IN THE IOWA DISTRICT COURT FOR WARREN COUNTY

KADING PROPERTIES, LLC, AN IOWA LIMITED LIABILITY COMPANY, Plaintiff, vs. **CITY OF INDIANOLA**, Defendant.	**Case No. CVCV038374** **RULING ON PETITION FOR WRIT OF CERTIORARI**

INTRODUCTION

Before the Court is a Petition for Writ of Certiorari filed by the Plaintiff on February 19, 2020. The matter was heard on January 15, 2021. The Plaintiff, Kading Properties, LLC, was represented by Christopher Pose. The Defendant, City of Indianola, was represented by Hugh Cain.

After hearing the arguments of counsel and reviewing the court file, including the briefs filed by both parties and the video of the January 21, 2020 City Council meeting, the Court now enters the following Ruling.

FACTUAL BACKGROUND

Plaintiff Kading Properties, LLC ("Kading" or "Plaintiff") is the owner of the following two properties located in the City of Indianola: Lot 1 in Cavitt Creek Plat 1 located between 1404 and 1500 North 9th Street (hereinafter, "Cavitt Creek I") and Lot 2 in Cavitt Creek Plat 2 located west of 1500 North 9th Street (hereinafter, "Cavitt Creek II") (hereinafter collectively referred to as "the Properties"). Pl.'s Br. p. 1. Plaintiff sought to develop residential condominiums on the Properties and submitted its initial site plans in June of 2019 to Defendant City of Indianola (hereinafter, "the City"). *Id.* at p. 2. Pursuant to Section 165 of the City of Indianola Municipal

Code, because both Cavitt Creek I and Cavitt Creek II are larger than one acre, Plaintiff was required to submit its proposal to the Planning and Zoning Commission for review and subsequent recommendation to the City Council. Pl.'s Br. p. 2; City of Indianola Mun. Code § 165. The City Council then decides whether to approve or deny the proposed site plans.

Subject to the City Comprehensive Plan, the Properties are designated as "Mixed Residential" and are zoned "R-3 Mixed Residential" per the City Zoning Ordinance. Pl.'s Br. p. 1. An R-3 zoning district allows developments of between four to sixteen dwelling units per acre. *Id.* at pp. 1–2 (citing Record p. 203). Plaintiff's initial June 2019 proposal requested 9.6 dwelling units per acre (24 units total) for Cavitt Creek I and 8.2 dwelling units per acre (126 units total) for Cavitt Creek II. *Id.* at p. 2. On September 16, 2019, the City Council ultimately denied Plaintiff's initial site plans.[1] *Id.*

On October 9, 2019, Plaintiff submitted its second proposal to the City, this time requesting a condominium development of 6.8 units per acre (17 units total) for Cavitt Creek I and 7.7 units per acre (119 units total) for Cavitt Creek II. *Id.* at p. 3. The Planning and Zoning Commission reviewed these second proposed site plans on December 10, 2019, ultimately recommending Cavitt Creek I for approval and Cavitt Creek II for denial. *Id.* at p. 4. As part of its recommendation of approval for Cavitt Creek I, the Planning and Zoning Commission required Plaintiff to complete a traffic impact study and a wetland study prior to the City Council's review of the site plans. *Id.*

At the City Council meeting on January 21, 2020, a representative from the Planning and Zoning Commission presented the history of Plaintiff's project, the results of the wetlands study, the results of the traffic impact analysis, and an outline of their recommendations. R. pp. 431–36. The City Council members had no follow up questions and then moved on to open the floor up to

[1] Plaintiff appealed the denial to the district court but has since dismissed that appeal following its submittal and the City Council's denial of its second proposal, which is the focus of the present matter. Pl.'s Br. p. 2.

public comment. *Id.* at pp. 436–37. The City Council first acknowledged that they had read all written materials sent directly to them and asked that people limit their oral comments to what had not already been provided. R. p. 437. *See also* R. pp. 155–60 (copies of emails sent to the City Council opposing the Kading site plans). During this time, approximately ten community members spoke in favor or opposition of Kading's site plans, with comments ranging from support of Kading as a management company to concerns over increased traffic and effects on the use and enjoyment of existing adjacent properties. *See* R. pp. 442–63. (providing a transcript of the January 21, 2020 meeting). The substance of these public comments is described in more detail below and pages 24 through 30 of the City's brief contain a comprehensive summary of public opposition. Plaintiff's attorney also spoke twice, providing support for approval of the site plans, clarifying who conducted the traffic impact study, and offering multiple times to answer any questions. R. pp. 438–41, 461–63. The City Council did not ask any questions during this public forum and only spoke up once to clarify who conducted the traffic impact study. R. p. 449–50. After all comments had been made, the City Council took a vote on whether to approve the site plans for Cavitt Creek I and for Cavitt Creek II. Both motions resulted in a five-to-one vote against approving the site plans. R. pp. 464–66.

On February 19, 2020, Plaintiff filed a Petition for Writ of Certiorari. The City filed its Brief in resistance on December 4, 2020, arguing that the City committed no illegality in its denial of Plaintiff's site plans and asking this Court to annul the writ. Def.'s Trial Br. p. 1.

LEGAL STANDARD

Iowa Rule of Civil Procedure 1.1401 allows a party to "commence a certiorari action when authorized by statute or when the party claims an inferior tribunal, board, or officer, exercising judicial functions, or a judicial magistrate exceed proper jurisdiction or otherwise acted illegally."

Iowa R. Civ. P. 1.1401. *See also Montgomery v. Bremer Cty. Bd. of Supervisors*, 299 N.W.2d 687, 692 (Iowa 1980) ("A writ of certiorari is granted where a board, exercising judicial functions, is alleged to have exceeded its jurisdiction or acted illegally.").

"The term 'judicial functions' as utilized in this particular rule is not construed strictly or technically and can apply if the underlying act is quasi-judicial." *Residential and Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 41 (Iowa 2016). *See also Wallace v. Des Moines Indep. Cmty. Sch. Dist. Bd. of Dirs.*, 754 N.W.2d 854, 858 (Iowa 2008) (stating that Iowa courts "do not construe 'judicial functions' in a strict or technical sense" and "[t]herefore, the action of the Board need only be quasi-judicial to support a certiorari proceeding"); *Hoefer v. Sioux City Cmty. Sch. Dist.*, 375 N.W.2d 222, 224 (Iowa 1985) (same); *Montgomery*, 299 N.W.2d at 692 (stating that the Iowa Supreme Court has "broadly defined 'judicial functions' for certiorari purposes to include cases where . . . the challenged action takes place after required notice and an opportunity to be heard"); *Massey v. City Council of City of Des Moines*, 31 N.W.2d 875, 878 (Iowa 1948) ("The authorities are substantially agreed and we have recognized that certiorari will lie if the act is of a quasi-judicial character."); Iowa R. Civ. P. 1.1401 cmt. (stating that the rule's updated requirement that the challenged action be "judicial" does "not change[] the prior practice of reviewing quasi-judicial action as well").

"An inferior tribunal commits an illegality if the decision violates a statute, is not supported by substantial evidence, or is unreasonable, arbitrary, or capricious." *Bowman v. City of Des Moines Mun. Hous. Agency*, 805 N.W.2d 790, 796 (Iowa 2011). In a certiorari action, "[t]he plaintiff bears the burden to prove the illegality." *Nash Finch Co. v. City Council of City of Cedar Rapids*, 672 N.W.2d 822, 825 (Iowa 2003). "Evidence is considered substantial when reasonable minds could accept it as adequate to reach a conclusion." *Vance v. Iowa Dist. Court for Floyd Cty.*,

907 N.W.2d 473, 476 (Iowa 2018) (quoting *State v. Garrity*, 765 N.W.2d 592, 595 (Iowa 2009)). "If the inferior tribunal's decision is supported by substantial evidence, [the court is] bound by the findings in the record." *Bowman*, 805 N.W.2d at 796.

The Iowa Supreme Court has made it clear that "[i]n a certiorari proceeding, unless modified by statute or constitutional principle, a court's scope of review is limited." *Montgomery*, 299 N.W.2d at 692. "A board's action must be upheld if supported by any competent and substantial evidence." *Id.* "If the reasonableness of the board's action is open to a fair difference of opinion, the court may not substitute its decision for that of the board." *Lang v. Linn Cty. Bd. of Adjustment*, 829 N.W.2d 1, 7 (Iowa 2013) (quoting *W & G McKinney Farms, L.P. v. Dallas Cty. Bd. of Adjustment*, 674 N.W.2d 99, 103 (Iowa 2004)) (citation and internal quotation marks omitted).

ANALYSIS

A. The City Council Did Not Act Illegally By Failing to Provide Written Findings

Plaintiff argues that the City Council's denial of the site plans was arbitrary and capricious because it was not supported by any comment, statement, or finding. Pl.'s Br. pp. 6–7. Specifically, Plaintiff asserts that the denial votes of each City Council member "were not supported by any statement, basis or discussion" and no reasons were given for why the site plans were contrary to the City Code. *Id.* at pp. 7–8. Additionally, Plaintiff points out that at the January 21, 2020 meeting, the City Council did not ask any questions or issue any demand of the Plaintiff. *Id.* at p. 7. The City Council made no comment either before or after taking the vote, it moved on to the next agenda item immediately after the vote, and it "issued no form of communication to Kading on what needed to be done to gain later approval." Pl.'s Reply Br. p. 5. According to Plaintiff, "[t]his failure is a violation of law entitling Kading to judicial relief." *Id.* In short, Plaintiff argues that the

City Council "made no attempt whatsoever to justify the 'No' vote on the resolutions of approval that were placed in the staff packet," and similar "[f]ailure to justify reasoning beyond a legal conclusion in a quasi-judicial proceeding has been fatal to upholding a ruling." Pl.'s Br. p. 7.

In response, the City argues that the Iowa Supreme Court has not extended the written-findings requirement to actions by city councils, even though it has done so for boards of adjustment. Def.'s Trial Br. p. 7. Furthermore, the City asserts that "for the purposes of the written-findings requirement," site-plan review is an administrative, not quasi-judicial, function. *Id.* Therefore, because the "essential nature" of the proceeding is not evidentiary and adjudicatory, written findings are not required. *Id.* (citing *Montgomery*, 299 N.W.2d at 693–94).

1. <u>The City Council's Action is Not Quasi-Judicial for the Purposes of the Written Findings Requirement</u>

In determining whether an action is "judicial" or "quasi-judicial" for certiorari proceedings, the Iowa Supreme Court considers the following three factors:

> (1) whether the questioned act involves a proceeding in which notice and an opportunity to be heard are required; (2) whether a determination of rights of parties is made which requires the exercise of discretion in finding facts and applying the law thereto; or (3) whether the challenged act goes to the determination of some right the protection of which is the peculiar office of the courts.

Wallace, 754 N.W.2d at 858 (internal quotations omitted) (citing *Buechele v. Ray*, 219 N.W.2d 679, 681 (Iowa 1974)). An activity is termed "quasi-judicial" when it "appears to be judicial in nature, but in reality is not." *Id.* In other words, "it is the nature of an act, not identity of the board or tribunal charged with its performance, which determines whether or not a function is judicial or quasi-judicial." *Buechele*, 219 N.W.2d at 681. "However, the mere exercise of judgment or discretion is not alone sufficient to characterize an act as quasi-judicial." *Wallace*, 754 N.W.2d at 858.

Although an action may be characterized as a quasi-judicial function for purposes of determining whether certiorari is available under Rule 1.1401, the Iowa Supreme Court has found that the same action may *not* be quasi-judicial for purposes of the written-findings requirement. *Montgomery*, 299 N.W.2d at 694. In *Montgomery*, the court found that the board was not required to make findings of fact because "the essential nature of the decision to rezone is legislative and the hearing before the Board was of the comment-argument type." *Id.* The court distinguishes evidentiary hearings from comment-argument type hearings, which are more informal and merely "involve[] 'an opportunity for persons to present data and arguments orally to the (Board) in an effort to communicate their views more effectively than they could in writing.'" *Id.* at 693 (quoting Arthur E. Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, and the Rulemaking Process*, 60 IOWA L. REV. 731, 853 (1975)).

The *Montgomery* court concluded that the type of hearing contemplated by the rezoning statute at issue was of the comment-argument type because "the Board [was] exercising a legislative function" and "[t]he purpose of the statutory hearing [was] primarily to aid the Board in gathering information to discharge the legislative function." *Id.* Subsequently, the court found that written findings of fact were not required because the board was "not determining adjudicative facts to decide the legal rights, privileges or duties of a particular party based on that party's particular circumstances." *Id.* at 694.

The City also relies on the *Montgomery* case to support its argument that unlike boards of adjustment, the written findings requirement does not apply to actions by city councils. Def.'s Trial Br. p. 7. The City points out that "[i]n *Montgomery*, the Iowa Supreme Court had the opportunity to extend the written findings requirement to a municipal body that is primarily legislative, and it

declined to do so." Def.'s Trial Br. p. 10. *See Montgomery*, 299 N.W.2d at 694 ("We decline to impose a requirement of making findings of fact on the Board."). The Court finds this point persuasive.

In the present case, the City argues "that site-plan review by a city council is an administrative function, according to which a city enforces its zoning code and exercises oversight and control – it is not a quasi-judicial function." Def.'s Trial Br. pp. 15–16 (citing *Kane v. City Council of City of Cedar Rapids*, 537 N.W.2d 718, 722 (Iowa 1995) and *City of Johnston v. Christenson*, 718 N.W.2d 290, 298–99 (Iowa 2006)). Therefore, the City contends that for the purposes of the written-findings requirement, the City Council's action was not quasi-judicial and Iowa law does not require the City to provide written or specific findings to explain its decision. *Id.* at pp. 10, 16.

In *Kane*, the Iowa Supreme Court first reviews the power of a city council, noting the difference between an ordinance and a resolution or motion,[2] and restating the long-established principle that "[a]dministrative decisions of a city council may be made by resolution." 537 N.W.2d at 722 (citing *Bryan v. City of Des Moines*, 261 N.W.2d 685, 687 (Iowa 1978)). The court then explains the process for review and approval/disapproval of site development plans, ultimately characterizing it as "an administrative device":

> The city's code provides the council may approve, approve with modification, or disapprove a revised site development plan by resolution after recommendation from the city planning commission. This process is a part of the mechanics for enforcing the city's zoning code; it is an administrative device whereby the city exercises oversight and control.

[2] "A city council shall exercise a power only by the passage of a motion, a resolution, an amendment, or an ordinance." Iowa Code § 364.3(1). The statute defines "ordinance" as "a city law of a general and permanent nature" and defines a "resolution" or "motion" as "a council statement of policy or a council order for action to be taken." *Id.* at §§ 362.2(16) and (21). The statute notes that the only difference between a "resolution" and a "motion" is that a "'motion' does not require a recorded vote." *Id.* at § 362.2(21).

Kane, 537 N.W.2d at 722. The court also notes that "[w]hen a site development plan is not submitted with a request to rezone the property, council approval by resolution is sufficient." *Id.* at 723. In short, the review of site plans is considered an administrative rather than adjudicative function.

In the present case, the City Council's review and final decision regarding site plans involved a comment-argument type hearing rather than a more formal evidentiary hearing. Recall that comment-argument type hearings have been described as a more informal "opportunity for persons to present data and arguments orally to the [board] . . . ." *Montgomery*, 299 N.W.2d at 693 (quoting Bonfield, *The Iowa Administrative Procedure Act*). This is exactly what occurred on January 21, 2020: a member of the Planning and Zoning Commission, a representative of the developer, and members of the community orally presented arguments and data to the City Council. There was no confrontation or cross-examination of witnesses, and the City Council was gathering information to complete an administrative function rather than "determining adjudicative facts to decide the legal rights, privileges or duties of a particular party based on that party's particular circumstances." *Id.* at 694.

To conclude, the Court agrees that the "essential nature" of site plan review is characterized as an administrative function of a local body rather than adjudicative, and any accompanying hearing before the tribunal, such as the January 21, 2020 meeting here, is of the comment-argument type. Therefore, the City Council was not required to provide written findings of fact.

Contrarily, Plaintiff points to *Sutton v. Dubuque City Council* in support of its contention that zoning matters are quasi-judicial functions: "Although municipal zoning ordinarily involves the enactment of an ordinance, an action that on first blush appears to be legislative in nature, rezoning often takes on a quasi-judicial character by reason of the process by which it is carried

out." 729 N.W.2d 796, 798 (Iowa 2006). Ten years later, the Iowa Supreme Court cites *Sutton* and reaffirms that it has "recognized that there are some situations in which a zoning decision can take on a quasi-judicial nature . . . ." *Residential & Agric. Advisory Comm.*, 888 N.W.2d at 40–41. However, there are some important distinctions to note. First, these cases concern rezoning issues, not mere site-plan review. *See id.* at 39–40 (noting the issues raised on appeal, including "review [of] the city council's actions in rezoning the *Field of Dreams* site"); *Sutton*, 729 N.W.2d at 798 (recognizing that "*rezoning* often takes on a quasi-judicial character") (emphasis added). Plaintiff even points out that the present issue is *not* one of rezoning, but rather concerns site plans: "It must be remembered that Kading's were [sic] not asking for a rezoning, comprehensive plan amendment, or any extraordinary form of zoning permission. Kading submitted site plans." Pl.'s Reply Br. p. 16.

Second, the *Sutton* case dealt with a specific and unique situation, planned unit development (PUD) zoning, which the court recognized is different from many of its other zoning cases. *Residential & Agric. Advisory Comm.*, 888 N.W.2d at 42. The Iowa Supreme Court acknowledges the distinction between PUD zoning and traditional zoning, stating that "[t]he quasi-judicial character of municipal rezoning is particularly evident in matters involving PUD zoning." *Sutton*, 729 N.W.2d at 798. Finally, these cases discuss the quasi-judicial function of zoning matters in terms of applying certiorari. Here, the City does not seem to oppose Plaintiff's assertion that certiorari is the proper remedy; rather, the City argues that *for the purposes of the written findings requirement*, the City Council's review of the site plans was not a quasi-judicial action. *See* Def.'s Trial Br. p. 10. As illustrated by the *Montgomery* case and previously discussed, there is a distinction.

2. <u>The City Council's Actions Were Not Unreasonable, Arbitrary, or Capricious</u>

Plaintiff argues that the City Council's action in denying the site plans "was conducted in an arbitrary and capricious manner because their votes were not supported by substantial evidence or any type of comment to tie their votes to the evidence." Pls.' Reply Br. p. 8. Specifically, Plaintiff states that none of the City Council members "gave any indication that they relied on any evidence, ordinance, policy, comprehensive plan, statement of concern, or anything at all during the" January 21, 2020 meeting or when voting to reject the site plans. *Id.* at p. 7. Plaintiff further alleges that "[t]he City Council never intended to give a reason of any kind when they voted to deny the plans." *Id.*

In response, the City argues that "[t]he absence of explanation does not mean the council did not have reasonable, non-arbitrary, and non-capricious reasons for its actions." Def.'s Trial Br. p. 16. The City further asserts that it is not acting with discriminatory intent or capriciously toward Kading by denying its site plans: "If Indianola was acting in the unreasonable manner suggested, the City would not have approved the re-platting, and the projects would not have gotten to the level of site-plan review." *Id.* at p. 17.

"Agency action is considered arbitrary or capricious when the decision was made without regard to the law or facts." *Doe v. Iowa Bd. of Med. Exam'rs*, 733 N.W.2d 705, 707 (Iowa 2007) (internal quotation marks omitted). S*ee also Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 831 (Iowa 2002) (same); *Bernau v. Iowa Dep't of Transp.*, 580 N.W.2d 757, 764 (Iowa 1998) (same); *Allen v. State Dep't of Pers.*, 528 N.W.2d 583, 587 (Iowa 1995) ("To be arbitrary or capricious, the agency action must be taken without regard to the law or consideration of the facts of the case."); *Churchill Truck Lines, Inc. v. Transp. Regulation Bd. of Iowa Dep't of Transp.*, 274 N.W.2d 295, 299 (Iowa 1979) ("The terms 'arbitrary,' and 'capricious,' when applied

to test the propriety of agency action are practically synonymous and mean that the action complained of was without regard to established rules or standards.").

Similarly, "[a]gency action is unreasonable if the agency acted 'in the face of evidence as to which there is no room for difference of opinion among reasonable minds . . . or not based on substantial evidence.'" *Doe*, 733 N.W.2d at 707 (quoting *Greenwood Manor*, 641 N.W.2d at 831). *See also Dico, Inc. v. Iowa Emp't Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998) (stating that arbitrary, capricious, and unreasonable have "established meanings," and that "[a]gency action is 'unreasonable' when it is 'clearly against reason and evidence'") (quoting *Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688–89 (Iowa 1994)).

Based on the evidence outlined in detail in the following section, the Court concludes that the City Council's actions were not unreasonable because the evidence presented was adequate to support their decision and there was certainly "room for difference of opinion among reasonable minds." Furthermore, the City Council's decision to deny the site plans was not arbitrary or capricious, but rather was governed by Chapter 166 of the Indianola Municipal Code and was made in the face of ample and legitimate concerns, such as area density, increased traffic problems, and issues for adjoining properties. Although the Planning and Zoning Commission recommended approval of the site plans for Cavitt Creek I, the City Council is not required to follow this recommendation, but rather takes it into consideration when making the final decision: "Upon recommendation from the Commission to the Council, the applicant's plan will be put on the agenda for the next regularly scheduled Council meeting, for final approval or disapproval by the Council." City of Indianola Mun. Code § 166.07(3).

The Court agrees that the City Council's complete lack of any explanation, even a sentence at the minimum, is troubling and today's ruling is not intended to be read as allowing tribunals to

deny applications without reason. However, as explored in the preceding sections, the Indianola City Council is not subject to the written-findings requirement here and a tribunal's decision is not automatically arbitrary and capricious simply because it fails to articulate the reason for its decision.

B. <u>The City Council's Decision Was Supported by Substantial Evidence</u>

"Evidence is considered substantial when reasonable minds could accept it as adequate to reach a conclusion." *Vance*, 907 N.W.2d at 476 (quoting *State v. Garrity*, 765 N.W.2d 592, 595 (Iowa 2009)). *See also Bontrager*, 748 N.W.2d at 495 ("Evidence is substantial when a reasonable mind could accept it as adequate to reach the same findings."); Iowa Code § 17A.19(f)(1) (defining "substantial evidence" as "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance").

Furthermore, "[e]vidence is still substantial even though it would have supported contrary inferences." *Chiafos v. Mun. Fire & Police Ret. Sys. of Iowa*, 591 N.W.2d 199, 201 (Iowa 1999). "If the inferior tribunal's decision is supported by substantial evidence, [the court is] bound by the findings in the record." *Bowman*, 805 N.W.2d at 796. In other words, "[e]vidence is substantial to support an agency's decision if a reasonable person would find it adequate to reach a given conclusion, *even if the reviewing court might draw a contrary inference*." *Allen v. State Dep't of Pers.*, 528 N.W.2d 583, 587 (Iowa 1995) (emphasis added).

In the *Bontrager* case, the Iowa Supreme Court adopted a number of helpful principles in considering whether a tribunal's decision was supported by substantial evidence. First, the court noted that the absence of expert testimony is not fatal because such evidence is not required by Iowa case law or by the Iowa City Code. 748 N.W.2d at 496 (citing *Petersen v. Harrison Cty. Bd.*

of Supervisors, 580 N.W.2d 790, 796 (Iowa 1998) and *Norland v. Worth Cty. Comp. Bd.*, 323 N.W.2d 251, 253 (Iowa 1982)). Similarly, in acknowledging a comment by one person residing in the vicinity of a transient house that the property values in that neighborhood had not been adversely affected, the *Bontrager* court stated that a board is also "certainly permitted to rely on such anecdotal evidence." *Id.* Additionally, the *Bontrager* court stated that a board "may rely on commonsense inferences drawn from evidence relating to other issues, such as use and enjoyment, crime, safety, welfare, and aesthetics, to make a judgment as to whether the proposed use would substantially diminish or impair property values in the area." *Id.* With these principles in mind, the *Bontrager* court found that collectively, there was adequate evidence to support the board's conclusion, even though "there was evidence to the contrary" as well. *Id.* at 497. The court reasserts that when "the reasonableness of the board's decision is open to a fair difference of opinion" and even though the evidence "might well support an opposite finding," the board's decision must be affirmed. *Id.* (quoting *Helmke v. Bd. of Adjustment*, 418 N.W.2d 346, 352 (Iowa 1988)).

Most of the concerns raised by the public at the January 21, 2020 meeting and in emails to the City Council dealt with the traffic problems already present in the area. Multiple people called the traffic impact study into question and stressed that its findings did not align with their personal experiences. R. pp. 442–43, 448–51. They stated that considering the traffic issues currently faced by the neighborhood, they could not imagine what the situation would be like after "[a]dding potentially 270 to 300 more vehicles" and that they "don't think [their] neighborhood can handle that much more." *Id.* at pp. 455, 448–49. *See also id.* at p. 155 ("My concerns include the density of Kading's multi-family housing development in this area of town, along with . . . the traffic along ninth street from East Madison to Salem in prime traffic times. If you have not done so already, I strongly invite you to travel that route between 7:20–8:00am or 3:00–3:45 on any given week day

so you can experience for yourself the traffic issues we are talking about."); *id.* at p. 160 (raising concerns over current traffic congestion, pedestrian and children's safety, and the ability of emergency vehicles to maneuver through the streets).

Another resident who owns property adjacent to the site brought up her concerns about fencing around Cavitt Creek II and stated that although she has previously raised the issue, Kading indicates it has no plans to install fencing. *Id.* at p. 443. This resident expressed that she is worried that a high-density project such as this with children could create liabilities; specifically, she is concerned about someone entering their property and drowning in their pond. *Id.* at pp. 443–44. Additionally, several community members expressed their concerns about areas density, specifically the impact Kading's development would have on the school district and, again, the traffic issues. These residents "do not feel that this project provides minimal effect on its neighbors." *See id.* at p. 159 (citing City of Indianola Mun. Code § 166.01).

Section 166.05 of the site plan ordinance provides a list of general design policies that site plans must comply with in addition to the specific design policies required by section 166.04. Even if a site plan meets all the specific design standards, the Director of Community Development may refuse to grant it approval if it does not comply with the general design policies. City of Indianola Mun. Code § 166.05. The purpose is to ensure all property is developed "in such a manner as will safeguard the public's health, safety and general welfare." *Id.*

The City alleges that Kading's site plans did not meet these general design policies, arguing specifically that there is substantial evidence showing the developments would "unduly diminish or impair the use and enjoyment of adjoining property" and would "unduly increase [traffic] congestion on adjacent or surrounding public streets." Def.'s Trial Br. p. 31. (citing City of Indianola Mun. Code § 166.05(2)–(3)). Furthermore, the City asserts that the site plans do not

promote the policies of the site plan ordinance because there is substantial evidence demonstrating that the developments would have more than a "minimal effect upon adjacent properties and existing development." *Id.* at pp. 31–32 (citing City of Indianola Mun. Code § 166.01(2)).

Plaintiff argues that the traffic study is substantial evidence compelling approval of the site plans because the results indicate the city streets would still function at service level "A," the highest level of service, if the site plans are approved. Furthermore, Plaintiff asserts that during the meeting on January 21, 2020, the City Council heard only "generalized concerns" from "a handful of neighboring property owners." Pls.' Br. p. 12. According to Plaintiff, these "unsubstantiated claims of future harm . . . do[] not constitute substantial evidence to support the Board's conclusion . . . ." *Id.* (quoting *Baugh v. Waterloo Bd. of Adjustment*, 756 N.W.2d 48 (Table), 2008 WL 2746331 at *5 (Iowa Ct. App. July 16, 2008)). Rather, Plaintiff argues that such generalized concerns from property owners are not sufficient to attack the professional traffic impact study completed by Plaintiff and approved by both the City staff and the City's consulting engineer. Pls.' Br. p. 12.

First, the Court agrees that Plaintiff misstates the standard here. The question is not whether there is substantial evidence compelling a plaintiff's position. Rather, the Court must determine whether the City Council's decision was not supported by substantial evidence. *See Bowman*, 805 N.W.2d at 796.

Additionally, the cases cited in support of Plaintiff's assertion are not quite persuasive, including *Baugh v. Waterloo Board of Adjustment*, an unpublished decision from the Iowa Court of Appeals. The court draws its support from two Illinois court cases (one which the Seventh Circuit has disagreed with) and a footnote in an Iowa Supreme Court case, which likewise draws support from Illinois, Georgia, and New Mexico cases. *See U.S. Cellular Corp. v. Bd. of*

Adjustment of City of Des Moines, 589 N.W.2d 712, 721 n.4 (Iowa 1999) ("It is questionable whether neighborhood opposition alone, even if considerable could justify the denial of a permit for construction of a personal wireless facility."). Nine years after the Iowa Supreme Court's mere musing in a footnote, the court provides more concrete guidance and conclusions in *Bontrager*. Therefore, the case law appears to more strongly indicate that a board may rely on commonsense inferences and such anecdotal evidence as public comments.

Finally, the City raises a fair point that in conducting the traffic impact study, traffic counts "were taken only during December 11 through December 13, 2019" and such a limited sample may not "be representative of traffic conditions throughout the entire year." Def.'s Trial Br. p. 32 (citing R. pp. 114, 167–77). This is especially compelling when taken into consideration alongside the large amount of public comment indicating the results of the traffic impact study do not match their own experiences. *See* R. pp. 155–60, 442–63 (demonstrating public opposition through emails sent to the City Council and oral testimony at the January 21, 2020 meeting, most of which relates to traffic concerns). Furthermore, although the city engineer generally agreed with the results of the traffic impact study, his report does note the same problems that people expressed. *See* R. pp. 138–41.

The Court concludes that there was substantial evidence for the City Council to deny Kading's site plans. Once again, it is a longstanding and well-settled principle that "[i]f the reasonableness of the board's action is open to a fair difference of opinion, the court may not substitute its decision for that of the board." *Lang v. Linn Cty. Bd. of Adjustment*, 829 N.W.2d 1, 7 (Iowa 2013) (quoting *W & G McKinney Farms, L.P. v. Dallas Cty. Bd. of Adjustment*, 674 N.W.2d 99, 103 (Iowa 2004)) (citation and internal quotation marks omitted). *See also Perkins v. Bd. of Supervisors of Madison Cty.*, 636 N.W.2d 58, 69 (Iowa 2001) (concluding that the court

would not substitute its judgment for the board's "[b]ecause the reasonableness of the amendment [was] fairly debatable"); *Helmke v. Bd. of Adjustment*, 418 N.W.2d 346, 352 (Iowa 1988) (stating that "whether the evidence in a close case . . . might well support an opposite finding [was] of no consequence, for the district court cannot substitute its judgment for that of the board of adjustment"); *Zilm v. Zoning Bd. of Adjustment*, 150 N.W.2d 606, 611 (1967) (concluding that there was no basis for finding the board did not act reasonably and therefore, the court could not substitute its judgment).

Recall that the "[e]vidence is considered substantial when reasonable minds could accept it as adequate to reach a conclusion." *Vance*, 907 N.W.2d at 476. The Court believes that reasonable minds, when presented with the significant amount of public concern expressed orally and via email, could conclude that the Kading site plans would "unduly diminish or impair the use and enjoyment of adjoining property" and would "unduly increase [traffic] congestion on adjacent or surrounding public streets." City of Indianola Mun. Code § 166.05(2)–(3).

C. <u>The City Council Did Not Violate Section 166.07 of the Site Plan Ordinance</u>

Plaintiff argues that the City Council violated section 166.07 of the site plan ordinance by rejecting the site plans without advising Kading of what needed to be done in order to gain approval. Pl.'s Reply Br. p. 5. According to Plaintiff, because Kading's land complied with the zoning ordinance, the site plan review was merely supposed to be a stage at which the City Council would "fine tune" the plans rather than have "an approve or deny choice." *Id.* at p. 6. Plaintiff contends that "[t]he site plan ordinance is not a superpower that allows the City to prevent a use that their other ordinances allow . . . ." *Id.* Furthermore, Plaintiff asserts that if the site plan ordinance does provide the City Council with the ability "to prevent a site plan for a use the zoning

ordinance allows, then the City would be invading the province of the zoning board of adjustment under Iowa Code Section 414.7." Pl.'s Reply Br. p. 6.

Section 166.07 of the site plan ordinance outlines actions taken on submitted site plans and the proper procedures. The relevant text of section 166.07 states the following:

> (1) Within forty-five (45) days after receiving the application for site plan review . . . the Planning and Zoning Commission shall *recommend to the Council to either approve, approve subject to conditions, or disapprove the site plan* . . . .
>
> (3) An electronic file of the plan with all changes recommended by the Commission, if any, shall be submitted to the Director of Community Development. Upon recommendation from the Commission to the Council, the applicant's plan will be put on the agenda for the next regularly scheduled Council meeting, *for final approval or disapproval by the Council*. *If the Council rejects the plan, they will advise the owner or developer of any changes which are desired or that should have consideration before approval will be given.* The applicant shall then submit the revised original for certification by the Council. The Planning and Zoning Commission and the Council, in approving or disapproving any site plan and in making recommendations for alterations or amendments to the site plan as presented, shall be governed by the general policies as set out by this chapter in Section 166.05 and the purpose of this chapter as set out in Section 166.01.

City of Indianola Mun. Code § 166.07(3) (emphasis added).

At the hearing for this matter held on January 15, 2021, the City argued that despite what the Plaintiff's interpretation suggests, there is nothing in the ordinance that would provide for serial application after application until the developer gets it right. Rather, the City Council has the ability to deny a site plan. Additionally, the City argued that "will" is a descriptive word and does not mandate providing the owner or developer changes that should be made before the site plans are approved.

For the purpose of statutory interpretation, courts "attempt to give effect to the general assembly's intent in enacting the law," which is generally "gleaned from the language of the statute." *Nash Finch Co. v. City Council of City of Cedar Rapids*, 672 N.W.2d 822, 826 (Iowa 2003). When analyzing the language, words are given their ordinary meaning and "the context of

the provision at issue" must be kept in mind. *Id.* Furthermore, courts "strive to interpret each provision of a statute 'in a manner consistent with the statute as an integrated whole.'" *Id.* (quoting *Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 864 (Iowa 2003)). "A statute is ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute." *State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003) (citations omitted). *See also Nash Finch Co.*, 672 N.W.2d at 827 (finding the statute at issue ambiguous because neither proposed interpretation was unreasonable). "When a statute is ambiguous, the court may consider, among other factors, the purpose of the statute, the consequences of a particular construction, and any administrative interpretation of the statute." *Id.* (citing Iowa Code § 4.6).

Although the proper meanings of the words "shall," "must," and "may" have been repeatedly discussed by courts and our legislature, there is next to no analysis of the word "will." *See, e.g.*, *Willett v. Cerro Gordo Cty. Zoning Bd. of Adjustment*, 490 N.W.2d 556, 559 (Iowa 1992) (engaging in a discussion of statutory interpretation, including the meanings of "shall" and "must"); Iowa Code § 4.1(30) (providing explanations for the meaning and application of the words "shall," "must," and "may" in statutory construction). Furthermore, *Black's Law Dictionary* is of little help, as it provides no entry for the verb form of the word "will" as used in the present context. Instead, all entries are for various types of physical wills or the legal expression of an individual's wishes regarding their property upon their death. *See* ANTHONY R. MELLOWS, THE LAW OF SUCCESSION 6 (3d ed. 1977) ("The word 'will' has two distinct meanings. The first, and strict, meaning is metaphysical, and denotes the sum of what the testator wishes, or 'wills,' to happen on his death. The second, and more common, meaning is physical, and denotes the document or documents in which that intention is expressed.")

One possible interpretation is that "will" signifies a promise, which is not as definite as "must" but still implies some kind of requirement. Another avenue of thought is that "will" connotes a future use rather than imposes a duty or obligation. The Eighth Circuit appears to agree with this latter interpretation in a case concerning the construction of an ERISA plan. *Windstream Corp. v. Da Gragnano*, 757 F.3d 798, 804 (8th Cir. 2014). Citing the dictionary definition of "will," the court explains that "[w]hen placed in front of a verb like 'pay,' the word 'will' indicates 'simple futurity,' 'likelihood or certainty,' 'requirement or command,' 'intention,' 'customary or habitual action,' 'capacity or ability,' and 'probability or expectation.'" *Id.* (citing WEBSTER'S II NEW COLLEGE DICTIONARY 1293 (3d ed. 2005)). The court then concludes that "[n]one of these definitions promise that the verb will be performed permanently" because "[a]ctions that are likely, certain, required, commanded, customary, or habitual may be expected one day to end." *Id. See also Stanley J. How & Assocs., Inc., v. Boss*, 222 F.Supp. 936, 940 (S.D. Iowa 1963) (stating that "[t]he words 'will be' connote something which will take place in the future" and it "contemplates future and further action").

Similarly, although much earlier, the Iowa Supreme Court found that use of the word "will" in a jury instruction was misleading because "the jury could have understood the word 'will' as equivalent to the word 'must.'" *Boom v. Boom*, 220 N.W. 17, 20 (Iowa 1928).[3] Although that was not the intent and purpose of the court, the use of "will" in light of its context (*i.e.,* "you will allow plaintiff exemplary damages") "robbed the word of its permissive or discretionary meaning." *Id.* This case suggests that "will" does *not* have the same or a similar meaning to the word "must," but rather implies something is discretionary rather than obligatory.

[3] "While that case is not factually the same as the present one, it is indicative of the ordinary meaning of these words." *Stanley J. How & Assocs.*, 222 F.Supp at 940.

Because reasonable minds could differ on the proper interpretation of the word "will" and its specific use in the ordinance at issue, the Court finds that section 166.07(3) is ambiguous. Therefore, the focus now shifts to factors such as the context of the rest of the statute and possible consequences of a particular construction.

Subsections 1 and 2 of section 166.07 both indicate that the Planning and Zoning Commission's options for recommendation to the Council are approval, disapproval, or approval subject to conditions. City of Indianola Mun. Code § 166.07(1) and (2). The fact that the ordinance provides an option for "approval subject to conditions" that is distinct from the "disapproval" option, or that it provides the option for an outright disapproval at all, suggests that the City Council is not required to provide feedback and conditions until site plans are ultimately approved. Although these subsections do directly refer to actions by the Planning and Zoning Commission and not the City Council, it would not make sense to provide the Commission with an option for a type of recommendation to give the Council that the Council would not be able to follow.

Based on this analysis, the Court finds that although the ordinance is poorly written and open to interpretation, it should not be read to require the City Council to ultimately approve every site plan submitted to it. Furthermore, although there is very little available case law or statutory guidance, use of the word "will" rather than "shall" or "must" suggests the ordinance is more discretionary than obligatory in allowing the City Council to advise developers of what changes might be made before their site plans can be approved.

CONCLUSION

For the foregoing reasons, the Court concludes the following:

(1) For the purposes of the written-findings requirement, the City Council's action in reviewing and disapproving the site plans was not a quasi-judicial

function. Therefore, the City Council was not required to provide written findings of its decision.

(2) The City Council's decision to deny the site plans was not arbitrary, capricious, or unreasonable.

(3) The Court believes that reasonable minds, when presented with the significant amount of public concern expressed orally and via email, could conclude that the Kading site plans would "unduly diminish or impair the use and enjoyment of adjoining property" and would "unduly increase [traffic] congestion on adjacent or surrounding public streets." City of Indianola Mun. Code § 166.05(2)–(3). Therefore, there was substantial evidence for the City Council to deny Kading's site plans.

(4) The City Council did not violate section 166.07 of the site plan ordinance by failing to advise Kading of what changes could be made that would lead to ultimate approval of the site plans.

Therefore, the Court finds that the City Council did not act illegally in denying Plaintiff's site plans. Accordingly, Plaintiff's Writ of Certiorari is **DENIED**.

State of Iowa Courts

Case Number	**Case Title**
CVCV038374	KADING PROPERTIES, LLC V. CITY OF INDIANOLA, IOWA
Type:	OTHER ORDER

So Ordered

Richard B. Clogg, District Court Judge,
Fifth Judicial District of Iowa

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