

In The Iowa Supreme Court
Supreme Court No. 17-1149

AMES 2304, LLC,

Petitioner-Appellant,

vs.

CITY OF AMES, ZONING BOARD OF ADJUSTMENT,

Respondent-Appellee.

Appeal from the District Court for Story County

The Honorable Michael J. Moon

Ames 2304, LLC's Resistance to Application for Further Review

Iowa Court of Appeals Decision filed October 10, 2018

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I. The Court of Appeals’ opinion interpreting a zoning ordinance raises no issue of broad public importance regarding error preservation.

From the onset, this zoning-permit dispute turned on a statutory-interpretation issue regarding the Ames Municipal Zoning Code (“Code”).¹ The Ames Zoning Board of Adjustment (“Board”) and the district court interpreted the zoning code’s nonconforming use² statutory language, including “[a] nonconforming use may not be increased in intensity.” Ames Mun. Code § 29.307(2)(a) (JA 248-249). The Board argued, below and on appeal, that the statutory text is ambiguous. JA 191-192, 195; Appellee’s Final Brief 17-19. Yet the

¹ “Chapter 29 of the Ames Municipal Code is a comprehensive and detailed zoning ordinance enacted by the City in April 2000 to regulate the use of real estate within the City’s boundaries.” *Ames Rental Prop. Ass’n v. City of Ames*, 736 N.W.2d 255, 257 (Iowa 2007).

² A nonconforming property use is one “that lawfully existed prior to the time a zoning ordinance was enacted or changed, and continues after the enactment of the ordinance even though the use fails to comply with the restrictions of the ordinance.” *City of Des Moines v. Ogden*, 909 N.W.2d 423-24 (Iowa 2018) (citation and internal punctuation omitted). The property’s prior use “creates a vested right in the continuation of the nonconforming use once the ordinance takes effect.” *Id.* at 423-24.

Board now complains because, in interpreting the zoning code and attempting to resolve ambiguous statutory text, the Court of Appeals considered the Code’s definition of “intensity.” Ames Mun. Code § 29.201(109) (JA 234). The Board argues Ames 2304 didn’t preserve error because it did not cite the definition of “intensity” below.

The Court of Appeals considered and rejected the Board’s argument that Ames 2304 failed to preserve error. The Court of Appeals concluded “the preservation question turns on whether the nature of the error has been timely brought to the attention of the district court.” Court of Appeals Opinion 10 (“Opinion”) (citation omitted). The Court of Appeals correctly determined that Ames 2304’s citation to the zoning code’s definition of “intensity” was “additional ammunition for the same argument . . . made below—not a new argument advanced on appeal.” Opinion 11 (citation and internal punctuation omitted).

A. The district court analyzed whether an interior remodeling permit would result in an “increase in intensity” to a nonconforming use.

Ames 2304, LLC owns the property located at 2304 Knapp Street, Ames (“2304 Knapp”).³ Opinion 3. In 1910, 2304 Knapp was built as a single-family residence.⁴ Opinion 3. In 1928, 2304 Knapp converted from a single-family home to an apartment building with four one-bedroom units.⁵ Opinion 3. Since then, 2304 Knapp has remained a four-unit residential apartment building.⁶ Opinion 3. Under the Code, 2304 Knapp’s use as a four-unit apartment building is a “pre-existing” and legal nonconforming use.⁷ Opinion 3.

In 2016, Ames 2304 applied for an interior-remodeling permit. Opinion 3. Ames 2304’s proposed interior-remodeling plan would alter interior walls and upgrade unit layout, while maintaining 2304

³ JA 121-123.

⁴ JA 121-123, 176-183.

⁵ JA 115.

⁶ JA-148.

⁷ JA 115-116, 121-123, 125-128, 131-133, 140-143, 168-169, 173, 176-183.

Knapp's nonconforming use as a four-unit apartment building.⁸

Opinion 3. The remodeling plan "would change the four one-bedroom units into two studio units, one two-bedroom unit, and one three-bedroom unit." Opinion 3.

The statutory interpretation issue surrounding the permit is whether the interior-remodeling plan would result in an "increase in intensity" of the nonconforming use. The Code regulates nonconformities generally, including nonconforming uses and interior remodeling:

(2) **Nonconforming Uses.** Any use of any structure or lot that was conforming or validly nonconforming and otherwise lawful at the enactment date of this ordinance and is nonconforming under the provisions of this Ordinance or that shall be made nonconforming by a subsequent amendment, may be continued so long as it remains otherwise lawful, subject to the standards and limitations of this Section.

(a) Movement, Alteration and Enlargement.

(i) Enlargement.

⁸ JA 115-116, 118-119, 121-123, 125-129, 131-133, 140-141, 147-153, 168-169, 176-183.

a. A nonconforming use may not be increased in intensity and may not be enlarged, expanded or extended to occupy parts of another structure or portions of a lot that it did not occupy on the effective date of this Ordinance, unless the enlargement, expansion or extension complies with all requirements for the zone, does not create an additional nonconformity, and is approved for a Special Use Permit

b. Any building or structure containing a nonconforming use may be enlarged up to 125% of the floor area existing on the effective date of this ordinance, provided that the expanded building or structure complies with all density, coverage and spatial requirements of the zone in which it is located.

c. The enlargement of a nonconforming use that has the effect of making a structure nonconforming, other than as described in subsection b. above, shall not be specially permitted

(ii) Exterior or Interior Remodeling or Improvements to Structure. Exterior or interior remodeling or improvements to a structure containing a nonconforming use shall be permitted, provided that any proposed enlargement, expansion or extension shall be subject to the provisions set forth in the above paragraph.

(iii) Relocation of Structure. A structure containing a nonconforming use shall not be moved unless the use and structure will comply with all of the regulations that apply in the new location

Ames Mun. Co.:” de § 29.307(2)(a) (JA 248-249).

The Code defines “intensity

(109) **Intensity** means the degree or level of concentration to which land is used for commercial, industrial or any other nonresidential purpose.

Ames Mun. Code § 29.201(109) (JA 234).

An Ames zoning enforcement officer denied the permit, reasoning that the proposed interior-remodeling plan would result in an “increase in the intensity” of the nonconforming use. Opinion 3.

(JA 121). The Ames zoning enforcement officer reasoned the increase in bedrooms would be an increase in intensity:

staff still makes the determination from code that the intensity of a nonconforming use cannot be increased, which is the addition of units or bedrooms to the site. What are you [sic] showing in your floor plans in an *increase in bedrooms which is an increase in the intensity of the existing nonconforming use.*

(JA 121) (emphasis added).

Ames 2304 disputed the zoning enforcement officer’s conclusion and appealed the interior-remodeling permit denial to the Board. Opinion 3. (JA 176-184). In part, Ames 2304 argued that “the proposed remodel does not constitute an increase in intensity.” (JA

179). Ames 2304 appeared through counsel and presented arguments based on the Code's statutory language, including an argument that the proposed remodeling plan did not increase the intensity of the use. (JA 78-80).

In a 3-1 vote, the Board denied the permit. (JA 130). The Board made two conclusions to affirm the zoning enforcement officer's decision. (JA 130). First, under Ames Municipal Code § 29.307(2), "interior remodel of a nonconforming use *cannot be increased in intensity.*" (JA 130) (emphasis added). Second, an increase in bedrooms *is an increase in intensity* of use for a "nonconforming residential apartment unit." (JA 130) (emphasis added). The Board's written order affirming the decision of the zoning enforcement officer concluded that the interior-remodeling plan would cause an increase in "intensity." (JA 133).

Ames 2304 filed an action for writ of certiorari in the district court. Opinion 3. (JA 11-13). Relying on the Board's reasoning, the district court affirmed the Board's denial of the interior-remodeling

permit. (JA 206-218). The district court concluding that the Board correctly denied the permit because the proposed remodeling plan would result in an “increase in intensity.” (JA 206-218). Interpreting the “increase in intensity” statutory language, the district court concluded in part that “[a]n interpretation of the term ‘increase in intensity’ in the Ames ordinance cannot ignore the practical effect of increasing the number of occupants.” (JA 215). The district court concluded that “[the Board] correctly interpreted . . . Section 29.307(2)(a) as prohibiting an increase in the intensity of a nonconformity through a remodeling project.” (JA 217). The district court also concluded “[the Board] correctly determined that the increase in bedrooms from 4 to 7 constitutes an *increase in the intensity of the nonconformance.*” (JA 217) (emphasis added). Finally, the district court concluded “[the Board] correctly interpreted the provisions of the parking space ordinance as evidencing an *increase in intensity of the nonconforming use.*” (JA 217) (emphasis added). Without question,

the district court's ruling turned on statutory interpretation, particularly the text "increase in intensity."

B. The Court of Appeals interpreted the zoning code's statutory text regarding an "increase in intensity."

On appeal, Ames 2304 again argued the Board acted illegally in denying its permit application because the proposed remodel would not result in an "increase in intensity."

The Court of Appeals interpreted the ordinance's statutory language regarding "increase in intensity." Opinion 2. Because the appeal turned on statutory interpretation, the standard of review is *de novo*. *Lauridsen v. City of Okoboji Bd. of Adjustment*, 554 N.W.2d 541, 543 (Iowa 1996). The Court of Appeals summarized its interpretation of the zoning ordinance:

In the context of the facts presented, we interpret the ordinance to tie "increase in intensity" to an increase in number of dwelling units, and not to an increase in number of bedrooms, occupants, or required off-street parking. We conclude that because the proposed remodeling project does not increase the number of dwelling units, it does not violate the ordinance's prohibition against increases in intensity of a nonconforming use. The Board's interpretation of the

ordinance on this issue is erroneous and denial of the permit on that basis illegal.

Opinion 2.

The Court of Appeals determined that “the section 29.307(2)(a) prohibition of increases in intensity, as applied to residential uses, is tied only to an increase in the number of dwelling units.” Opinion 15. The Court of Appeals concluded that “[u]nder our interpretation of the ordinance, the proposed remodel does not violate the ordinance’s prohibition against an increase in intensity of the nonconforming use.” Opinion 15.

Although the Board’s application is solely predicated on an error-preservation argument, the Court of Appeals ultimately interpreted the statute in a manner that was not advanced by either party. The Board argued that an increase in bedrooms was an increase in intensity, even though the structure would continue to have four apartment units. Ames 2304 argued that an increase in intensity could never apply to a residential property use, because the definition of “intensity” applied only to non-residential uses. The

Court of Appeals did not adopt either interpretation. Instead, appropriately engaging in de novo review to interpret the statute, the Court of Appeals determined “the section 29.307(2)(a) prohibition of increases in intensity, as applied to residential uses, is tied only to an increase in the number of dwelling units.” Opinion 15. How could error preservation have made a difference in the outcome of this appeal when the Court of Appeals conducted an independent, de novo statutory interpretation analysis? The Court of Appeals necessarily considered the statutory text in deciding whether an “increase in intensity” occurred.

The Board proposes an error-preservation rule that would cabin an appellate court’s ability to engage in statutory interpretation. Error-preservation rules do not preclude the Court of Appeals and this Court from considering relevant statutory text when engaging in statutory interpretation.

C. The Court of Appeals properly considered the statutory definition of “intensity” when it interpreted the zoning code.

This zoning-permit dispute has always centered on interpreting the zoning code’s “increase in intensity” statutory text. Generally, zoning restrictions are constructed “strictly in order to favor the free use of property.” *Ernst v. Johnson Cty.*, 522 N.W.2d 599, 602 (Iowa 1994). Courts avoid “an interpretation which would make them confiscatory.” *Id.* (citing *Jersild v. Sarcone*, 149 N.W.2d 179, 183 (Iowa 1967)). “A zoning ordinance should not be extended by implication to prevent a use not clearly prohibited.” *Johnson*, 239 N.W.2d at 881-82. “Simply stated, a board of adjustment cannot disregard the provisions of, nor exceed the power conferred by, a zoning ordinance.” *Id.* at 886. (citation omitted).

When a court interprets municipal zoning ordinances, general rules of statutory construction apply. *Baker v. Bd. of Adjustment*, 671 N.W.2d 405, 416 (Iowa 2003); *Lauridsen*, 554 N.W.2d at 543. In determining what a statute means, the Court will first look to the

statute's language. *Myria Holdings Inc. v. Iowa Dep't of Revenue*, 892 N.W.2d 343, 348 (Iowa 2017).

When a term—such as intensity—is defined by statute, the statutory definition should control. “[T]he legislature may act as its own lexicographer.” *The Sherwin-Williams Co. v. Iowa Dep't of Revenue*, 789 N.W.2d 417, 425 (Iowa 2010) (citations and internal quotation marks omitted). “When it does so, [courts] are normally bound by the legislature’s own definitions.” *Id.* See also *Jersild v. Sarcone*, 149 N.W.2d 179, 187 (Iowa 1967) (reviewing certiorari action to correct errors at law, “[the appellate court] cannot rewrite the [ordinance]”). Legislatively prescribed standards provides stability and allow property owners to know what to expect. See *Chicago R.I. & P.R. Co. v. Liddle*, 112 N.W.2d 852, 854-55 (Iowa 1962). As a quasi-judicial body, The Board “cannot disregard the provisions of, nor exceed the power conferred by, a zoning ordinance.” *Johnson v. Bd. of Adjustment*, 239 N.W.2d 873, 886 (Iowa 1976).

Here, the Code’s language controls. Under the title “General Rules of Construction,” the Code establishes straightforward principles for construing the zoning ordinance:

In the construction of this Ordinance, words and phrases shall be construed according to the commonly approved usage of the language, except that technical words and phrases that have acquired a particular and appropriate meaning in law shall be construed accordingly.

Ames Mun. Code § 29.200 (JA 229). Related statutes should be read together in an attempt to harmonize them. *In re A.M.*, 856 N.W.2d 365, 372 (Iowa 2014). Courts “read statutes as a whole rather than looking at words and phrases in isolation.” *Matter of Estate of Gantner*, 893 N.W.2d 896, 902 (Iowa 2017) (citations omitted).

The Ames City Council intended that these definitions would apply to the entire Ames zoning code. *See Lauridsen*, 554 N.W.2d at 544. Article 2 is titled “Rules of Construction and Definitions.” (JA 229). Under the “Definitions” heading, the Code defines 250 terms and phrases. Ames Mun. Code § 29.201 (JA 229-243). These definitions apply, “[e]xcept as otherwise defined in this Ordinance or

unless the context may otherwise require.” Ames Mun. Code § 29.201 (JA 229). “Intensity” is not defined elsewhere. Contextually, there is no reason to conclude a different interpretation is required for nonconforming uses. “[L]egislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.” *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008) (citation and internal punctuation omitted).

The Code affirmatively recognizes the property owners’ interest. Section 29.307 regulates “Nonconformities.” The City’s expressly stated general policy protects nonconforming uses: “It is the general policy of the City to allow uses, structures and lots that came into existence legally, in conformance with then-applicable regulations, to continue to exist and be put to productive use.” Ames Mun. Code § 29.307(1)(a) (JA 248). The stated purpose in regulating nonconformities is to “[r]ecognize the interests of property owners in continuing to use their property.” Ames Mun. Code § 29.307(1)(a)(i)

(JA 248). The City intends to “[p]romote reuse and rehabilitation of existing buildings.” Ames Mun. Code § 29.307(1)(a)(ii) (JA 248).

The Court of Appeals applied these well-recognized principles to interpret an ambiguous statute.

Conclusion

This appeal presents no issue of broad public importance for this Court to determine. The Court of Appeals’ decision is consistent with and presents no conflict with this Court’s precedent. The Court should decline to grant further review, because the Court of Appeals’ well-reasoned decision is based on sound precedent. Ames 2304, LLC respectfully requests that the Court deny City of Ames, Zoning Board of Adjustment’s application for further review.

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/s/Debra Hulett

Certificate of filing and service

I hereby certify that on November 8, 2018, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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