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IN THE IOWA DISTRICT COURT FOR WARREN COUNTY

CITY OF INDIANOLA, IOWA, Petitioner, v. THE BOARD OF ADJUSTMENT OF WARREN COUNTY, IOWA, Defendant.	CASE NO.: CVCV037789 **RESPONSE TO BRIEF OF INTERVENOR & MOTION TO STRIKE AFFIDAVIT**

COMES NOW the City of Indianola by and through its attorneys, and by way of response to Brief of Intervenor and in support of its Motion to Strike Affidavit states to the Court the following:

STATEMENT OF FACTS

The City of Indianola does not necessarily agree with the facts as set forth by the Intervenor but would point out that on Page 2 of their Brief Intervenor states with regard to the meeting between the City of Indianola and citizens "at that meeting the City failed to propose any additional concessions, and further agreement was not reached between the citizens and the City." This is a fact that is outside of the record and was not set forth in any of the information presented to the Board. It is an improper and unsubstantiated recitation of the facts. The facts as presented are that the City had proposed curtained steps to alleviate the neighbors' concerns, the Board was concerned about the City putting those concessions in writing and the City did so. Nothing was reported about the outcome of the meeting.

ARGUMENT

A the outset, the City again urges that the Intervenor's arguments, as set forth in their Brief are untimely and should not be considered. Nevertheless, the City's response to those arguments is as follows:

THE COUNTY'S ORDINANCES SHOULD APPLY TO THE CITY AND AN ACTION FOR DECLARATORY JUDGMENT IS NOT APPROPRIATE AT THIS TIME.

A. Trial is necessary for the Court to effectively evaluate the validity of the special use permit as it applies to the City.

As pointed out by the City both in its resistance to the Petition for Intervention and at the hearing, the Intervenor has failed to take action to intervene in the action in a timely manner which would have allowed them to take part in an action that was filed on December 14, 2018 and which was not submitted to the Court until July 23, 2019, a span of seven months. The Intervenor should have known that a balancing test would be necessary since the City's declaratory judgment action has always sought a declaration by the Court that the zoning ordinances of Warren County do not apply to the City. For the Intervenors now to allege that the Court cannot make a decision and that some type of hearing or trial on the merits is necessary is inappropriate and the Intervenors have slept on their rights and are merely attempting to delay the action by insisting on an evidentiary hearing.

In their Brief, the Intervenors have advanced and cited no facts, law or argument which would support their contention that the County's zoning ordinances should apply to the City or that would tip the balance of interests as set forth in *City of Ames v. Story County*, 392 N.W.2d, 145 (Iowa 1986), despite the ample record in this proceeding. The City submits that the

Intervenor's request is actually a recognition that the record, as developed, is overwhelmingly in the City's favor. The request for an evidentiary hearing should not be granted.

B. There are material facts in dispute warranting trial.

The Intervenor is now for the first time bringing up several facts they now say are disputed which have never been disputed in this action and those facts are:

(1) The cost of hooking up to the WRA is $64,000,000.00 than the cost to build a new plant. The Intervenors have cited no information and provided no information to this Court or to the Board of Adjustment disputing this fact. The City's position is undisputed and unrefuted.

(2) The cost of rebuilding at the current site is prohibitive.

The same argument applies to this position. The City has long said that the cost of rebuilding at the same location would not be a viable option based upon their Consulting Engineer's analysis and determination. (Sept. Tr. pgs. 43-44). HR Green is an expert in the field of wastewater treatment plant operations and plant construction. They are acting as the City's consultant assisting the City in negotiating the arduous process of designing, permitting and placement of the WWTP. There was no evidence presented before the Board that the City's position that it could not rebuild at the current site because that option would be cost prohibitive. In fact, the unrefuted evidence was that it could not.

(3) The surrounding properties will not suffer a loss of value. Again, the Intervenor's have provided no credible information showing that the property values would be adversely affected. Again, the Intervenor's wish to delay this action based upon their own lack of diligence in taking part in this proceeding when the unrefuted evidence is that property values would not be affected.

(4) There are no adverse health affects related to living next to a sewage treatment plant. The Intervenor's bolding contending "there may be additional facts in dispute as well; however, discovery has not been conducted so it is difficult to determine at this time all of the facts which may be in dispute." Again, the Intervenor slept on their rights, failed to intervene timely in this matter and cannot now ask the Court to reward that lack of diligence with a delay in this proceeding. In addition, there was literally no evidence of adverse health affects related to living next to a sewage treatment plant and this is merely a "Hail Mary" by the Intervenors to attempt to delay the matter. If the Intervenors truly felt that there were adverse health effects, they could have presented those to the Board of Adjustment, and they did not. Even the Board of Adjustment, in its discussions never mentioned health effects.

The Affidavit Filed in This Matter Should be Stricken.

In support of their intervention, the Plaintiffs filed the Affidavit of Michael J. Staudacher attempting to introduce new facts to this litigation. This Affidavit was untimely and was not even presented to any of the parties prior to its filing and prior to the hearing on July 23, 2019. It should not be considered by the Court and it should be stricken.

CONCLUSION

The Intervenor's position seems to be to delay this matter as long as possible. The Intervenors had ample opportunity at three different hearings to present whatever they wished before the Board of Adjustment. The Intervenors also had seven months to be involved in the present action and to present whatever evidence they wished, and they failed to do so. This matter should proceed to judgment and the actions of the Board of Review should be overturned and the

Court should determine that the zoning ordinances or Warren County do not apply to the City of Indianola.

Respectfully submitted

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By: */s/ Cindy S. Juhl*