CVCV052023 on the lack of

[2] The Palenskys do not pursue this claim in the present case.

fact-finding. The courts' decisions on that issue meant there was not yet any reason to consider the others. If this court now finds that the Board has adequately found the facts, then decisions on the remaining issues will be required. Now, however, the issues are defined by the petitions in the pending cases. The recitation in the issues in the prior cases is merely background.

The Appeals

The Board appealed from both district court certiorari decisions. The Court of Appeals affirmed the first district court decision on April 15, 2020. Procedendo issued June 8, 2020. Procedendo issued in this second case on June 10, 2020. It recited that the Board voluntarily dismissed the second appeal. Presumably the appeal was dismissed because the Board and its counsel could read the handwriting on the wall.

The opinion of the Court of Appeals is the final decision in CVCV050675, the case that is the predecessor to CVCV052022. In CVCV050724, the predecessor to CVCV052023, the district court decision was the final order because the appeal was voluntarily dismissed before the Court of Appeals decided it. While the court notes and remains aware of the distinction, the distinction will not make any difference here. This court considers the Court of Appeals opinion to be controlling in this case, at the very least as a practical matter.

The appeal in the second case was dismissed but both cases were decided on a lack of fact finding. Both cases are now before this court in the same substantive configuration.

On April 21, 2021, the undersigned granted motions for partial summary judgment, one in each case, that dismissed the Palenskys' counts for declaratory judgment. The Palenskys' trial briefs, which were filed in January and February of 2021, before the ruling on the motions for partial summary judgment, incorporate

their arguments made in their summary judgment motions and brief regarding the declaratory judgment counts. Those arguments have been considered in the process of ruling on the motions for summary judgment. There is no apparent benefit to this court repeating the contentions relating to the declaratory judgments.

PRESENT CASES' ARGUMENTS AND ISSUES

The parties made arguments at the August 24 trial on the basis of the returns to the writs. No additional evidence was offered.[3] The trial was reported. In summary, the Palenskys' initial contention is that the conditional use permits were vacated by the previous district court decisions or the Court of Appeals decision, or both, and thus are of no force and effect; that the Board proceedings of September 16, 2020, which were conducted in response to the remand orders, are a nullity; and that Perkins must begin the CUP process anew. This was a continuation of their argument made at the Board of Adjustment meeting of September 16, 2020 (which considered both CUPs), that "the district court annulled and vacated the CUPs and the CUPs acted on today [September 16, 2020] do not exist." (Meeting minutes: CVCV052022 Rec. Ret. part 8, 386-87; CVCV052023 Rec. Ret. part 8, 606-07.)

As a part of that contention, or perhaps as a corollary to it, the Palenskys contend that the materials in the return to the writ should be confined to matters that occurred after the remands from the appeals. They also contend that even if the pre-remand materials are considered, the post-remand decisions to approve the CUPs violated various provisions of the law and were not supported by the record before the Board. The Board seeks annulment of both writs of certiorari, which would, in effect, affirm the Board action.

[3] The Palenskys did offer a supplement to the trial briefs on June 10, 2021, that related an incident with a bull on May 25, 2021. Although this court declined to strike the supplement, this had no relevance to the issues properly before this court in these cases.

In their Reply Trial Briefs, filed in both cases on February 16, 2021, the Palenskys at least arguably soften their approach. "The Palenskys' arguments do not rely upon the proposition that a new application is required when a court sustains a writ and annuls the previous proceedings. The issue is addressed here as a matter of error preservation." (Pl.'s Reply in CVCV052022, p. 19; Pl.'s Reply in CVCV052023, p. 17.) The court does not understand how error preservation might be dissociated from a party's contentions. In any event, this court will address the substance of this contention.

Instead of arguing for requiring a new beginning with a new application, the Palenskys now argue that "the Board does not have jurisdiction to take up the matter [after the earlier certiorari decisions] *sua sponte.*" (Pl.'s Reply in CVCV052022 p. 20; Pl.'s Reply in CVCV052023, p. 18.) They conclude that section of their briefs by contending that, "This Court should hold that a new 'application' was required in the limited sense that Perkins was required to initiate or request a proceeding as a matter of public record before the Board was 'required to pass' upon a CUP application under Iowa Code section 335.15. In the absence of such a request, the Board acted illegally or in excess of its jurisdiction." (Pl.'s Reply in CVCV052022, p. 20; Pl.'s Reply in CVCV052023, p. 18.)

There was no need for Perkins to make any such request. The board did not act *sua sponte.* Instead, the board acted in obedience to the court orders to make findings of fact. The Board gave public notice of its intention to consider proposed findings of fact at its August 19, 2020 meeting and, when there was not a quorum, the September 16, 2020 meeting, and then acted at the September meeting.

This court concludes that the pre-remand records, that is the records made during the original proceedings in 2017 and 2018, are properly included in the

returns. The facts of these cases thus begin with the original applications for conditional use permits.

Many of the Palenskys' contentions are built on the premise that the February 21, 2018 meeting of the board (in what is now CVCV052022) and the September 16, 2020 meeting were two separate proceedings, and that the March 21, 2018 meeting of the board (in what is now CVCV052023) and the September 16, 2020 meeting were also two separate proceedings. Thus, they assert that everything the Board was required to do in both cases was required to be accomplished in the September 16, 2020 meeting, as if the February 21, 2018 meeting and the March 21, 2018 meeting never happened.

This contention by the Palenskys has some arguable basis in the decisions of the district courts and the Court of Appeals, but this court understands those decisions differently from the Palenskys and therefore rejects this contention. All three of those decisions discuss annulling the Board's decisions. However, all three in their closing language return the cases to the Board for findings of fact. None of those decisions require anything from the Board beyond findings of fact. This court understands that the CUPs were annulled or vacated, but concludes that there was no intention by any previous court to hold that the work done by the Board and the staff and the statements of persons who appeared before the Board somehow disappeared. In simple everyday language, the prior district courts said to the board, "You approved this CUP. Now explain why you approved it."

The Court of Appeals engaged in a careful and thorough analysis and, as noted, used annulment language, but in the end the Court of Appeals in the predecessor to CVCV052022 affirmed the district court's remand for findings of fact. Neither of the district courts nor the Court of Appeals in the predecessor to CVCV052022 said the Board's actions of February 21, 2018 or of March 21, 2018

ceased to exist. All three courts simply directed the Board to explain why it did what it did.

The Palenskys discuss the application of the law of the case and issue preclusion doctrines to this matter. Their arguments regarding those doctrines are made in support of their position that everything must be redone in the new Board meeting on September 16, 2020. Whatever the correct label for the proposition might be, this court is absolutely convinced that it should follow, that is obey, the direction of the Court of Appeals in this court's disposition of both cases. To do otherwise would be disrespectful and a fool's errand. This court understands the decision of the Court of Appeals, and the decisions of the district courts, differently from the Palenskys.

The issues raised by the Palenskys in the present cases have evolved to some extent from those raised in the previous certiorari cases. In CVCV052022, they now raise the following contentions:

(1) They incorporate their declaratory judgment submissions. (Pl.'s Trial Brief, filed January 14, 2021, p. 10.)
(2) The Board once again failed to make findings of fact. (Pl.'s Trial Brief, p. 10.)
(3) The Board failed to make findings of fact in considering whether to approve a CUP application. (Pl.'s Trial Brief, p. 13.)
(4) It was arbitrary, capricious, and unreasonable for the Board to attempt to discern the reasoning, if any, of previous board members. (Pl.'s Trial Brief, p. 16.)
(5) The board's action relating to CUP 03-19.1 was illegal. (Pl.'s Trial Brief, p. 17.)
(6) The Board failed to comply with its rules for granting CUPs. (Pl.'s Trial Brief, p. 20.)
(7) The Board failed to promulgate procedural rules in violation of Iowa Code section 335.12 and the *Mowery* case. (Pl.'s Trial Brief, p. 23.)
(8) The Board did not hear and decide whether a CUP should be granted. (Pl.'s Trial Brief 23.)
(9) The Board's proceedings violated due process. (Pl.'s Trial Brief, p. 25.)

(10) The Board violated the petitioners' [sic] right to petition the government for a redress of grievances. (Pl.'s Trial Brief, p. 25.)
(11) The Board's proceeding of February 21, 2018 is not reviewable. (Pl.'s Trial Brief, p. 26.)
(12) CUP09-17 is not supported by substantial evidence or sufficient findings of fact. (Pl.'s Trial Brief, p. 28.)

In CVCV052023, the Palenskys raise the following contentions:

(1)They incorporate their declaratory judgment submissions. (Pl.'s Trial Brief, filed January 14, 2021, p. 10.)
(2) The Board once again failed to make findings of fact. (Pl.'s Trial Brief, p. 11.)
(3) The Board failed to make findings of fact in considering whether to approve a CUP application. (Pl.'s Trial Brief, p. 13.)
(4) It was arbitrary, capricious, and unreasonable for the Board to attempt to discern the reasoning, if any, of previous board members. (Pl.'s Trial Brief, p. 15.)
(5) The Board did not consider the combined effects of CUP09-17, CUP03-19.1, and CUP08-17. (Pl.'s Trial Brief, p. 17.)
(6) The Board failed to comply with its rules for granting CUPs. (Pl.'s Trial Brief, p. 18.)
(7) The Board failed to promulgate procedural rules in violation of Iowa Code section 335.12 and the *Mowery* case. (Pl.'s Trial Brief, p. 21.)
(8) The Board did not hear and decide whether a CUP should be granted. (Pl.'s Trial Brief, p. 22.)
(9) The Board's proceedings violated due process. (Pl.'s Trial Brief, p. 23.)
(10) The Board violated the petitioners' [sic] right to petition the government for a redress of grievances. (Pl.'s Trial Brief, p. 23.)
(11) The Board's proceeding of February 21, 2018 is not reviewable. (Pl.'s Trial Brief, p. 24.)
(12) CUP09-17 [sic – CUP08-17 is the subject of this case] is not supported by substantial evidence or sufficient findings of fact. (Pl.'s Trial Brief, p. 26.)

LEGAL STANDARDS

Illegality

The action of the Board in granting a CUP is illegal if it violates a statute or ordinance, is not supported by substantial evidence, or is unreasonable, arbitrary or capricious. *Leddy v. Bd. of Adjustment*, No. 14-0781, 2015 WL 1331521, at *5 (Iowa App. March 25, 2015); *Perkins v. Bd. of Supervisors of Madison Cty.,* 636 N.W.2d 58, 64 (Iowa 2001). The action of the board may also be illegal if it violates due process and "basic considerations of fairness." *Buchholz v. Bd. of Adjustment,* 199 N.W.2d 73, 77 (Iowa 1972)(due process); *Citizens Against the Lewis & Clark (Mowery) Landfill v. Pottawattamie Cty. Bd. of Adjustment,* 277 N.W.2d 921, 923 (Iowa 1979)(hereinafter *"Mowery"*)(basic considerations of fairness).

"'[A]rbitrary and unreasonable action or proceedings' that are not authorized, are contrary to the statute defining the powers of the board, or are unsupported by facts upon which the board's power to act depends are illegal." *Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment,* 748 N.W.2d 483, 491 (Iowa 2008). A decision is "arbitrary" and "capricious" if it is contrary to the facts or to the law. *Riley v. Boxa,* 542 N.W.2d 519, 523 (Iowa 1996). "A decision is unreasonable if it is against reason and evidence `as to which there is no room for difference of opinion among reasonable minds.'" *Id*. (quoting *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994)).

Substantial Evidence

The district court has a limited role in reviewing a certiorari action. The court must limit its review of the merits of a lower tribunal's decision to whether substantial evidence supported the underlying tribunal's decision. *Bontrager*, 748 N.W. 2d at 492. The limited review of an inferior tribunal's finding after *Bontrager* is for the purpose of determining whether the inferior entity exceeded its jurisdiction or otherwise acted illegally. The Iowa Supreme Court explained that

if one of the grounds of alleged illegality is arbitrariness or unreasonableness based on the actions of the inferior tribunal, "and on the facts the reasonableness of the board's action is open to fair differences of opinion, there is, as to that, no illegality." *Baker v. Bd. of Adjustment of the City of Johnston*, 671 N.W. 2d 405, 413 (Iowa 2003). Under this theory, the court is not "authorized to substitute its judgment for that of the local board." *Id.* at 414; s*ee also Prybil Family Invs. v. Bd. of Adjustment of Iowa City*, 2013 WL 4769376, at *5 (Iowa App. 2013) (noting that "although we may disagree with the Board, we are not allowed to substitute our opinion for the Board's decision.").

A board's 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." *Mowery,* 277 N.W.2d at 925. If there is substantial evidence to support each of the required findings of fact of the board, and if the reasonableness of the board's decision based upon such findings of fact is "open to a fair difference of opinion, [then] the court may not substitute its decision for that of the board." *Bontrager,* 748 N.W.2d at 495; *Ackman v. Bd. of Adjustment for Black Hawk Cty.,* 596 N.W.2d 96, 106 (Iowa 1999).

"Evidence is substantial 'when a reasonable mind could accept it as adequate to reach the same findings.'" *Bontrager,* 748 N.W.2d at 495 (quoting *City of Cedar Rapids v. Mun. Fire & Police Ret. Sys.,* 526 N.W.2d 284, 287 (Iowa 1995)). In determining if substantial evidence exists in the record to support a board's findings, a court reviews the record in the light most favorable to the judgment when a party challenges its decision for lack of substantial evidence. *Raper v. State,* 688 N.W.2d 29, 36 (Iowa 2004). When reasonable minds can accept the evidence as adequate to reach a conclusion, courts will find that such evidence is substantial. *Meincke v. Northwest Bank & Trust Co.,* 756 N.W.2d 223, 227 (Iowa 2008).

A court may find a lack of substantial evidence only if a determination "is not supported by substantial evidence in the record before the court when that record is viewed as a whole." *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007). A court cannot find a lack of substantial evidence "[j]ust because the interpretation of the evidence is open to a fair difference of opinion..." *Id.* A court should not consider evidence "insubstantial" "merely because the court may draw different conclusions from the record." *Id*. The law does not require a fact finder to "discuss each and every fact in the record and explain why or why not he has rejected it." *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 274 (Iowa 1995) ("Such a requirement would be unnecessary and burdensome.").

A court conducting a substantial evidence review should not make "a determination as to whether evidence 'trumps' other evidence or whether one piece of evidence is 'qualitatively weaker' than another piece of evidence..." *Arndt*, 728 N.W.2d at 394. This means a reviewing court does not engage in reweighing the evidence. *Id*. at 395. It is for the trier of fact "to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue." *Id*. Instead, a reviewing court should determine whether there was substantial evidence based on the witnesses the trier of fact actually believed. *Id*.

Conditional use permits

A conditional use permit is a special exception under the Iowa zoning statutes. *Vogelaar v. Polk Cty. Zoning Bd. of Adjustment,* 188 N.W.2d 860, 862 (Iowa 1971).

> The purpose of conditional use permits is to provide for flexibility in what otherwise would be the rigidity of zoning ordinances, while at the same time controlling troublesome aspects of somewhat incompatible uses by requiring certain restrictions and standards. An application for a conditional use permit must meet all conditions of an ordinance. The failure to satisfy even one of the ordinance's conditions is fatal to a

> permit application. Further, the applicant has the burden of proof in showing that all the conditions of the ordinance are satisfied.

W. & G. McKinney Farms, LP v. Dallas Cty. Bd. of Adjustment, 674 N.W.2d 99, 103-104 (Iowa 1999) (internal citations omitted).

This court should give "deference to the board of adjustment's interpretation of its . . . zoning ordinances, [but] final construction and interpretation of zoning ordinances is a question of law" for this court, and ultimately one for the appellate courts, to decide. *Lauridsen v. City of Okoboji Bd. of Adjustment,* 554 N.W.2d 541, 543 (Iowa 1996).

With these standards in mind, this court will first address CVCV052022 and then turn to CVCV052023. The Palenskys have briefed and argued both cases in the same format, that is, in twelve divisions numbered I through XII. The arguments in each division are fundamentally the same, with minor differences that generally do not require a different analysis. Therefore, this court will not unduly extend this decision by repeating its entire analysis expressed in CVCV052022 in its analysis of CVCV052023. Those divisions from CVCV052023 that are notably different from their counterparts in CVCV052022 and require further development or analysis will be identified and addressed.

CVCV052022 (formerly CVCV050675), CUP09-17

I. Declaratory Judgment Issues

The declaratory judgment issues in both cases were decided by the ruling on the motions for summary judgment that was filed in both cases on April 21, 2021.

II. Did the Board once again fail to make findings of fact?

Procedural History

On November 20, 2017, Perkins applied for a conditional use permit from Story County Planning and Development, seeking authorization to build a bed and breakfast inn and include a 4400 square-foot event venue at the site. This was CUP09-17, and the previous certiorari action was Story County docket number CVCV050675.

The CUP application was sent to all of the county departments for review and comment prior to a hearing before Planning and Zoning (P&Z). A letter compiling all of the departments' questions was sent to Perkins on November 27, 2017. Additional input was provided by the Xenia Rural Water District in December 2017 and January 2018. Alliant Energy provided information in December 2017. Perkins responded with a Site Plan Checklist created by SB&A Architects, LLC on January 18, 2018.

The P&Z considered the CUP application at its meeting on February 7, 2018. Prior to the P&Z meeting, the Planning and Development staff prepared a report containing staff comments and specific recommendations for conditions to be placed on the CUP, and proposing four options from which the P&Z could select to move forward on the CUP application. (Rec. Ret. part 2, 55-56.) One of the conditions the staff recommended was limiting the maximum capacity of the event venue to 150 guests per event with the option for Perkins to apply for a modification increasing the guests to a maximum of 300 after the first year of operation. (Rec. Ret. part 2, 55.) This would allow the CUP to be evaluated by county staff and permit the staff to make further recommendations to P&Z and the Board based upon any feedback received from adjacent property owners and the general public.

At the P&Z meeting, several members of the public spoke in favor of the project and the Palenskys' attorney, Mr. Ervanian, spoke against the project. The P&Z voted to recommend approval of the CUP with the following conditions:

1. All parking stall areas shall be clearly marked in order to meet the Story County Land Development Regulations Section 88.08 that all parking spaces and circulation routes are well-defined and clearly marked.
2. The applicant shall provide dust control on 240th Street adjacent to existing and future dwellings if daily traffic counts to and from the subject property exceed 150 vehicles per day. At any time, the Planning and Development Department may request the applicant to hire an engineer to study the traffic counts on 240th Street to and from the subject property.
3. A site plan meeting all requirements of the Story County Land Development Regulations shall be submitted for action by the Story County Board of Supervisors prior to the issuance of any Zoning Permits.

(Rec. Ret. part 3, 121.) The P&Z did not adopt the staff recommendation for capping maximum capacity of the event venue at 150 guests.

On February 13, 2018, six days after the P&Z meeting, the staff received information regarding fire safety and response capabilities and the fact that additional help would be required from local towns. On February 15, 2018, the staff received a letter from the City of Ames Planning and Housing Director. The Director expressed concerns regarding the compatibility of the proposed uses of the project with the Ames Urban Fringe Plan Designation and proposed five conditions for approval of the CUP.

The next step for the CUP application was review and action by the Board of Adjustment. The Board held a public meeting on February 21, 2018, two weeks after the P&Z meeting, to consider the application. The Planning and Development staff presented a report and a project overview to the Board. The report addressed each of the standards in Story County Land Development Regulation Ordinance section 90.04 for considering a CUP. When this matter came before the Court of

Appeals, it described the requirements of section 90.04(1) as the "six affirmative criteria" and the requirements of section 90.04(2) as "the five dangers." *Palensky v. Story Cty. Bd. of Adjustment*, 2020 WL 1879711, at **3 (Iowa App. 2020).

The Palenskys contend that previous courts determined the staff report was not adequate as findings of fact. That is not accurate. In fact, the inadequacy the previous courts found was that the Board did not adopt the staff report, or anything else, as its findings in its 2018 decision. The Court of Appeals was clear in distinguishing between the presentation of information to the Board and adoption of that information as findings. "We do not therefore read *Condon Cabin* as standing for the proposition that mere presentation of information to a board alone suffices to satisfy the board's obligation to make findings." *Palensky*, 2020 WL 1879711, at **5. The courts, both district and appellate, did not say that the staff report would have been inadequate if it had been adopted by the Board. Because the absence of findings of fact by itself required that the 2018 writ of certiorari be sustained, the previous district court did not consider the Palenskys' other complaints, and the Court of Appeals did not go beyond affirming what the district court did.

In any event, the staff report's recommendations of 2018 did form the basis for the findings of fact that the Board eventually adopted on September 16, 2020. For that reason, the court will recite or summarize each recommendation from 2018 and relate it to the associated finding of fact made in 2020.

The staff report said this regarding the compatibility standard of Section 90.04(1)(A):

> The Bed and Breakfast use will occupy the existing dwelling as well as a proposed 2,376 square foot addition to the dwelling. The event venue is a proposed 4,400 square foot addition to the site. This area is zoned A-1 Agricultural and A-R Agricultural Residential which

> permits uses such as agriculture, single-family dwellings, cemeteries, stables, parks, and forest reserves. Surrounding land use is currently limited to single-family dwellings, agriculture, and natural area.
>
> The Ames Urban Fringe Plan Land Use Framework Map designates this area as Urban Residential, which is intended for future city growth. This property is intended to be annexed and developed at an urban density with infrastructure and residential subdivisions according to City standards. The proposed Bed and Breakfast is the proposed use that best fits with this designation. However, if the property were ever annexed into Ames, a bed and breakfast of no more than two (2) guest rooms would be permitted under the city's existing zoning ordinance.
>
> While the bed and breakfast and event venue are located on the south side of the creek, the addition of an events venue to serve up to 300 guests could potentially have a major impact on the immediate vicinity due primarily to potential noise and traffic. Additionally, such a commercial use may limit the future residential growth of this area.
>
> The hours of operation for the event center are planned to be 8:00am to 12:00am. Outdoor activities and music are anticipated. It is the intention of the applicant to end any outdoor music at dusk, and to end indoor music inside the event center at 11:00pm.

(CVCV052022 Rec. Ret. part 3, 113.) This section of the report became finding of fact A.1. (CVCV052022 Rec. Ret. part 9, 412-13.)[4]

The staff report considered the transition requirements of section 90.04(1)(B) and noted the numerous trees and large natural areas that "will likely act as a partial buffer of the proposed uses", the relative location of Worrell Creek, and the

[4] All references to the record return in this section of this decision are to the record return in CVCV052022, unless otherwise specified.

requirement for additional landscaping. (Rec. Ret. part 3, 114.) This was the basis for finding of fact A.2. (Rec. Ret. part 9, 413-14.)

The staff report addressed the traffic standards in Section 90.04(1)(C):

> The 2015 Iowa DOT Traffic Counts show 60 vehicles as the Average Annual Daily Traffic on 240th Street between South Dakota Avenue and 500th Avenue. Based on the applicant's estimated vehicle trips per day with the bed and breakfast at 50% capacity, the Average Annual Daily Traffic would increase by over 25%. With the event venue for up to 300 guests, staff estimates that the number of vehicles travelling to the site would likely be closer to between 100 and 150 vehicles, making two vehicle trips during any event, totaling between 200 and 300 additional vehicle trips. Story County Engineering and Secondary Roads will require the applicant to provide dust control measures if the traffic counts exceed 150 average annual daily traffic. While it is possible that the event guests will stay at the bed and breakfast, it is also possible that those staying at the bed and breakfast are separate from the event. It would be possible that there would be up to 320 people on the subject property at one time. The applicant is proposing to work with local hotels and shuttle services to provide transportation for the guests to and from the event venue, which will reduce the number of vehicles traveling to and from the site.
>
> In comparison to these numbers, the currently approved Human Services Conditional Use Permit issued for Youth and Shelter Services (YSS) estimated a total of 24-32 vehicles traveling to the site each day. The estimated increase in traffic would be approximately 48-64 vehicle trips per day.

(Rec. Ret. part 3, 114-15.) This language became finding of fact A.3. (Rec. Ret. part 9, 414-5.) The findings of fact also note that Perkins proposed to alleviate traffic congestion by using shuttles to transport guests from hotels in Ames. (Rec. Ret. part 9, 406.)

The staff report addressed the parking and loading requirements of 90.04(D) by reciting the planned parking areas and describing how they were adequately buffered by trees and open space. (Rec. Ret. part 3, 115.) This was the basis for finding of fact A.4. (Rec. Ret. part 9, 415-16.)

The staff report considered the signs and lighting requirements of 90.04(E) by noting that ADA compliant signs will be required for ADA parking spaces and lighting will be required to meet the requirements of chapters 88 and 89 Story County Land Development Regulation Ordinance. (Rec. Ret. part 3, 115-16.) This supported finding of fact A.5. (Rec. Ret. part 9, 417.)

The staff report addressed the environmental protection criteria in Section 90.04(1)(F):

> All proposed site improvements are planned outside of the flood plain. The 20% landscaping of the imperious [sic – impervious] surfaces added is required to be installed at lower areas adjacent to the improvements to provide maximum benefit for preventing soil erosion. The applicant will be required to design the proposed building and site improvements in accordance with Iowa Stormwater Management Manual and SUDAS for erosion control. The applicant will need to monitor the water across the driveway and make any necessary adjustments to keep the access safe for the general public.

(Rec. Ret. part 3, 116.) This became finding of fact A.6. (Rec. Ret. part 9, 417-18.)

Having completed its review of the considerations in section 90.04(1), the staff report then moved on to examine the various parts of section 90.04(2), which, as noted above, the Court of Appeals characterized as “the five dangers.” *Palensky*, 2020 WL1879711, **3. Section 90.04(2) opens by saying:

> If the Board of Adjustment concludes that all development criteria [that is, the requirements of section 90.04(1)] will be met by the development, it shall approve the application and plans unless it concludes, based on the information submitted with the official application materials and at the hearing that if completed as proposed there is a strong probability that the development will . . .

run afoul of the considerations that follow in section 90.04(2). (Rec. Ret. part 8, 359.)

The staff report addressed the criterion in section 90.04(2)(A), regarding possible impairment of health, safety and welfare of others nearby:

> Impact of the proposed Bed and Breakfast will likely have minimal impact on the neighboring properties. The proposed Events Venue will have much more of a potential impact on traffic and noise for neighboring property owners.

(Rec. Ret. part 3, 116-17.) This became finding of fact B.1. (Rec. Ret. part 9, 418.)

Section 90.04(2)(B) prohibits the impairment of an adequate supply of air and light or of its quality. The staff foresaw no such impairment. (Rec. Ret. part 3, 117.) The Board adopted the staff's conclusion as finding of fact B.2. (Rec. Ret. part 9, 418.)

The staff report addressed the criteria in Section 90.04(2)(C), regarding congestion on the roads or hazard from fire, flood or other similar dangers:

> It is anticipated that during large events, traffic along 240th Street could be increased by as much 500% with 100 to 150 vehicles to reach the anticipated 300 guests with the addition of the events venue. This traffic may have impact on local and agricultural traffic in the area. The use of shuttles for transporting guests will help to reduce the increase in traffic.

(Rec. Ret. part 3, 117.) This staff comment became finding of fact B.3. (Rec. Ret. part 9, 419.)

The staff report addressed the criteria in Section 90.04(2)(D) regarding possible diminution of property values and noted the assessor raised no concerns. (Rec. Ret. part 3, 117.) This supported finding of fact B.4. (Rec. Ret. part 9, 419.)

Section 90.04(2)(E) requires considering whether the "proposed use is in accord with the intent, purpose and spirit of the Ordinance or the Story County Development Plan." The staff report states that "[t]he proposed use is in accordance with the Story County Land Development Regulations which permits Bed and Breakfast Inns with event venues in the A-1 Agricultural district if a Conditional Use Permit is granted . . . ." (Rec. Ret. part 3, 117.) The staff also notes this use would not align with the Urban Residential Land Use Plan of the Ames Urban Fringe Plan (AUFP). (*Id.)* This is the basis for finding of fact B.5. (Rec. Ret. part 9, 419.)

The amended petition for certiorari alleges that the property owners, Douglass and Wanda McCay, submitted a request to the City of Ames to amend the Land Use Framework Map to accommodate the event venue, and this request was denied by the Ames City Council. (Pl.'s Amended Petition, filed Oct. 8, 2020, par. 109(a), pp. 24-25.) The record return in CVCV052022 does not include the Ames Urban Fringe Plan (AUFP). The Palenskys' brief relies upon an extra-record citation to Story County materials found on the internet. (Pl.'s Trial Brief, filed January 14, 2021, p. 29.) That brief also includes a citation to page 1117 of the record return, but the return in CVCV052022 ends at page 944. The record return in CVCV052023 includes 1144 pages, but page 1117 does not relate to this issue. The 2011 28E implementing agreement for the 2006 AUFP is, however, contained in the record return in CVCV052023, at part 3, pages 137-48, and gives the court some insight into the contents of the AUFP. This is developed further at pages 39-41 of this decision.

The AUFP was discussed at the March 21, 2018 meeting of the Board of Adjustment, according to the minutes signed on April 18, 2018. (See Rec. Ret. part 4, 182-185.) That topic was the major focus of the discussion on this CUP. The Board regarded the possible need for amendment of the AUFP as an issue to be resolved by a different body and chose to approve this CUP. This topic arises again in connection with the Palenskys' contention that the AUFP binds the Board of Adjustment and prevents the Board from granting the CUP. At this point in this decision, it is sufficient to note that the Board did make findings of fact regarding the existence of the AUFP (Rec. Ret. part 9, 419) and noted that the event venue "would not likely align" with the AUFP. (*Id*.) What effect the failure to align with the AUFP should have on the Board's decision will be considered below.

The staff report next reviewed comments from other sources, both within county government (interagency review) and from the general public. (Rec. Ret. part 3, 117-119.) The interagency review section included discussions about: (1) environmental health; (2) engineering; and (3) the Assessor. (Rec. Ret. part 3, 118.) The comments from the general public included comments from the plaintiffs' attorney Greg Ervanian; the Westory fire chief; and the City of Ames Planning and Housing Director. (Rec. Ret. part 3, 118-19.) All of this was included in the September 16, 2020 findings of fact. (Rec. Ret. part 9, 420-22.)

The staff report included "Points to Consider for the Conditional Use Permit", which gave further consideration to the purposes behind the standards for granting a CUP. (Rec. Ret. part 3, 119.) The section then discussed the particular potential issues with this CUP in relation to those purposes. (Rec. Ret. part 3, 119-20.) This section discussed location and buffering, the potential issues with hosting 300 people for an event, the increased traffic on average and during events, issues with annexation into the City of Ames, and the AUFP future use

map. (*Id*.) Unlike the earlier actions of the Board, these considerations were included in the September 16, 2020 findings of fact. (Rec. Ret. part 9, 422-23.)

The Board received input from members of the public. Mary Greeley Medical Center staff raised concerns about emergency response and the ease of access for emergency vehicles, signage lighting, establishing separate addresses for identifying specific buildings, and whether an AED or first aid/bleeding control would be available at the site. (Rec. Ret. part 3, 118.)

The September 16, 2020 findings of fact note that P&Z approved this CUP, with the conditions discussed at page 17 of this decision. (Rec. Ret. part 9, 423-24.) The conditions recommended by P&Z did not include the staff recommendation, also mentioned at page 17, that the event venue be limited to 150 people for the first year. (*Id*.)

The Palenskys' attorney appeared at the public hearing on February 21, 2018. He argued that the CUP should not be issued because of increased traffic and fire safety and septic concerns resulting from the event venue portion of the proposed project. (Rec. Ret. part 4, 177.) The staff continued to recommend limitation of the event venue capacity to 150 for the first year. (Rec. Ret. part 3, 120.)

Following discussion, the Board, acting at its meeting of February 21, 2018, approved the CUP by a vote of three to one with the three conditions recommended by P&Z, but did not include the conditions proposed by the City of Ames. (Rec. Ret. part 4, 179.) The problem that caused the 2018 petition for writ of certiorari to be sustained arose because the Board never made findings of fact and did not indicate whether they incorporated or relied upon the P&Z or staff presentations in their approval of the application. That omission was corrected at the meeting of September 16, 2020. (Rec. Ret. part 9, 427-28.)

Continuing in the matter that is now CVCV052022, the CUP certificate was recorded with the Story County Recorder's office on February 27, 2018. The minutes of the February 21, 2018 meeting were unanimously approved at the March 21, 2018, Board meeting. (Rec. Ret. part 4, 180.)

On March 22, 2018, the Palenskys filed a Petition for Writ of Certiorari in the district court as Story docket number CVCV050675. The petition raised seven issues. The seventh issue, which the district court found dispositive, was that the Board failed to make findings of fact on any issues.

After a hearing, the district court filed its decision on January 30, 2019. After relating the facts and procedural history, the court began its legal analysis by relating the standard that governs the district court in a certiorari case.

> A party may file a petition for writ of certiorari when the party asserts an inferior board, exercising judicial functions, exceeded its proper jurisdiction or otherwise acted illegally. Iowa R. Civ. P. 1.1401. The reviewing court may only enter judgment on the writ by annulling the writ or sustaining it (either fully or partially) to the extent the proceedings below were illegal or in excess of its jurisdiction. Iowa R. Civ. Proc. 1.1411. The judgment must prescribe the manner in which either party may proceed and must not substitute the court's own order for the board's decision being reviewed. *Id*. Furthermore, the court cannot authorize a limited remand to the Board while retaining jurisdiction to review the Board's subsequent actions. *Sereda v. Zoning Bd. of Adjustment*, 641 N.W.2d 206, 208 (Iowa Ct. App. 2001).

Order of January 30, 2019, Story County Docket No. CVCV050675, p. 6.[5]

[5] As the first district court pointed out, Rule of Civil Procedure 1.1411 provides that it is *the writ* that is to be either annulled or sustained. This is a change from the previous language of the rule which, as recently as 2002, "provide[d] that '[u]nless otherwise specially provided by statute, the judgment on certiorari shall be limited to sustaining the proceedings below, or annulling the same wholly or in part, to the extent that they were illegal or in excess of jurisdiction....' Iowa R. Civ. P. 1.1411. " *Carruthers v. Bd. of Sup'rs, Polk*

The district court went on to note that:

> The application and staff's PowerPoint presentations at the P&Z meeting and the Board meeting set forth Perkins' and P&Z's arguments that the project complied with the six development criteria set forth in Story County Ordinance 90.04(1). . . . *However, the Board never made findings of fact or indicated whether they incorporated or relied upon the P&Z documentation* in their approval of the CUP application. Likewise, the Court cannot tell whether the Board considered and disregarded the objections to the CUP – such as the staff recommendation to reduce maximum capacity during the first year to 150 people per event, the City of Ames' objection that the proposed use would not comply with the Ames Urban Fringe Plan, or the Palenskys' concerns about traffic and fire safety – or whether they were not considered at all. There was some extended discussion about fire safety but the Board did not appear to make a determination on the issue at all.

Id. at pp. 7-8 (emphasis added).

The district court addressed the Palenskys' seventh contention first, that the Board issued no finding of fact, and decided the case on that ground alone. The court first recited the requirements of Story County Ordinance 90.06(1)(A), which provides:

> "[t]he Board of Adjustment shall establish a finding of facts based upon information contained in the application, the staff report, and the Commission recommendation and presented at the Commission or Board of Adjustment hearings." In addition to other requirements, the ordinance requires that "[a]ll conditions or requirements shall be recorded with the *written decision and order* developed by the Board of Adjustment." Story County Ordinance 90.06(4).

Cty., 646 N.W.2d 867, 869–70 (Iowa App. 2002). This court has been unable to determine exactly when the change in language occurred.

Id. at p. 8.

The district court then cited the rule the Iowa Supreme Court stated in deciding *Mowery*, 277 N.W.2d at 925, that:

> . . . boards of adjustment shall 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.

Id. The court observed that the Supreme Court later determined that substantial compliance with the written findings requirement is sufficient. *Bontrager,* 748 N.W.2d at 488. The district court was focused entirely on the lack of fact finding by the Board.

This need for fact finding was why the district court declined the Board's request to conduct a review of the record to determine if substantial evidence supported the Board's issuance of the CUP. *Id*. at pp. 11-12. The final paragraph of the district court's Legal Analysis section, which was the penultimate paragraph of the January 30, 2019 Order, was clear: "This matter is remanded to the Board for filing of written findings of fact in compliance with Story County Ordinance 90.06, *Citizens Against Lewis and Clark (Mowery) Landfill*, 277 N.W.2d 921, and *Bontrager Auto Service, Inc.*, 748 N.W.2d 483. Because this issue is dispositive, the Court will not address the remaining allegations raised by the Palenskys." *Id*. at p. 12.

The district court's Conclusion was consistent with the Legal Analysis. "It is therefore ordered the Petitioners' Petition for Writ of Certiorari is sustained, that the previous proceedings of the Board are annulled [despite the rule's requirement that the court annul *the writ*], and this matter is remanded to the Board for creation of written findings of fact regarding its decision to approve Perkins' CUP application." The district court did not require that the CUP be refiled. It did not

require that the Board conduct a new hearing. The district court ruled that findings of fact were necessary to understand why the Board had approved the CUP and to determine whether the action was supported by the record.

The Board appealed and the case was referred to the Court of Appeals. The Court of Appeals affirmed the first district court decision on April 15, 2020. Procedendo issued June 8, 2020. The opinion of the Court of Appeals is the final decision in CVCV050675, the case that is the predecessor to CVCV052022. The appellate decision is unpublished, but may be found at 2020 WL 1879711, or in the district court docket for CVCV050675, where it was filed on June 8, 2020.

When discussing the proceedings in the district court, the Court of Appeals observed:

> [t]he district court found the Board's failure to make written findings to be dispositive, relying on Story County land regulation ordinances; *Citizens Against Lewis & Clark (Mowery) Landfill v. Pottawattamie County Bd. of Adjustment*, 277 N.W.2d 921, 925 (Iowa 1979); and *Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483, 488 (Iowa 2008).

Palensky v. Story County Bd. of Adjustment, 2020 WL 1879711, **1 (Iowa App. 2020).

The Court of Appeals first discussed the motion to dismiss the appeal filed by Perkins. The court held that the district court's decision was a final order. "When a district court grants a writ of certiorari holding a zoning board's decision to be illegal and remanding for further proceedings before the board, the district court fully relinquishes jurisdiction. *Sereda v. Zoning Bd. of Adjustment*, 641 N.W.2d 206, 208 (Iowa Ct. App. 2001) . . . ." *Palensky*, 2020 WL 1879711, at **2. That the district court order was final does not change the fact that the order required the board to make findings of fact, and nothing more.

The entire discussion of the merits of the appeal was dedicated to the need for findings of fact and whether the Board had substantially complied with that requirement. The appellate decision concluded, "Because the Board's decision lacked substantial compliance with the written findings requirement of *Bontrager* and *Citizens* and lacked compliance with Story County ordinances, we affirm the district court's decision reversing and remanding for findings of fact." *Palensky*, 2020 WL 1879711, at **7. There is no violation of the law of the case doctrine here. The Board did what it was told to do.

The Palenskys argue that "the Board produced nothing at its proceeding of September 16, 2020 that was not available to the district court and court of appeals when they concluded the Board did not substantially comply with the requirement of written findings of fact." (Pl.'s Trial Brief, p. 12.) That is not the case. The Board action converted the staff and P&Z recommendations into findings of fact and thus changed their nature.

The Palenskys make other arguments, which follow, about the adequacy of the Board's findings and the Board's authority to make them, but the Board did make findings of fact on September 16, 2020. This contention has no merit.

III. Did the Board fail to make findings of fact in considering whether to approve the CUP application?

The Palenskys make three arguments under this issue. The first is that the current board (referring to the Board that acted on September 16, 2020) has a different composition than the Board that approved CUP09-17. They contend that the Board that met on February 21, 2018 was a different Board than the Board that met on September 16, 2020. Indeed, the membership of the Board had changed. One member of the 2018 Board remained in 2020. The Palenskys do not cite any authority for the proposition that the 2020 Board was different, but they do cite *In*

re Marriage of Seyler, 559 N.W.2d 7, 9 (Iowa 1997) for the related proposition that a matter should be decided by the judge who heard the evidence.

First, considering the argument that the Board was different, the Board of Adjustment is an administrative or quasi-judicial government entity. *Martin Marietta Materials, Inc. v. Dallas Cty.,* 675 N.W.2d 544, 553 (Iowa 2004); *Earley v. Bd. of Adjustment of Cerro Gordo Cty*., 955 N.W.2d 812, 816 (Iowa 2021). It is a continuous entity and its power is a continuing power. *Schumacher v. City of Clear Lake*, 214 Iowa 34, 239 N.W. 71, 73 (1931) (city council). In *Schumacher*, the Iowa Supreme Court relied on *State (Booth et al., Prosecutors) v. Mayor of City of Bayonne*, 56 N. J. Law, 268, 28 A. 381 (1893); *In re Mayor*, 193 N. Y. 503, 87 N. E. 759 (1908); and *Zeo v. City Council of Springfield*, 241 Mass. 340, 135 N. E. 458 (1922).

The New Jersey Supreme Court writing in *City of Bayonne* made this very point:

> There can be no serious contention that every time there is an annual charter election in the city of Bayonne, wherein one–half of the council go out of office and their successors are elected, that all prior proceedings end, and must be again commenced. The city council is a continuous body, and, as to street improvements, the new city council can take up the proceedings where they were left by the old council, and proceed to carry out the provisions of the charter in reference thereto.

28 A. at 382. This language applies with equal force to Boards of Adjustment.

This principle also applies to judicial entities. In *State v. Richards*, 229 N.W.2d 229, 233 (Iowa 1975), the Iowa Supreme Court held that a judge can change a prior ruling by another judge and explained, "A change of judges makes no difference, since it is the same court." The Board of September 16, 2020 was

the same Board that existed on February 21, 2018. A change in the membership did not change the entity.

However, as noted above, the Palenskys also contend that the decision to issue the CUP was improperly decided by members of the Board who were not present for the 2018 presentations and cite *Seyler* in support. 559 N.W.2d at 9. *Seyler* involved a situation in which one judge heard the evidence but a different judge decided the case without having access to the transcript and without holding any hearing.

Here, the members of the Board who heard the evidence, the people before whom the record was created, made the decision on February 21, 2018. They approved the CUP. The later proceedings that were conducted on September 16, 2020, after the petition for writ of certiorari was sustained and after membership of the Board had changed, merely explained why that decision was made. This situation is more akin to the facts in *Hartig v. Francois,* 519 N.W.2d 393, 394 (Iowa 1994), which is discussed in *Seyler*. 559 N.W.2d at 11.

In *Hartig,* a judge considered a motion for summary judgment after hearing the arguments of counsel. 519 N.W.2d at 394. "The judge who heard the motion dictated a proposed order, but left on vacation before signing it. *Id*. A second judge, apparently concerned about an approaching trial date, located the order and signed it. *Id*." *Seyler*, 559 N.W.2d at 11. The Supreme Court permitted that procedure. As the court explained in *Seyler,* "The purely ministerial act of signing the order was not deemed the exercise of jurisdiction inconsistent with the power of the judge who had the matter under advisement." *Id*.

The Board points out that neither Story County Ordinance 90.03(G)(1) nor Iowa Code section 335.17 requires that the membership of the Board remains unchanged. (Def.'s Trial Brief, pp. 28-29.) The record does not include Ordinance 90.03(G). (See CVCV0052022 Rec. Ret. part 8, 358-59; CVCV052023 Rec. Ret.

part 7, 578-79.) In any event, the change in membership does not present the impediment for which the Palenskys argue.

The second argument the Palenskys make under their contention that the Board failed to make findings of fact is that when the Board acted on September 16, 2020, it engaged in no review of the proceeding of February 21, 2018. (Pl.'s Trial Brief, p. 14.) This contention is not accurate. The record return shows that the Board was familiar with and did consider the matters presented on February 21, 2018. (See Rec. Ret. part 8, 385-87 (adoption of findings of fact); part 9, 411 (CUP09-17 itself); part 9, 412-28 (the findings of fact that incorporated what occurred on February 21, 2018); part 9, 435-36 (referring to the prepared findings of fact); part 9, 441-42 (the votes); part 9, 448-50, and part 10, 451 (Mr. Ervanian's comments, after the vote on the CUP, but before the meeting concluded; these included his contention the CUPs "simply don't exist" due to the actions of the courts.)) Once again, this court rejects the contention that the proceedings and actions taken before September 16, 2020, somehow ceased to exist. The record shows substantial compliance, which is all that is required. This argument is not supported by the record.

The third argument is that the Board failed to "consider" whether to approve the CUP application. (Quotations in brief.) (Pl.'s Trial Brief, p. 15.) This argument again seeks to dissociate the September 16, 2020 meeting from all that had gone on before. The consideration occurred on February 21, 2018. The only new action the courts required in their certiorari decisions was findings of fact. The Board met that requirement.

IV. Was it arbitrary, capricious and unreasonable for the Board to discern the reasoning of previous Board members?

The Palenskys' primary complaint here is that Steve Bruns, the sole dissenting vote on February 21, 2018, was no longer a member of the Board and thus had no opportunity to make a record regarding the facts he relied upon or to persuade other members to change the approval. This contention again attempts to divorce the action of February 21, 2018, from the action of September 16, 2020,

More importantly, this argument does not take into account that any approval or disapproval of a CUP, including the approval of this one, is an action of the Board, and not of individual members. Even Board members who voted for the result that prevailed may have had differing reasons for their individual votes.

The Palenskys argue that the Board should have had the latitude to reach a different outcome on September 16, 2020. The Board did have that latitude. The members who voted on September 16, 2020 had before them the records from the February 21, 2018 meeting and the benefit of one holdover member. If any of the Board members believed the result was wrong or was unsupported, they had the opportunity to vote to reject the findings of fact, but all members chose to approve them. Their vote shows they were satisfied with the action of February 21, 2018, whether they took the action of September 16, 2020 for the same reasons or not. This is not a good basis for upsetting the September 16, 2020 action of the Board.

V. Was the Board's action relating to CUP03-19.1 illegal?

In their reply brief, the Palenskys refer to the "rogue modification" of CUP09-17 by CUP03-19.1. (Pl.'s Reply Trial Brief in CVCV052022, pp. 4 and 6.) They contend that the Board made a "false claim" in its argument before this court "that CUP03-19.1 reduced the plans for the bed and breakfast structure." (*Id.* at 6.)

The modification was not rogue and the Board's claim is not false, but is fair argument. There is nothing in this record to support a claim that CUP03-19.1 was unlawful or improperly granted. The grant of that CUP is not before this court.

The Board's characterization of CUP03-19.1 is not false. CUP03-19.1 deleted the request for four additional rooms, which is a clear reduction. (Rec. Ret. part 9, 429.) It provided that an existing outdoor patio area would be enclosed, without any expansion. (*Id.*) Enclosing the patio would tend to contain noise from any gatherings there. Overall, the Board's description of this as a reduction seems accurate to this court.

The Palenskys argue that a modification request was required by Ordinance section 90.07. The approval of CUP03-19.1 was an accomplished fact by the time of the September 16, 2020 meeting. This is an untimely attack on CUP03-19.1.

The Palenskys also assert that the Board did not consider the combined effects of CUP09-17, CUP03-19.1 and CUP08-17. The first and third of these were before the Board for fact finding on September 16, 2020. The second of the three was the topic of a specific finding of fact, in which the Board "acknowledges the above identified changes due to the Board of Adjustment's approval of CUP03-19.1." (Rec. Ret. part 9, 427.) This finding followed the recommendation of the Story County Planning and Development Director expressed in a memorandum dated August 19, 2020, four weeks before the September 16, 2020 meeting. (Rec. Ret. part 9, 429-30.) The Palenskys' contentions are late and are not supported by the record.

VI. Did the Board fail to comply with its rules for granting CUPs?

There are ten specifications of alleged failure under this heading. (Pl.'s Trial Brief, pp. 20-22.) Each specification suffers from the same infirmity. The Palenskys' arguments on this this issue and its individual specifications are

premised on the contention that the February 21, 2018 action and the September 16, 2020 action are two separate matters, and that everything that happened in 2018 had to repeated on September 16, 2020, with the addition of findings of fact. That premise is not accurate. The Board was directed by the first district court and by the Court of Appeals to prepare findings of fact. Again, there was no requirement that the Board start over. As this court has said previously, this court rejects the premise that underlies these contentions.

VII. Did the Board fail to promulgate procedural rules in violation of Iowa Code section 335.12 and the *Mowery* case?

Here, too, the underlying premise is that the 2018 and the 2020 actions were two separate matters so that the September 16, 2020 action was outside the existing rules. This court has rejected that premise and continues to do so.

VIII. Did the Board not hear and decide whether a CUP should be granted?

Once again, the underlying premise is that the 2018 and the 2020 actions were two separate matters. If this premise had merit, the plaintiffs would not have needed to repeat it as often as they have. It does not have merit.

IX. Did the Board's proceeding violate due process?

Due process was served at the 2018 meeting. The prior courts directed the Board to prepare findings of fact. The Board followed that direction and acted, entirely properly, on the basis of the record made on February 21, 2018. The Board might have chosen to permit further argument and debate, but it was not required to do so.

The language of Iowa Rule of Civil Procedure 1.1411 is critical. The rule says, in part, that if the writ is sustained, the "judgment shall prescribe the manner in which either party may proceed, ..." Iowa R. Civ. P. 1.1411. The district court

in CVCV050675, after the troublesome annulled language that the Palenskys read too much into, ordered that "this matter is remanded to the Board for creation of written findings of fact regarding its decision to approve Perkins' CUP application." There is nothing about holding a new hearing, taking additional evidence or requiring new reports. The Court of Appeals affirmed the district court without creating any additional requirements. Due process was accomplished at the 2018 meeting. Repetition of the entire process was not required.

X. Did the Board violate the Palenskys' right to petition the government for a redress of grievances?

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The Iowa Constitution provides: "The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives and to petition for a redress of grievances." Iowa Const. art. I, § 20. The Iowa Supreme Court "has generally viewed the federal and state constitutional provisions as coextensive." *State v. Hill*, 2015 WL 3613313, at *3 (Iowa App. 2015); *See, e.g., City of West Des Moines v. Engler,* 641 N.W.2d 803, 805 (Iowa 2002); *State v. Milner,* 571 N.W.2d 7, 12 (Iowa 1997); *Des Moines Register & Tribune Co. v. Osmundson,* 248 N.W.2d 493, 498 (Iowa 1976). Thus, the court "will interpret the scope of the state constitutional provisions to track with the federal interpretations of the First Amendment." *Hill*, 2015 WL 3613313, at *3.

Although the Palenskys do not elaborate on their legal theory beyond citing the First Amendment and Article I, section 20, this court understands them to be arguing the "access-to-courts and other forums" meaning of the Petition clause.

"[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011). "[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." *Id*. (quoting *Sure–Tan, Inc. v. NLRB*, 467 U.S. 883, 896–897 (1984)).

The Palenskys are not being denied access to the courts. They were heard by the Story County Board of Adjustment on February 21, 2018. They thereafter petitioned the district court in certiorari action CVCV050675, were heard on January 24, 2019, and obtained a favorable ruling on January 30, 2019. They were permitted to successfully defend that ruling in the Court of Appeals, and are now exercising their right to petition in this certiorari case.

The Board did not deny the Palenskys their right to petition for redress of grievances when it created written findings of fact as directed by the district court. They had already been heard by the Board on February 21, 2018. On remand, the Board was simply following the instructions of the district court issued in compliance with rule 1.1411, as affirmed by the Court of Appeals, to create written findings of fact. This certiorari case and this decision are further demonstration that the Palenskys have been afforded the right to petition for redress.

XI. Is the Board's proceeding of February 21, 2018 not reviewable?

The Palenskys' contention here seems to be a repetition of their position that the lack of findings of fact made it impossible for the district court to review the Board's February 21, 2018 decision to approve the CUP. That was the basis for the district court decision in CVCV050675 and the affirmation by the Court of Appeals. However, as previously expressed, the previous courts ordered the Board to make findings of fact to remedy that fault. The Board has followed that instruction. This claim has no longer has any merit.

XII. Is CUP09-17 supported by substantial evidence and sufficient findings of fact?

The Palenskys contend that the "Board has again failed to make findings of fact," (Pl.'s Trial Brief, p. 28), and that the "district court and court of appeals found that the staff report and minutes did not contain findings of fact." (Pl.'s Trial Brief, p. 34.) The previous courts found that the Board had not adopted any minutes or the staff report as findings of fact.

As this court has already said, at page 18 above, the previous courts saw a difference between the Board receiving information and the Board saying what information it relied on to make a decision. This court quoted the Court of Appeals: "'We do not therefore read *Condon Cabin* as standing for the proposition that mere presentation of information to a board alone suffices to satisfy the board's obligation to make findings.' *Palensky*, 2020 WL 1879711, at **5." The courts, both district and appellate, found that there were no findings of fact. The courts did not say that the staff report would have been inadequate if it had been adopted by the Board.

A. The "intent, purpose and spirit of the ordinance or the Cornerstone to Capstone Comprehensive Plan."

Although this court does not find the Cornerstone to Capstone Plan in this record, (the Palenskys provide an extra-record internet citation in their trial brief at page 29) the parties do not dispute that the Plan incorporates the Ames Urban Fringe Plan (AUFP). The AUFP is a 2006 document that is also not in the record. But the parties both refer to the Ames Urban Fringe Joint and Cooperative Agreement (AUFJCA) which is in the Record Return in the companion case, CVCV052023, where it is included as an attachment to a 2018 letter from Mr. Ervanian to the Board. (CVCV052023 Rec. Ret. part 3, 133, 137-48.) Both sides refer to this AUFJCA as the AUFP, but in fact it is a 2011 28E agreement that

"provide[s] a legal mechanism for the implementation of the [AUFP.]" (CVCV052023 Rec. Ret. part 3, 138.) The Palenskys argue that the AUFP prevents the Board from granting this CUP.

The AUFP is apparently an agreement among Story County and the cities of Ames and Gilbert. The AUFJCA limits the authority of the participating government units in specifically defined ways which are presumably consistent with the AUFP itself. Section 5 of the AUFJCA (the implementing agreement) states that "...Cities and County agree that each will waive the exercise of some portion of its otherwise existing land use authority..." (CVCV052023 Rec. Ret. part 3, 138.) The use of the phrase "some portion" means that each of the cooperators retained a portion of their "existing land use authority." The implementing agreement explains:

> Where an existing land use authority is not specifically referenced in this Section 5, it shall continue to be normally exercised unless it would render one or more of the following subsections inoperative, in which case it shall be deemed to be waived to the extent necessary to give effect to any subsection hereof.

(*Id*.)

Assuming this implementing language is consistent with the AUFP (and both parties appear to assume that it is), this means that the AUFP can limit an existing power when: (1) it does so explicitly; or (2) the exercise of the existing power would render a portion of Section 5 "inoperative." The implementing agreement requires notification to other participants "[i]n any instance when a Cooperator seeks to exercise its land use authority . . ." so it requires notice when a conditional use permit is being considered. (*Id*. at 138-39.)

The Board contends the purpose of this notice is to provide the cooperators with an opportunity to claim that the exercise of an existing power renders some portion of Section 5 "inoperative." The Palenskys do not contend otherwise.

Section 5 of the implementing agreement does not create any explicit limitations on conditional use permit applications. (*Id*. at 138-141.) Instead, Section 5 governs: (1) Story County Land Development Regulations, but only for A-2, Agribusiness Zoning District; (2) the Official Zoning Map of Story County; (3) Subdivision Regulations; and (4) the Cities' Annexation Powers. (*Id*.) As a result the only way that the Ames Urban Fringe Plan would be relevant to a conditional use permit application would be if the application rendered "inoperative" a limitation on zoning A-2 Agribusiness Zoning District; the Official Zoning Map of Story County; Subdivision Regulations; or annexation. (*Id*.) The subdivision regulations are relevant only to the extent that Story County agreed to "waive the exercise of its subdivision authority" within "areas designated Urban Services Area in the Plan." (*Id*.)

The Board of Adjustment was not exercising "subdivision authority" when it granted the conditional use permit application. The county's "subdivision authority" is grounded in Iowa Code Chapter 354. Section 354.2 sets out the definitions for Chapter 354. This section defines "division" as "dividing a tract or parcel of land into two parcels of land by conveyance or for tax purposes." Iowa Code § 354.2(6). The "governing body" for purposes of Chapter 354 is defined as "a city council or the board of supervisors, within whose jurisdiction the land is located, which has adopted ordinances regulating the division of land." Iowa Code § 354.2(8). A "subdivision" is "a tract of land divided into three or more lots." Iowa Code § 354.2(17).

The terms of Section 354.8 set out the standards for a "governing body" to review and approve a proposed subdivision. By way of contrast, a board of

adjustment's authority to grant "special exceptions to the terms of the ordinances or regulations..." is found in Iowa Code Section 335. Iowa Code § 335.10(1). The Board of Adjustment does not have subdivision authority and was not subdividing this property. Additionally, the conditional use permit application would not divide the land "into three or more lots." The granting of a conditional use permit does not render the "subdivision" terms of Section 5 "inoperative."

The board of adjustment was not creating zoning regulations for an A-2 Zoning District when it granted this conditional use permit. A board of supervisors creates "zoning regulations" pursuant to Iowa Code Section 335.3 ("the board of supervisors may by ordinance regulate and restrict. . . ."). The board of adjustment does not have authority to pass zoning regulations; it is limited to either granting special exceptions to the zoning ordinance or regulations or reviewing variances for the board of supervisors. Iowa Code § 335.10. This property was zoned A-1 agricultural and A-R, which permits uses such as agriculture, single-family dwellings, cemeteries, stables, parks, and forest reserves. Present uses are single-family dwellings, agriculture, and natural area. (Rec. Ret. part 3, 113.)

The Board of Adjustment did not amend the Official Zoning Map of Story County, Iowa within the Fringe Area when it granted the conditional use permit. The provisions allowing for an official zoning map are contained in two different Iowa Code sections. Section 335.4 empowers the supervisors of a county to "divide the county, or any area or areas within the county, into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this chapter. . . ." Iowa Code Section 335.5 governs the adoption of the "comprehensive plan." The Iowa Supreme Court explained:

> Our legislature has given county boards of supervisors the authority over county zoning matters. Iowa Code §§ 335.3, 335.6. This authority

> includes the power to designate areas of the county into districts and to regulate the use of property within those districts. *See id.* §§ 335.3, 335.4. Iowa Code section 335.6 provides in part "[t]he board of supervisors shall provide for the manner in which the regulations and restrictions and the boundaries of the districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed." "In addition to the express powers granted by statute to the board of supervisors, many implied powers are authorized in order to properly perform its multiplicity of duties." *Bd. of Supervisors v. Standard Appliance Co.*, 249 Iowa 438, 441, 87 N.W.2d 459, 461 (1958).

Perkins, 636 N.W.2d at 65.

A board of adjustment is specifically prohibited from rezoning property through the exercise of any of its powers. *Build-A-Rama, Inc. v. Peck*, 475 N.W.2d 225, 228 (Iowa App. 1991) (citing *Deardorf v. Bd. of Adjustment*, 254 Iowa 380, 389-390, 118 N.W.2d 78, 83 (Iowa 1962) and *Bd. of Adjustment v. Ruble*, 193 N.W.2d 497, 503 (Iowa 1972)). The only entity that can amend the zoning regulations is the board of supervisors.

The AUFP does not prevent the Board of Adjustment from treating this property as an A-1 agricultural zone. The AUFJCA specifically states:

> **5.1.3 Non-conforming Properties.** Properties zoned a classification inconsistent with this Agreement or the Plan as determined by the Cooperators, as of the date this Agreement is executed, shall not be deemed to be in violation of this Agreement or the Plan, as long as such zoning remains in effect on the property.

(CVCV052023 Rec. Ret. part 3, 139.)

Furthermore, according to the AUFJCA, the AUFP is designed to address “the two mile extraterritorial jurisdiction over land divisions available to [the cities] pursuant to the *Code of Iowa*, Chapter 354.” (CVCV052023 Rec. Ret. part 3,

137.) The two-mile extraterritorial jurisdiction in Iowa Code Chapter 354 is specifically limited to jurisdiction to "review subdivision plats or plats of survey for divisions or subdivisions outside the city's boundaries" and allows a city to "establish by ordinance specifically referring to the authority of this section, the area subject to the city's review and approval." Iowa Code § 354.9(1). Section 354.9(2) requires a county that exercises its subdivision power within the two-mile extraterritorial jurisdiction to submit the "subdivision plat or plat of survey for the division or subdivision…to both the city and county for approval." Section 354.9(3) empowers a county and city to enter into a 28E agreement "for review of subdivisions within the overlapping area."

Iowa Code Chapter 354 does not authorize a county to cede its authority to zone by district to a city. Chapter 354 is specifically limited to the power to subdivide properties. The provisions of the AUFJCA recognize this limitation in Attachment A, which states "[t]he Cities and County all have established subdivision review and approval and, for the Cities, have extended that review and approval outside its boundaries in accordance with Code of Iowa 354.9 and as amended." (CVCV052023 Rec. Ret. part 3, 146.)

The provisions of Story County Ordinance 90.01 do not make the Ames Urban Fringe Plan binding on the board of adjustment. Ordinance 90.01 states, in relevant part, that "[t]he objective of the conditional use permit process is to encourage compatibility with the proposed development with the environment, and with existing and future land uses in the area." (Rec. Ret. part 8, 358.) However, this "statement of intent" is not explicitly made part of the elements necessary to approve a conditional use permit. The "Standards for Approval" in Story County Ordinance 90.04 do not specifically require compliance with the Ames Urban Fringe Plan.

Entirely apart from the fact that the AUFP is not included in this record and this court is left to infer its provisions from the AUFJCA, this court should not, and will not, interpret the provisions of the Story County Ordinances in a way that makes the Ames Urban Fringe Plan binding beyond what this court infers to be its explicit terms. Zoning restrictions are to be construed strictly in order to favor the free use of property. *Ernst v. Johnson Cty.*, 522 N.W.2d 599, 602 (Iowa 1994). A court should not "extend such restrictions by implication or interpretation." *Id.* (citing *Greenawalt v. Zoning Bd. of Adjustment of Davenport*, 345 N.W.2d 537, 545 (Iowa 1984)). Additionally, this court must avoid an interpretation of those ordinances that would make them confiscatory. *Ernst*, 522 N.W.2d at 602. Finally, this court should not "construe zoning restrictions in such a way that they will be arbitrary or unreasonable..." *Id.*

The Palenskys' proposed interpretation of the Ames Urban Fringe Plan restricts the free use of property without the AUFP doing so explicitly. The Palenskys are asking this court to determine that the "statement of intent" in Ordinance 90.01 incorporates through implication the terms of the Ames Urban Fringe Plan as conditions on the granting of a conditional use permit. This restriction is not one that is apparent on the face of the Story County Ordinance. Essentially, the plaintiffs ask that the court determine that the future use map is binding on the applicant in the present. This leads to an arbitrary or unreasonable zoning restriction because it makes the future land use map the current zoning map for purposes of conditional use permit applications.

The more reasonable interpretation of Ordinance 90.01 is that it is an aspirational statement intended to encourage consideration of future land uses in deliberating on a conditional use permit. There is significant difference between a statement that a board of adjustment should think about future land uses and the Palenskys' position that this Board of Adjustment is bound to make all current

decisions in strict compliance with the Ames Urban Fringe Plan. Instead, Story County Ordinance 90.04(2)(E) allows the board of adjustment discretion to determine whether the conditional use permit would create a "strong probability" that it would "[n]ot be in accord with the intent, purpose and spirit of the Ordinance or the Story County Development Plan." (Rec. Ret. part 8, 359-60.) The phrase "strong probability" necessarily means that a mere possibility of future incompatibility does not prevent the granting of a conditional use permit.

The Palenskys' proposed interpretation would create a current land restriction on property that would transform the property from an A-1 zone to a residential zone for purposes of conditional use permits. The Palenskys' proposed interpretation would render the grandfathering language of the Ames Urban Fringe Plan ineffective. The AUFJCA, and presumably the AUFP, includes the language that grandfathers in existing zoning designations. Under the AUFP this property can properly remain A-1 agricultural indefinitely. There is no requirement that the land, even upon annexation, must change its designation. The City of Ames may be able to effectuate such a change by an involuntary change of zoning through annexation pursuant to Iowa Code Chapter 368. However, the city council would be required to file a petition before the city development board. Iowa Code §§ 368.9 and 368.11. At that point the City of Ames might be able to change the zoning through legislation, but it cannot do so under the auspices of Section 354.9 that deals only with subdivision power.

This court rejects the argument that the Ames Urban Fringe Plan is binding on the Board of Adjustment. The AUFP does not affect this conditional use permit because the terms of the AUFP, as this court infers them from the arguments of the parties and the AUFJCA, do not explicitly limit the power to grant a conditional use permit in the present case. Finally, this court rejects the Palenskys' argument that any future land use designation in the Ames Urban Fringe Plan constitutes a

presently existing restriction on this A-1 agricultural property. That argument transforms a potential future land use restriction into a present land use restriction in contravention of Iowa law.

B. Compatibility with existing and future land uses.

A reasonable person could conclude that the proposed use, a bed and breakfast and event venue, is an appropriate use for existing and future uses in an A-1 agricultural zoning district. The evidence before the Board of Adjustment was sufficient for such a person to conclude that a bed and breakfast and event venue could be run in a manner that would be compatible. To a great extent, what this court says in the next section applies here as well.

C. Compatibility with the character of the immediate vicinity and development and use of adjacent property.

The Palenskys contend that the proposed use is not compatible with the character of the immediate vicinity. As noted earlier, this property was zoned A-1 agricultural and A-R, which permits uses such as agriculture, single-family dwellings, cemeteries, stables, parks, and forest reserves. Present uses are single-family dwellings, agriculture, and natural area. (Rec. Ret. part 3, 113.)

The standard imposed by Section 90.04(1)(A) is "[t]he proposed buildings or use shall be constructed, arranged and operated so as to be compatible with the character of the zoning district and immediate vicinity, and not to interfere with the development and use of adjacent property in accordance with the applicable district regulations." (Rec. Ret. part 8, 359.) The standard requires consideration of both the character of the zoning district and the character of the immediate vicinity. As a result, the fact that property has been developed in one way does not preclude more intense uses when the zoning district is designated for more intense uses.

A reasonable person could conclude that the proposed use, a bed and breakfast and event venue, is an appropriate use for an A-1 agricultural zoning district. The evidence before the Board of Adjustment was sufficient for such a person to conclude that a bed and breakfast and event venue could be run in a manner that would be compatible with the surrounding area. The evidence demonstrates that the event venue would be between 1000 and 1,500 feet from any residence and the topography would shield those residences from noise and light. (Rec. Ret. part 6, 267.)

The information before the Board of Adjustment included a discussion of the possibility that the event venue would reach full capacity for events such as weddings. (Rec. Ret. part 6, 256-257.) Perkins explained that the 300-person occupancy is based on International Building Code requirements. (Rec. Ret. part 6, 255.) However, he also explained, "My intent is not to pack this with 300 people." (Rec. Ret. part 6, 257.) He elaborated, "You'll notice, given my parking areas, every car would have to have six people in it to get to 300." (*Id.*)[6] Perkins explained that he was in contact with local transportation companies including shuttles and driving companies to provide access to the building. (Rec. Ret. part 6, 258.)

A reasonable person, and thus the Board, could conclude that placing a bed and breakfast and event center on a 70-plus acre parcel in an A-1 Agricultural zone was consistent with "the character of the zoning district and immediate vicinity."

D. The Ames Urban Fringe Plan

The Palenskys argue that the Ames Urban Fringe Plan is a binding legal document that prevents the Story County Board of Adjustment from granting a

[6] Understanding that Mr. Perkins was using round numbers, his calculation was slightly off. With 58 parking places, five patrons per car for a total of 290 would be a closer approximation. The difference is inconsequential.

conditional use permit for this land. Again, the AUFP is not in the record, but the AUFJCA, the 28E implementing agreement, is. The Ames Urban Fringe Plan does not limit the authority of the Board of Adjustment for the reasons discussed above in section A, concluding at page 47.

E. Health, safety, and general welfare

In this section of their argument, the Palenskys focus on fire safety issues in the context of Section 90.04(2)(A). (Pl.'s Trial Brief, pp. 33-34.) Section 90.04(2)(A) provides, "If the Board of Adjustment concludes that all development criteria will be met by the development, it shall approve the application and plans unless it concludes, based on the information submitted with the official application materials and at the hearing that if completed as proposed there is a strong probability that the development will...[n]ot adequately safeguard the health, safety and general welfare of persons residing or working in adjoining or surrounding property..." (Rec. Ret. part 9, 359.)

However, Section 90.04(2)(C) specifically addresses fire hazards and uses a different standard for fire hazard concerns. Section 90.04(2)(C) provides "If the Board of Adjustment concludes that all development criteria will be met by the development, it shall approve the application and plans unless it concludes, based on the information submitted with the official application materials and at the hearing that if completed as proposed there is a strong probability that the development will . . . [u]nduly increase . . . the hazard from fire . . . ." (Rec. Ret. part 9, 359-360.)

When a general statute and a specific statute set different standards, "the provisions of the more specific statute control." *In re Estate of Thomann*, 649 N.W.2d 1, 4 (Iowa 2002). The provisions of Section 90.04(2)(C) specifically set out a standard for considering hazard from fire. This court will apply the specific

standard of Section 90.04(2)(C). This court must consider the issue of fire hazard in context of the "strong probability" and "unduly increase" legal standards. The Story County Ordinance 90.04(2)(C) requires the Board of Adjustment to determine there is not a "strong probability the development will" "[u]nduly increase...hazard from fire..." (Rec. Ret. part 9, 359-360.) Arguably, all buildings increase the probability of hazard from fire. The question for the Board is whether there is a strong probability that they unduly do so. The question for this court is whether a reasonable person could reach the conclusion the Board did.

A board of adjustment "may rely on commonsense inferences drawn from evidence related to other issues, such as use and enjoyment, crime, safety, welfare, and aesthetics, to make a judgment..." *A-Line Iron & Metals, Inc. v. Cedar Rapids Bd. of Adjustment,* No. 10-0232, 2010 WL 4484399, at *3 (Iowa App. Nov. 10, 2010) (quoting *Bontrager*, 748 N.W.2d at 496). Decisions by boards such as this one enjoy a strong presumption of validity. *Leddy*, 2015 WL 1331521 at *5 (citing *Ackman*, 596 N.W.2d at 106). The commonsense inferences from the evidence in this case support the contention that fire protection will be sufficient. The evidence is that any of the buildings, the most likely place for a fire, are a substantial distance from adjacent neighbors. There is no evidence to suggest that this CUP is more dangerous than other permitted uses in the A-1 Agricultural district such as agriculture-crop and livestock production.

The Board of Adjustment received testimony from Bradley Perkins, the applicant and a mechanical engineer (Rec. Ret. part 6, 251-80), that the building would comply with International Building Codes concerning ingress and egress standards for fire protection. (Rec. Ret. part 6, 273-74.) Perkins also testified that he could design the building with materials that were designed to prevent the spread of fire. (Rec. Ret. part 6, 274-75.) He explained that he would design the building with these materials specifically to address the lack of a fire sprinkler

system. (*Id*.) Additionally, Perkins explained that he would require events at the event venue to be catered in as opposed to cooked on-site. (Rec. Ret. part 6, 278.) The event venue would have no on-site kitchen and no on-site grease traps or other hazards associated with cooking. (*Id*.) All of this was included in the findings of fact. The Board of Adjustment considered that any fire that one district could not handle would result in cooperation from other districts. (Rec. Ret. part 7, 316-17.) The record contains sufficient evidence for a reasonable person to conclude there is not a "strong probability" that the CUP would "[u]nduly increase...hazard from fire..."

Once again, the Palenskys assert that the "district court and court of appeals found that the staff report and minutes did not contain findings of fact." (Pl.'s Trial Brief, p. 34.) In fact, the problem was that the Board did not make findings of fact that said what parts of the report and minutes they relied on.

F. Ground pollution or other undesirable, hazardous or nuisance conditions.

In this section, the Palenskys focus their concerns on the septic system. They misapprehend the role of the Board of Adjustment in this process. The Board of Adjustment is responsible for determining whether to allow a conditional use permit in the context of a zoning decision. The Board of Adjustment is not responsible for engineering decisions or issuing construction permits. Those duties fall upon other entities. Succinctly, the adequacy of the septic system is a building permit issue, not a CUP issue.

The documents before the Board of Adjustment demonstrate this. The Staff Report includes the applicant's statement that "[a] septic tank will be designed and installed for the reception hall as required by Story County Board of Health." (Rec. Ret. part 3, 116.) The statement continues, "[s]eptic tanks and secondary

treatment lines will have at least the minimum distances as set forth in Administrative Code 567-69 'On-Site Wastewater Treatment and Disposal Systems.'" (*Id*.) The Board of Adjustment specifically conditioned the CUP upon "[a] site plan meeting all requirements of the Story County Land Development Regulations [being] submitted for action by the Story County Board of Supervisors prior to the issuance of any Zoning Permits." (Rec. Ret. part 4, 179.) The discussion before the Board of Adjustment included the statement that direction as to the construction and completion of the septic system will come from either the Story County Environmental Health Department or the State of Iowa. (Rec. Ret. part 7, 319.)

The Board of Adjustment could reasonably issue a CUP without detailed plans on the septic system because it understood that other agencies are responsible for ensuring the construction of the septic system is in compliance with local ordinance and state law.

G & H. Congestion in the roads, or the hazards from fire and ingress and egress, with particular attention to vehicular and pedestrian safety and convenience, and traffic flow and control.

The Palenskys present arguments regarding vehicular and pedestrian safety and convenience, traffic flow and control, and emergency access. The property in question is about "three-quarters of a mile off of Highway 30." (Rec. Ret. part 6, 267.) The stretch of road to the property is approximately three-quarters of a mile from South Dakota Avenue. (Rec. Ret. part 6, 254.) It is important to note that the two proposed uses produce different results for traffic. The bed and breakfast might add 16 vehicle trips per day. (Rec. Ret. part 3, 114.) The estimates for the event venue were made on a weekly basis. (*Id*.) The applicant, Perkins, commented:

> Events at the reception hall would further add to the traffic along 240th. With 58 parking stalls in the proposed parking lot, this could add as many as 58 cars to that total, traveling twice during a typical 3 hour event. It is estimated that there will be on average one large event per week at the event center that would be at half of the event center capacity or higher. It is estimated that there would be one other smaller event per week at the event center with less than 50 people. There are currently two other residences along the route of travel on 240th Street. Dust control will be placed in front of these houses as recommended by Story County Engineering Department.

(*Id*.)

The project would almost certainly increase the traffic along 240th Street. However, the fact that a project increases traffic does not mean that there is a failure to provide adequate ingress or egress. The Planning and Development Department, the Planning and Zoning Commission, and the Board of Adjustment all reached the conclusion that the increased traffic did not prohibit the development. A reasonable person reviewing this evidence could conclude that the property and its location would adequately support events at the venue.

The Palenskys also argue that increased traffic will cause a fire hazard. Again Story County Ordinance 90.04(2)(C) provides a specific standard for considering fire hazards. It requires the Board of Adjustment to determine there is not a "strong probability the development will" "[u]nduly increase . . . hazard from fire . . . ." (Rec. Ret. part 8, 359-60.) Any development increases the chances of fire, but the ordinances require that the board reject only uses that might unduly increase fire hazard by creating a strong probability of fire. A reasonable person could conclude that increased road traffic does not create a "strong probability" of "unduly increasing" the hazard from fire.

Conclusion in CVCV052022

The court finds and concludes that the writ of certiorari in CVCV052022 should be annulled and the actions of the Board affirmed.

CVCV052023 (formerly CVCV050724), CUP 08-17

The history of this case and the preceding or underlying certiorari case in the district court is similar procedurally but not identical to the history in CVCV052022. In November 2017, Perkins applied for a CUP from Story County Planning and Development, seeking authorization to build a commercial campground and travel trailer park at 5500 240th Street, the same location involved in CUP 09-17 and Story County CVCV052022. (CVCV052023 Rec. Ret. part 2, 62-92.)[7] This CUP application was, again, sent to all of the county departments for review and comment prior to a hearing before the P&Z. A letter compiling the departments' questions was sent to Perkins on November 27, 2017. (Rec. Ret. part 3, 103-05). Another letter compiling more of the departments' questions was sent to Perkins on February 23, 2018. (Rec. Ret. part 3, 106-08.)

The P&Z addressed the CUP 08-17 application at its meeting on March 7, 2018, a month after the P&Z considered CUP 09-17. (Rec. Ret. part 4, 205-17). As with the prior application, the staff prepared and submitted a report containing comments, points to consider, a recommendation and four alternatives for the P&Z. (Rec. Ret. part 4, 215-17). Members of the public spoke in favor of the project; the Palenskys' attorney spoke against the project.

The P&Z voted to recommend approval of the CUP and the matter was then reviewed by the Board of Adjustment. The Board held its meeting on March 21, 2018, a month after the Board meeting on CUP 09-17, to address the application. (Rec. Ret. part 4, 291). Emily Zandt gave the staff report and a project overview

[7] All references to the record return in this section of this decision are to the record return in CVCV052023, unless otherwise specified.

to the Board, after which the public provided its input. Following the public hearing and discussion by the Board, the Board voted three to one to approve this CUP with no conditions. (Rec. Ret. part 4, 296). As with the earlier CUP, no written findings of fact were filed and no findings were made on the verbatim record.

On April 19, 2018, the Palenskys filed a Petition for Writ of Certiorari in the district court that raised eight issues. This was Story County docket number CVCV050724. The Palenskys' eight issues are recounted on page 5 of this decision. The petition's eighth claim was that the Board failed to establish findings of fact on any issues.

The district court held a hearing on the petition for writ of certiorari on July 24, 2019 and filed its decision on September 10, 2019. The court acknowledged the legal analysis explained in CVCV050675 on January 30, 2019, and began its ruling similarly, by referring to Iowa Rules of Civil Procedure 1.1401 and 1.1411. The court quoted the exact language of the latter rule:

> Unless otherwise provided by statute, the judgment on certiorari shall be limited to annulling the writ or to sustaining it, in whole or in part, to the extent the proceedings below were illegal or in excess of jurisdiction. The judgment shall prescribe the manner in which either party may proceed, and shall not substitute a different or amended decree or order for that being reviewed.

Order of September 10, 2019, Story County Docket No. CVCV050724, p. 4 (quoting Iowa R. Civ. P. 1.1411).

In this second certiorari case, the Board again argued that despite the earlier district court decision and the lack of any written findings upon which the court could review its decision, the district court in this case should engage in a substantial evidence review based on the record available to the court. The court acknowledged it had all the "'documents, reports and testimony presented to the

Board.'…However, the Court cannot reasonably ascertain what the Board considered and determined in reaching the decision. Again, in this case, the Court cannot make a substantial evidence review . . . ." Order of September 10, 2019, p. 9.

The district court decided that, "[i]n the case presently before the Court, as in the previous case, the Board did not make any findings of fact upon which the Court may review its decision." *Id*. Just as in the previous case, the district court in the second certiorari case concluded its Legal Analysis section by saying:

> This matter is remanded to the Board for filing of written findings of fact in compliance with Story County Ordinance 90.06, *Citizens Against Lewis and Clark (Mowery) Landfill*, 277 N.W.2d 921, and *Bontrager Auto Service, Inc.*, 748 N.W.2d 483. The Court will not address the remaining allegations raised by the Palenskys.

Id. at p. 10.

> Once again, the Conclusion was consistent with the Legal Analysis.
>
> The Board did not substantially comply with the requirement of written findings of fact. IT IS THEREFORE ORDERED the Petitioners' Petition for Writ of Certiorari is sustained, the previous proceedings of the Board are annulled [again, despite the language of rule 1.1404 that speaks only of annulling the writ, not the action of the board being reviewed], and this matter is remanded to the Board for creation of written findings of fact regarding its decision to approve Perkins' CUP application.

Id. As in the earlier case, the district court did not direct that the CUP be refiled and did not require a new hearing or evidentiary record.

Legal Analysis and Conclusions

The entire discussion of the merits of the appeal, which was directed to the first case but should be followed in this one, was dedicated to the need for findings of fact and whether the Board had substantially complied with that requirement.

The appellate decision concluded, "Because the Board's decision lacked substantial compliance with the written findings requirement of *Bontrager* and *Citizens* [*Mowery*] and lacked compliance with Story County ordinances, we affirm the district court's decision reversing and remanding for findings of fact." *Palensky*, 2020 WL 1879711, at **7.

As mentioned previously, the Palenskys have briefed and argued CVCV052023 in the same format as CVCV052022, in twelve divisions numbered I through XII. The arguments in each division are fundamentally the same, with minor differences that generally do not require a different analysis. Therefore, this court will not unnecessarily extend or delay this decision, which has already taken much time and many pages.

The analysis of divisions I through IV is the same and does not require further development. Division V is slightly different in that CUP03-19.1 has even less impact on CUP08-17, the CUP involved in this case, than it does on CUP09-17, the subject of the first case.

Divisions VI though XI do not require any different analysis from their earlier counterparts. The same is true of most of division XII and its subparts. Parts A and B do not require an analysis different from the same parts in CVCV052022.

Division XII, part C, of this case, CVCV052023, requires a different analysis. The issue is the requirement of Ordinance 90.04(1)(A) regarding compatibility. Here, the Palenskys argue that the findings of fact support the conclusion opposite of what would be required to approve the CUP. The ordinance provides:

> 1. The Board of Adjustment shall review the proposed development for conformance to the following development criteria:
>
> A. Compatibility. The proposed buildings or use shall be constructed, arranged and operated so as to be compatible with the character of the zoning district and immediate vicinity, and not to

> interfere with the development and use of adjacent property in accordance with the applicable district regulations. The proposed development shall not be unsightly, obnoxious nor offensive in appearance to abutting or nearby properties.
> . . . .

(Rec. Ret. part 7, 579.)

The staff recommendation was to not approve this CUP. The Board is not bound to follow the staff recommendation or the views of the P&Z, but it is not possible to determine why the Board chose not to follow the staff recommendation on this issue after reciting the staff's negative recommendation in the findings. It may be that the Board found the positions of the several neighbors who appeared at the meeting and supported approval of the CUP to be more persuasive than the staff. There may be other reasons that do not instantly occur to this court. The problem is that it is the Board who should find the facts, and not this court. This court's consideration of the facts is limited to deciding whether or not the record before the Board would allow a reasonable person to make the findings of fact that the Board made.

As this court said earlier in this decision, a board's 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. *Mowery,* 277 N.W.2d at 925. If there is substantial evidence to support each of the required findings of fact of the board, and if the reasonableness of the board's decision based upon such findings of fact is open to a fair difference of opinion, then the court may not substitute its decision for that of the board. *Bontrager,* 748 N.W.2d at 495; *Ackman,* 596 N.W.2d at 106.

Here, this court can only speculate about the Board's thinking on the compatibility issue. This is one of the criteria that Ordinance 90.04(1) requires to be met. (Rec. Ret. part 7, 579.)

Additionally, the analysis of Division XII, parts D, E, and F is substantially the same as their earlier counterparts and do not require any different analysis. Division XII, part G suffers from a problem similar to that of Part C above, requiring an analysis different from its earlier counterpart here.

The issue in part G is the requirement of Ordinance Section 90.04(2)(C), which calls for denial of the CUP if there is a "strong probability the development will: . . . C. Unduly increase congestion in the roads . . ." (Rec. Ret. part 7, 579-80.) This is one of the considerations of section 90.04(2) that the Court of Appeals described as "the five dangers." *Palensky*, 2020 WL 1879711, at **3. These considerations are treated differently from the requirements of section 90.04(1), which the Court of Appeals described as the "six affirmative criteria." *Id.* The difference in treatment derives from the burden of persuasion established by section 90.04(3). (Rec. Ret. part 7, 580.) The burden to show that the six affirmative criteria of section 90.04(1) are met is on Perkins, as the applicant. The burden of presenting evidence regarding the five dangers of section 90.04(2) is on the Palenskys, as the persons who want the Board to conclude that the application does not comply with the ordinance requirements.

The Staff Comment paragraph of the findings of fact observes that average annual daily traffic would increase by 100%, plus traffic from the 10 RV sites and the bed and breakfast venue traffic. The Board may have concluded that the actual or absolute numbers were not large enough to create a strong probability of an undue increase in road congestion. The Board may have concluded that whatever the increases in numbers or percentages were, they were not "undue." They may have had some other rationale that was within their discretion as the initial finder of fact and decision maker. The problem is that assigning those reasons on this record would require this court to become the finder of fact rather than maintaining

its role to determine whether the findings made by the Board were supported by substantial evidence in the record.

Finally, the analysis of Division XII, part H is essentially the same as its earlier counterpart and does not now require any different analysis.

Conclusion in CVCV052023

This case, CVCV052023, must be once again remanded to the Board for findings of fact regarding the compatibility issue and the increased traffic issue. The Board may conduct a new hearing on these issues or it may make findings of fact based on the record already made on March 21, 2018 and September 16, 2020. Either alternative would meet the Board's obligation under Ordinance 90.06(1)(A) to establish findings of fact based on information contained in the application, the staff report, and the Commission recommendation presented at the Board meetings. The court notes that the ordinance refers to meetings, plural.

RULING

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. In CVCV052022, the writ of certiorari is annulled and the actions of the Board affirmed.
2. In CVCV052023, the writ of certiorari is sustained and the case is remanded to the Story County Board of Adjustment for written findings of fact relating to compatibility as required by Ordinance section 90.04(1)(A) and strong probability of undue increase in congestion in the roads, as required by section 90.04(2)(C).

State of Iowa Courts

Case Number	**Case Title**
CVCV052023	JCE/JAMES PALENSKY&TERESA SCHEIB-PALENSKY V STORY BD ADJUST
Type:	ORDER FOR JUDGMENT

So Ordered

James C. Ellefson, District Court Judge
Second Judicial District of Iowa

Electronically signed on 2021-12-20 10:24:16