

IN THE IOWA DISTRICT COURT FOR JOHNSON COUNTY

NEIGHBORS OF MANVILLE HEIGHTS ASSN, )  
ANNE LAHEY, CRAIG SYROP & ANNE )  
SADLER, BILL & KAREN ACKERMAN, )  
BRADLEY & CATHERINE ERICKSON, )

Plaintiffs, )  
v. )

BOARD OF ADJUSTMENT OF THE CITY OF )  
IOWA CITY, IOWA and the CITY OF )  
IOWA CITY, IOWA, )

Defendants. )

PETITION FOR DECLARATORY  
JUDGMENT AND TEMPORARY  
AND PERMANENT INJUNCTIVE  
RELIEF (FIRST AMENDED)

*“A reasonable person would consider the sanitary sewer connection, the adjacent slope protection, the potential public safety issue of a necessary turnaround as problems to be addressed by the City. The City’s response? In so many words...not according to the Code.*

*Carried to its logical extreme, the City is admitting that it has no power to stop this structure at this site, nor any power to prevent even worse abominations in any other residential zone in Iowa City. If the City’s decision is upheld, not one single neighborhood in this community is safe from such development.”*

Larry Baker, Chair, Iowa City Board of Adjustment,  
September 30, 2016<sup>1</sup>

COME NOW Plaintiffs NEIGHBORS OF MANVILLE HEIGHTS ASSOCIATION, an Iowa Non-Profit Corporation, ANNE LAHEY, CRAIG SYROP & ANNE SADLER, BILL & KAREN ACKERMAN, and BRADLEY & CATHERINE ERICKSON, by and through the undersigned counsel, James C. Larew, in support of their Petition for Declaratory Judgment and Temporary and Permanent Injunctive Relief (First Amended), hereby state the following:

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<sup>1</sup> Statement by Larry Baker, in announcing decision on Appeal, September 30, 2016, *Board of Adjustment Item EXC 16-00001*; Exhibit A, Attached.

## THE PARTIES

1. Plaintiff NEIGHBORS OF MANVILLE HEIGHTS ASSOCIATION is an Iowa Non-Profit Corporation. Its Registered Agent is James C. Larew, Larew Law Office, 504 E. Bloomington Street, Iowa City, Iowa 52245.
2. Plaintiff Anne Lahey owns real property at 111 Lusk Avenue, Iowa City, Iowa (“Lahey Property”), a single family dwelling located on a parcel that lies directly to the north of and abuts property owned by F. Reed Carlson and Sandra Carlson, husband and wife (“Carlsons”), located at 101 Lusk Avenue (“Carlson Property”).
3. Plaintiffs Craig Syrop and Anne Sadler have ownership interests in real property located at 117 Lusk Avenue, Iowa City Iowa (“Syrop-Sadler Property”), a single family dwelling located on a parcel that lies directly to the north of and abuts the Lahey Property.
4. Plaintiffs Bill and Karen Ackerman own real property located at 631 Bayard Street, Iowa City Iowa (“Ackerman Property”), a single family dwelling located on a parcel that lies directly north of and abuts the Carlson Property.
5. Plaintiffs Bradley and Catherine Erickson own real property located at 11 Rowland Court, Iowa City, Iowa (“Erickson Property”), a single family dwelling located on a parcel that lies within several hundred feet of the Carlson Property.
6. Defendant City of Iowa City, Johnson County, Iowa (“City”) is a municipal corporation located within the State of Iowa. One of the administrative departments of the City is Neighborhood and Development Services (“NDS”), which is responsible for enforcing the City’s Zoning Ordinances and which, for all material times hereto, was directed by Doug Boothroy.
7. Defendant Board of Adjustment of Iowa City (“BOA”) is one of the agencies of the City, an entity whose creation is authorized under Iowa Code Chapter 414 and which is authorized under the Iowa City Code of Ordinances, at § 14-7A-2, to consider appeals made by Building Officials

employed by the City wherein it is alleged that there has been an error in any order, requirement, decision, and/or determination.

### **FACTUAL SUMMARY**

8. This case involves the unlawful approval of a Site Plan and the unlawful issuance of a Building Permit by the City to F. Reed Carlson and Sandra Carlson, husband and wife, permanent residents of Decorah, Iowa, the two owners of real property located at 101 Lusk Avenue, which is located in what is sometimes known as the “Manville Heights” area of Iowa City, a low density single family residential area covered by the R-5 Zone as defined by the City’s Zoning Ordinances.
9. Lusk Avenue is a paved, dead-end, 20-foot wide street, 155 feet, 5-inches long. It abuts into a railroad right-of-way owned by the Cedar Rapids and Iowa City Railroad (CRANDIC). 101 Lusk Avenue is located on the westerly side of the end of the street; the right-of-way extends along the entire southerly boundary of the Carlsons’ property. The railroad’s property is characterized by very steep slopes which extend up to and touch the Carlsons’ land, as do trees that form a part of a grove of trees covering acres of land along the railroad’s property and residential lots that abut it.
10. The controversy leading to this action arises from the City’s staff’s refusal to enforce certain mandatory provisions of the Iowa City Code that are intended to provide protection to Plaintiffs and those members of the public who are similarly-situated to Plaintiffs. Although Plaintiffs have suffered a particular harm because the City’s conduct has adversely affected them in one particular case, more importantly, Plaintiffs believe, based on the City’s own written evidence and the testimony of the City’s witnesses at hearings conducted by the BOA , that the City’s conduct is the same in all instances: that is to say, the City’s staff, notwithstanding clear mandatory enforcement language of the Code, as to all parties, refuse to enforce certain provisions related to the installation of private sanitary sewers, the protection of sensitive lands and features, and the assurance of fire safety.

11. Plaintiffs' first awareness of these generalized, legislative facts (that is, that the City applies certain Code provisions wrongfully in every instance) arose in the context of hearings convened by the BOA when Plaintiffs challenged the City's approval of a Site Plan and issued a Building Permit to the Carlsons' for their proposed construction of a 7500 square foot structure (9,000 square foot, if a large courtyard in the middle of it were to be included in the measurement), a replica of the University of Iowa's nearby Kinnick Stadium and the Carlsons' articulated principal entertainment purpose for the building: to host tailgate parties.
12. True to form, the proposed structure was to be built with a brick façade, similar to Kinnick Stadium's own exterior, with one door on the front, an entrance designed for the public, whose entries would enter the building as through the stadium itself. Initial drawings filed by the Carlsons with the City depicted large entryway bathrooms—one for women (painted pink, as in Kinnick Stadium's visitors' locker room), complete with multiple stalls, and the other for men, furnished with urinals, with each set of restrooms equipped with lockers. No showings were made, in any documents submitted to the City prior to the issuance of a Building Permit, as to how the proposed building's sanitation system and private sewer lines would be connected to the City's sanitary sewer main.
13. To entertain the visitors, the planned structure, if built, will have an indoor basketball court, commercial grade appliances, and a bar longer than those found in many of Iowa City's own commercial drinking establishments. The seating configurations indicated a capacity of not less than 200 persons for entertainment purpose. Bedrooms are planned for the third-floor "press box," an angular part of the structure jutting up along the entire southerly side of the building.
14. The City's Zoning Ordinance classifies the area in which 101 Lusk Avenue is located as RS-5, Single Family Low Density Residential. The RS-5 zone does not anticipate and, therefore, does not allow, the building of a structure whose principal use is entertainment, whether that entertainment be commercial (that is, pay-for-use) or private. Nor does it anticipate and,

therefore, does not allow, the building of a structure whose accessory use is residential.

15. Structures built in the RS-5 zone are subject to the application of various provisions of the City's Code of Ordinances, legislated by the City Council of Iowa City. Those mandatory provisions include matters related to sanitation, the protection of proximate steep slopes and wooded areas, and the public's protection against the perils of fire.
16. For example, all proposed buildings are subject to provisions of the International Plumbing Code (IPC), the International Residential Code (IRC) and, thus, the International Building Code (IBC), and Iowa City Code § 16-30-5, which all *require* a proper separate private sanitary sewer connection between a building such as the one proposed by the Carlsons, and a public sanitary sewer.
17. Further, all proposed buildings sited on lots that are proximate to steep slopes and / or groves of trees of sufficient size are subject to mandatory provisions of the City's Sensitive Lands and Features Ordinance, at Chapter 14-5I of the City Code. The provisions of that Chapter are intended to protect against unwise construction near steep slopes and to protect elements of the natural environment. The standards imposed by the Ordinance are objective: a fifty-foot buffer strip must be placed between the edge of the slope and/or wooded area and that no structures can be built within that space. The owners of any proposed building (here, the Carlsons) have the burden to demonstrate that it will be in compliance with the Ordinance.
18. Further, all proposed buildings that are constructed on dead-end paved surfaces longer than 150 feet are subject to and may be affected by mandatory provisions of the 2015 International Fire Code (IFC), which is incorporated by reference in Iowa City Code § 7.1. Those mandatory provisions include, but are not necessarily limited to, the installation of "turnarounds" at the ends of dead-end streets to assure that fire trucks and emergency vehicles are not damaged when exiting from fire calls and that they can make rapid exits from fire calls if they are called to other emergencies.

19. Without the knowledge of any of the Plaintiffs, on May 25, 2016, the City, through its Building Official, Doug Boothroy, had approved an initial Site Plan and issued a Building Permit to the Carlsons to construct, at 101 Lusk Avenue, the Kinnick Replica structure.
20. Strangely, on no documents submitted to the City as a part of the Carlsons' application for a Building Permit had the owners indicated how they intended to connect the sanitary sewer from the proposed building to the City's sanitary sewer main. That is to say, neither the approved Site Plan, nor any building specifications submitted as a part of the Carlsons' new construction Building Permit application, contain information about whether the owners or the City indicated as to how the Carlsons' Kinnick Replica building's abnormal number of plumbing fixtures, commercial kitchen facilities, showers and tubs, in a space designed for 200 persons, would be connected separately and independently to the City's sewer main. The plan neither indicates a connection directly through the City's street right-of-ways, nor depicts sewer easements through the private property of adjoining lots.
21. Oddly, the approved Site Plan had falsely shown the project's drive, Lusk Avenue, being paved completely to the end of the Carlsons' property line along that roadway, and, on that southerly end of the lot, the building's only driveway was depicted on the approved Site Plan as connected to that end of the roadway surface when, in fact, that portion of the street was completely unpaved and populated with aged oak trees and rutted ground.
22. Nor on the initially-approved Site Plan had the Carlsons indicated any elevation changes on their own lot or the fact that a steep railroad embankment abutted their property's entire southerly lot line. Nor did that Site Plan note or acknowledge the large grove of trees extending along the entire southerly lot line or portions of that grove that extended onto the 101 Lusk Avenue lot.
23. Nor on the approved Site Plan had the Carlsons indicated the presence of any so-called, and required, buffer zone of the type and nature described on

the City's Sensitive Lands and Features Ordinance, at Chapter 14-5I of the City Code.

24. Nor on the approved Site Plan, or included in any building specification submitted by the Carlsons in support of their Building Permit application, had the Carlsons indicated how, and in what manner, the Carlsons' project would conform to minimum, mandatory provisions of the International Fire Code, adopted into the City Code, with respect to the requirement for emergency vehicle turnaround areas for all streets longer than 150 feet.
25. Plaintiffs, all of them owning adjacent properties or residing in the vicinity of 101 Lusk Avenue, learned of the City's approval of the Carlsons' initial Site Plan and issuance of the Building Permit to the Carlsons only after each had occurred. They learned inadvertently of the City's approval action during a brief period after which the Building Official, Mr. Boothroy, had "suspended" the Building Permit upon learning that he and his staff had approved a Site Plan that had shown the Kinnick Replica's driveway entering from and existing onto an unpaved, oak tree-occupied space.
26. Upon their receipt of the inadvertent notice, Plaintiffs began reviewing the limited plans and information then available to the public in the City's files; they were immediately concerned that the Kinnick Replica, as designed and as described in the media by the Carlsons, would be principally used by the Carlsons for public entertainment purposes, with any residential uses to be accessory to that principal use.
27. Plaintiffs filed an Application to Defendant Iowa City Board of Adjustment (BOA) to appeal actions of Building Official Doug Boothroy. At the City's request, one BOA Member recused herself from the proceedings based on public statements she had made about the Carlsons' planned project, interpreted to be adverse.
28. A public hearing was convened by the BOA and extended for over a two-day period, on September 14, 2016, and September 21, 2016. In the course of that proceeding Plaintiffs offered expert and lay witness testimony in support of their contention that the City had violated the law by:

(1) classifying the Carlsons' building as "residential," notwithstanding Plaintiffs' objection that, without a lawful connection of its private sanitary sewer to the City's sewer main, the Carlsons' proposed building failed to meet the definition of a dwelling; (2) approving the Carlsons' Site Plan and to issue a Building Permit, notwithstanding the Carlsons' failure to demonstrate compliance with the City's Sensitive Lands and Features Ordinance; and (3) failing to enforce mandatory provisions of the International Fire Code with respect to emergency vehicle turnarounds and related provisions, triggered by a paved street length in excess of 150 feet.

29. In each instance, the City's employees responded by presenting evidence and documents in support of the City's position that, as applied to single buildings constructed in infill lots, the City *never* enforces the Code's provisions with respect to these requirements. That is to say, as Plaintiffs understand the City's position:

- a. The City *never* requires a showing, in advance of issuing a Building Permit for construction of a building on an infill lot in an RS-5 Zone, as to how the structure will comply with the definitional requirement that its private sanitary sewer will connect to the City's sewer main;
- b. The City *never* requires that, in advance of issuing a Building Permit for construction of a building on an infill lot in an RS-5 Zone, when a steep slope or wood grove located on one parcel abuts to the lot line shared with another parcel, as to how the Owner will assure compliance with the City's Sensitive Lands and Features Ordinance's mandatory buffer zone requirement; and
- c. The City *never* requires a showing, in advance of issuing a Building Permit for construction of a building on an infill lot in an RS-5 Zone, located on a dead-end street longer than 150 feet, as to how the Owner will assure compliance with the emergency vehicle turnaround and related required International Fire Code provisions.

30. In response, certain Members of the Board of Adjustment interpreted the City's evidence that it never enforces certain mandatory provisions of the

Code as weighing in favor of the City's failure to enforce those provisions in the specific instance of Plaintiffs' appeal of the City's actions with respect to the Carlsons' proposed building.

31. The City's conduct, proven by its own evidence, by refusing to enforce required provisions of the Code, acts as a one-way ratchet and essentially amends the law without any legislative process. Moreover, the City's conduct transforms what otherwise might be construed as mere *adjudicative* facts (facts about the parties and their activities in particular cases) into *legislative* facts (generalized facts which apply more broadly than to particular parties and that, in effect, lay down a rule of law).
32. In this light, without intervention of this Court, by way of a Declaratory Judgment, directing the City to enforce the mandatory provisions of its own Code provisions, no citizen of Iowa City can expect to receive the benefits and protections of these mandatory Code provisions in the day-to-day operation of the City.
33. Similarly, without intervention of this Court, by way of a Declaratory Judgment, directing the Iowa City Board of Adjustment to enforce the mandatory provision of the City's Code provisions, no citizen can reasonably expect to obtain a fair outcome when confronted by the evidence adduced at hearings to the effect that the City never enforces those provisions, generally, and, therefore, should not be expected to enforce them in the instance of that citizen's appeal.
34. Plaintiffs have no other remedy, except by way of this declaratory judgment action, to address the wrongful legislative acts of the City and the resulting adverse consequences experienced by Plaintiffs and others similarly situated who advance appeals of the City's wrongful legislative acts to the BOA.

## **PRAYERS FOR RELIEF**

WHEREFORE, Plaintiffs pray that the Court will enter all appropriate orders declaring that all proposed buildings for construction in the RS-5 Zone in the City of Iowa City are subject to provisions of the International Plumbing Code (IPC), the International Residential Code (IRC) and, thus, the International Building Code (IBC), and Iowa City Code § 16-30-5, and that, as such, before Building Permits can be issued for the same, there must be proper showings that proper separate private sanitary sewer connections between such buildings and public sanitary sewers will be established and, further, that the City of Iowa City and the Iowa City Board of Adjustment shall be subject to said Order.

WHEREFORE, Plaintiffs pray that the Court will enter all appropriate Orders declaring that for all proposed buildings in the RS-5 Zone, sited on lots that are proximate to steep slopes and / or groves of trees of sufficient size are subject to mandatory provisions of the City's Sensitive Lands and Features Ordinance, at Chapter 14-5I of the City Code, including buffer strips of up to 50 feet in width, between the edges of steep slopes and/or wooded areas, and that no structures shall be allowed to be built within those spaces and, further, that the City of Iowa City (and the Iowa City Board of Adjustment as directed by the City) shall be subject to said Orders.

WHEREFORE, Plaintiffs pray that the Court will enter all appropriate Orders declaring Further, all buildings to be constructed on dead-end paved streets longer than 150 feet are subject to the mandatory provisions of the 2015 International Fire Code (IFC), as incorporated by reference into Iowa City Code § 7.1, and that said mandatory provisions include, but are not necessarily limited to, the installation of "turnarounds" at the ends of such dead-end streets, and, further, that the City of Iowa City and the Iowa City Board of Adjustment shall be subject to said Orders.

WHEREFORE, Plaintiffs pray that the Court will award all other relief to which Plaintiffs are entitled, including the costs of this action.

Respectfully submitted,

LAREW LAW OFFICE

*/s/ James C. Larew*

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