Case S-23-951

NEBRASKA SUPREME COURT

Main St Properties, LLC
Appellant

v.

City of Bellevue
Appellee

Appeal from the District Court of Sarpy County
Honorable George Thomson

Brief of Appellant

Adam J. Sipple # 20557
SIPPLE LAW
12020 Shamrock Plz
Suite 200
Omaha, NE 68154
402-778-5055
adam@sipple.law
Attorney for Appellant

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Statement of Jurisdiction

This is a civil case related to a municipal zoning agreement. The district court entered judgment October 24, 2023. (T255). Main St Properties, LLC filed Notice of Appeal on November 19, 2023. This Court exercises jurisdiction pursuant to *Neb Rev Stat* § 25-1911.

Statement of the Case

This is an action for declaratory judgment challenging the validity of a zoning ordinance enacted by the Bellevue City Council. The issue tried in the court below on the parties' cross-motions for summary judgment was whether either Main St Properties, LLC ("MSP") or the City of Bellevue were entitled to summary judgment. The district court entered summary judgment in favor of the City of Bellevue. The Court reviews for errors appearing on the record.

Assignment of Errors

I. The district court erred by denying MSP summary judgment because the City introduced and passed Ordinance 4004 in contravention of the statutory stay found at *Neb Rev Stat.* §19-909 prohibiting "all proceedings in furtherance of" its zoning violation notice while MSP's appeal of the notice was pending before the Board of Adjustment and District Court.

   a. The district court misinterpreted *Neb Rev Stat* §19-909.

b. The district court erred by finding passage of the ordinance was not "in furtherance of" the zoning violation notice issued by Code Enforcement officials June 19, 2020.

II. The district court erred by awarding the City summary judgment, denying MSP's claim that statutory stay prohibited introduction and passage of an ordinance returning MSP's property to a residential zoning classification while MSP's appeal was pending before the Board of Adjustment and District Court.

III. The district court erred by awarding the City summary judgment despite evidence creating a genuine dispute as to whether MSP breached the agreement.

a. Whether prior counsel for MSP made a judicial admission waiving MSP's position as to the meaning of the words "north of the north face of the building" in the development agreement.

b. Whether the evidence leaves a genuine dispute as to whether MSP committed and received notice of three or more violations of the agreement.

c. Whether the evidence leaves a genuine dispute as to whether the City is estopped from claiming the violations.

IV. The district court erred by denying MSP summary judgment on its claim the City's actions were taken out of ill will, or in bad faith, arbitrary and unreasonable.

Propositions of Law

I. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

McDonald v. DeCamp Legal Servs., C., 260 Neb. 729 (2000).

II. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

McDonald v. DeCamp Legal Servs., C., 260 Neb. 729 (2000).

III. An appellate court reviews the district court's grant of summary judgment *de novo*, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.

Pine Tree Neighborhood Assn. v. Moses, 314 Neb. 445 (2023); *Kaiser v. Allstate Indem. Co.*, 307 Neb. 562 (2020).

IV. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.

O'Brien v. Cessna Aircraft Co., 298 Neb. 109, 135 (2017).

V. When a contract is unambiguous, the parties' intentions must be determined from the contract itself, without the use of extrinsic evidence to explain the contract's terms.

Plains Radiology Servs., C. v. Good Samaritan Hos, No. A-16-674, 2017 Neb. Ap LEXIS 93 (Ct. Ap May 9, 2017).

VI. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions, but exceptions are made where right and justice so demand.

Mun. Energy Agency v. Cambridge, 230 Neb. 61 (1988)

VII. The doctrine of equitable estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done.

Hammer v. Dep't of Rds., 175 Neb. 178, 120 N.W.2d 909 (1963)

VIII. The action of a city in the exercise of its police power is not absolute or final but is subject to judicial review; accordingly, a city's action in adopting an ordinance or entering an agreement can always be challenged as arbitrary or unreasonable.

Hillerege v. Scottsbluff, 164 Neb. 560 (1957);
Giger v. Omaha, 232 Neb. 676 (1989).

IX. When there is a showing that the body acts arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, the deference normally accorded city officials does not apply.

Rath v. City of Sutton, 267 Neb. 265 (2004).

Facts

Main St Properties LLC ("MSP") is a Wyoming limited liability company registered to do business in Bellevue Nebraska. Patrick Shannon is the owner and president of MS (T255).

The Commercial Property and Zoning Anomaly

In 2005, MSP purchased a building at 2221 Main Street in the City of Bellevue. (T255, E20). The building is a 6,000 square foot commercial building originally constructed for use as a medical clinic, then used as an elementary school, and as the Bellevue School District's administration building. (E20, p. 2). Neither party is aware of evidence the building has ever been used for residential purposes. Consistent with the building's history, MSP purchased the property for use as a small business providing accounting services that still operates from the building. (E20, p. 2).

Highway 370 runs along the north side of the property in an area where both residential homes and businesses occupy lots adjacent to the highway. (E20, p. 2; E57, p. 5). At the time MSP purchased the building, the property was zoned for residential use and residential homes border the property to the South and East. (E20, p. 2). Properties to the immediate west were zoned for commercial use. (E30, p. 7, Interrogatory 16).

Despite the residential zoning, MSP has continuously used the building for commercial purposes since at least as early as 2005. (E20, p. 2; E23, p. 1). Prior to MSP's purchase of the building, the City issued a letter to MSP's prospective lender confirming the City authorized MSP to "conduct its business at this location because the previous use was also an office use." (E20, p. 2). In 2011, the City allowed MSP's continued use of the property for its accounting business pursuant to a Conditional Use Permit. (E18; E19, para. 9). Since 2010, MSP has also operated a U-Haul business from the property. (E20, p. 3). U-Haul trucks and equipment are stored in the parking areas on the east, south and west sides of the building. (E20, p. 3; E25, p. 1).

Entry into Conditional Zoning Agreement

In 2012, approximately twenty-eight area residents signed and submitted to the City a petition supporting conditional rezoning of the property to allow MSP's continued use of the building for commercial rather

than residential purposes. (E58, p. 6; E20, p. 3; E24). The Petition was signed by the owner or tenant of the residential properties to the immediate north, south, east and west of the Property. *Id.*

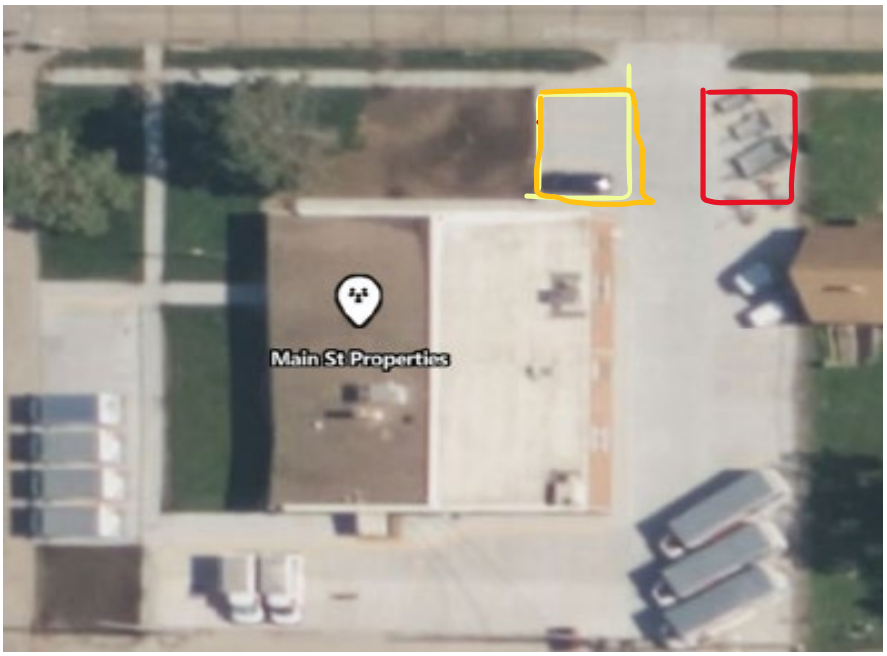
On September 2012, MSP and the City entered a Bellevue Zoning Development Agreement (the "Development Agreement"). (E23). Pursuant to the Development Agreement, the City agreed to conditionally rezone MSP's Property from RG-50-OTO (General Residence, 5,000 Square Foot Zone, Old Towne Overlay) to BGM-OTO (Metropolitan General Business District, Old Towne Overlay) subject to the Development Agreement. (E26, p. 1-2). The agreement allowed MSP's continued operation of the U-Haul business. *Id.*. In exchange, MSP agreed to surrender the ability to park U-Haul vans, trucks, and trailers in delineated parking spaces "north of the north face of the building" located on the property. (E26, p. 2). MSP had previously parked in these parking spaces prior to the execution of the Development Agreement. (E20, p. 3).

The Agreement provides the City several remedies in the event MSP violates the foregoing provision. The Agreement allowed the City to "deny approval of additional permits or certificates with respect to the" property, to bring a legal action to enjoin an unlawful use, or to use any and all other remedies provided to the city by law." (E26). The agreement also allowed the City "after providing the Owner with written notice of such violation, and upon the Owner's failure to cure such violation within ten (10) days after receipt of such notice, or, after three (3) violations have occurred regardless if the violations are cured," to rezone the property to it its prior RG-50-OTO (residential) zoning, deny permits, bring a legal action, or use other remedies provided by law. (E20, p. 3).

The Agreement expressly states that adopting the agreement allowing MSP to use the property for the U-Haul business was in the best interest of the health, safety and welfare of the City and its residents. (E26, p. 1). On September 10, 2012, the Bellevue City Council passed Ordinance 3682, rezoning the property to BGM-OTO pursuant to the agreement. (E18, para. 22; E19; E23, p. 2).

Dispute Regarding Agreement's Language

After entry of the agreement, issues developed regarding whether the language in the agreement prohibiting U-Haul equipment "north of the north face of the building" prohibits parking equipment in the northeast corner of the parking lot. (E50, p. 52). MSP contends the agreement prohibits only parking in the area of the yellow square depicted in the photo below. (E50, p. 54-55, Ex. 7). The City contends the agreement prohibits parking U-Haul equipment in both the yellow square and the red square. (*Id.*).



During a meeting before the City Council on August 27, 2012, an attorney appearing on behalf of MSP spoke in favor of Ordinance 3682. (E28). The attorney did not speak of a Development Agreement but did propose filing of a covenant restricting use of the property. The attorney also presented a diagram providing that the spots in the northeast corner of the lot (in the area of the red square) would be within the area where U-

Haul equipment could not be parked, calling the area the "No U-Haul Zone". (E28, p. 14, 17-18).

During a hearing before the City Council on September 10, 2012, an attorney representing the City referred to the development agreement ultimately passed by the Council as a "revised agreement". (E29, p. 19). In any event, the "No U-Haul" diagram was never appended to or otherwise incorporated into the Development Agreement. (E26). The revised agreement was signed by the Bellevue Mayor on September 10, 2012. (E26, p. 5). The agreement was signed by Pat Shannon on behalf of Main Street Properties on September 11, 2012. (E26, p. 6).

The City contends MSP committed "violations" of the parking restriction by parking in the northeast corner (in the area depicted by the red square), said "violations" occurring October 23, 2012, September 11, 2014, April 16, 2020 and June 19, 2020. (E30, p. 1; E31, p. 1-2). MSP contends it received no notice of two of the alleged violations. (E50, p. 49-50).

Conflict Unrelated to Development Agreement

A lot happened between Shannon and the City during the six years between the alleged September, 2014 notice and April and June, 2020 notices.

Shannon became a member of the Bellevue City Council and, in 2017, a recall petition was initiated to remove him based, in part, upon the condition in which he kept his properties. (E20, p. 5, para. 24).

In 2018, the City of Bellevue demolished a carwash owned by Shannon though he was actively rehabilitating the property. (E20, p. 5, para. 25). Shannon purchased the carwash in July 2015 after it had operated for thirty years at the location. *Id.* After he purchased it, the City immediately shut the wash down, claiming that the site was not zoned for a car wash. *Id.*

In 2019, Shannon was charged with criminal offenses presented to the County Attorney by the City's Code Enforcement Office related to electrical repairs performed at one of his properties. (E20, p. 5, para 26). Shannon was acquitted by Judge Robert Wester, drawing public criticism of the Judge by the Sarpy County Attorney. (E20, p. 5-6). Later in 2019, Shannon initiated a recall effort against a fellow member of the City Council. (E20, p. 6, para. 27).

It April, 2020, the City demolished a building owned by MSP (E20, p. 6, para. 28). The Board of Equalization approved a lien in the amount of $25,320 on July 21, 2020, and Shannon appealed. (E20, p. 6; E44). In addition to finding the amount of the lien unreasonable, the Court held that no reasonable person would contract for the work to be performed in the manner orchestrated by the City officials, who disregarded the scope of work previously approved by the City Council. *Id.* In a judgment that is final, the district court found the amount of the lien unreasonable, reducing it to $10,520.00. *Id.*

The General Welfare

The U-Haul retail business operating from MSP's property was in its thirteenth year of operation during the litigation. (E20, p. 4, para. 19). The City could not identify or describe a single occasion since entry into the Development Agreement involving investigation by City Code Enforcement of a concern MSP's use of its property threatened the health or welfare of residents of the City of Bellevue. (E30, p. 1; T90, p. 130-31). The City also could not identify any concern related to the general welfare of city residents favoring enforcement of a residential zoning ordinance to prohibit MSP from parking U-Haul equipment in the northeast corner of the parking lot or running a U-Haul business from the location. *Id.*

Likewise, when MSP's compliance or lack of compliance with the agreement was being reviewed by the City Clerk and its Community Development Director in April, May and June, 2020, officials identified no

health or safety concerns related to MSP's use of the east side of its property for parking U-Haul equipment. Further, no such concerns were documented. (E30, Rog. 22; E32). The City also could not identify or describe any manner in which parking U-Haul equipment in the three spots in the northeast corner of the property threatens the health, safety or welfare of residents of the City of Bellevue. (T90, p. 131, para. 67). The City did not contest any of the foregoing in the district court. (T235-38).

Restricting MSP to use of the building for residential purposes would materially reduce the value of MSP's property, cause financial loss to MSP consisting of rental commissions, box and moving supply sales and lost rental income, caused MSP to lose its goodwill which it has generated by its continuous operation since September 10, 2012, and harm the community by eliminating the a profitable business serving the Offit Air Force Base population and generating substantial tax revenue. (E20, p. 3-5).

Appeal by MSP of June, 2020 Notice

On June 19, 2020, Darryl Kuhlman ("Kuhlman"), a Bellevue Code Enforcement officer for the City, issued and delivered a Zoning Violation notice by handing it to Shannon. (E18, p. 19, 33). The Zoning Violation stated, "YOU ARE HEREBY NOTIFIED THAT YOU ARE IN VIOLATION OF THE BELLEVUE ZONING ORDINANCE AS INDICATED BELOW." *Id.* Below the foregoing language, the City official serving the notice wrote, "Ref Contract Zoning Agreement with City of Bellevue." *Id.* The Zoning Violation did not identify any zoning regulations or other municipal ordinances. Instead, the Notice stated MSP could remedy the violations as follows, "Have all Uhaul [sic] vans, trucks and/or trailers Parked or Stored South of the North face of the Building." (E33).

On July 13, 2020, MSP filed an appeal of the notice with the Board of Adjustment ("BOA") in accordance with Neb. Rev. Stat. § 19-909. (T258, E34). Neither the City Officer who served the Violation (Kuhlman) nor the City's Chief Code Enforcement Officer, Joey Bockman, certified to

the BOA in response to the appeal that a stay would cause imminent peril to life or property. Neither the Board or Adjustment or a court of record entered a restraining order. (E18, p. 19; E23, p. 3).

The Board of Adjustment denied MSP's appeal on a 2-2 vote and MSP appealed to the District Court of Sarpy County. (E37, p. 4). The appeal remained pending in the District Court until January 21, 2022 when it was dismissed pursuant to a stipulation of the parties. (E41). The stipulation provided that the dismissal shall not be relied upon by either party to prejudice or impair either party's claims or defenses asserted in the cases appealed from (CI20-1853 and CI20-1855). *Id.*

Passage of Ordinance 4004 While Appeal Pending

While MSP's appeal was pending, the Bellevue Planning Commission recommended to the City Council the property be returned to residential zoning based upon MSP's alleged breach of the Development. (E35, p. 2-3) The Commission's debate was focused on whether U-Haul equipment had been parked in the northeast corner of the lot and whether that violated the Development Agreement. *Id.* Tammi Palm, Bellevue Planning Manager, submitted a report summarizing the alleged violations of the agreement. (E32). The report provides that the October 23, 2012 and September 11, 2014 violations were "corrected." (E32, p. 6).

On August 4, 2020, the Bellevue City Council heard the first reading of proposed Ordinance 4004, which would rezone the property to its prior RG-50-OTO (residential) zoning, ostensibly based upon MSP's violation of the Development Agreement. (E18; E19, p. 9, para. 45). On August 18, 2020, the City Council held its second reading and public hearing on the Ordinance. An attorney representing MSP appeared and objected to passage of the ordinance based upon the stay imposed by *Neb Rev Stat* § 19-909. (E18; E19, p. 9; E38, p. 2).

On September 1, 2020, the City Council adopted Ordinance 4004 after third reading. (E39, p. 4). On its face, the Ordinance reverts the

applicable zoning of MSP's unique commercial property to BGM-50-OTO (residential). (E39). Prior to passing Ordinance 4004, the City Council heard no argument, and made no comment, individually or collectively, that rezoning of the property was in furtherance of any purpose related to the safety, health, or welfare of the residents of Bellevue, or for any reason other than MSP's alleged breach of the Development Agreement. (E18; E19; E23, p. 5, 19-22).

MSP filed two Complaints which were joined in the district court and consolidated for purposes of this appeal. (T258; E18; E48).

Summary of Argument

The district court's judgment must be reversed for at least three reasons. *First,* the City passed Ordinance 4004 while MSP's appeal of one of the violations remained pending in contravention of the statutory stay found at *Neb Rev Stat* § 19-909, rendering the Ordinance void. *Second,* the evidence leaves a genuine issue as to whether MSP committed and was given notice of three "violations" of the Agreement's restrictions and as to whether the City is estopped from acting on the violations. *Third,* even assuming MSP allowed equipment to be parked to the northeast of the building, the evidence leaves genuine disputes regarding whether the City's restriction of the commercial building to residential use, rather than seeking other remedies, was done out of ill will or in bad faith, arbitrarily, or unreasonably.

There is no dispute of the facts underlying MSP's claim passage of 4004 violated the statutory stay found at *Neb Rev Stat* § 19-909 while MSP's appeal of the June 19, 2020, notice was pending before the Board of Adjustment and the district court. Instead, the district court accepted the City's position that passage of the ordinance was not "in furtherance of" the June 19, 2020 notice on appeal. This argument lacks merit because all of the proceedings culminating in passage of the ordinance were taken based upon the alleged violations of the zoning agreement, including the alleged

June 19, 2020 violation. Code Enforcement officials issued the notices. The Planning Commission recommended passage of the ordinance based upon the notices. It is clear the City Council passed the ordinance based upon the alleged violations. The Ordinance was therefore passed "in furtherance of" the issuance of the notices by Code Enforcement officials. Passage of the ordinance therefore violated Section 19-909's mandatory stay and is therefore void. MSP is entitled to summary judgment enjoining enforcement of the Ordinance based on this issue alone.

If not, the evidence leaves a genuine dispute about whether MSP violated the agreement, and was properly notified of any violations, in the first instance. Comments made by MSP's attorney prior to execution of the agreement do not change the fact that Agreement's plain language restricts parking equipment "north of the north face" of the building and not to the northeast of the building, where the vehicles were parked. The district court's interpretation of the agreement renders use of the specific language "north face" meaningless. In any event, MSP introduced evidence City officials had agreed to allow vehicles in the northeast corner. Finally, MSP also introduced evidence it was not given proper notice of at least two alleged violations, including evidence supporting an inference a code enforcement official falsely signed the name of "Sara D'Amico," misspelling Ms. Damico's first name.

The district court also failed to acknowledge MSP's evidence creating a genuine issue as to whether the City's actions were taken out of ill will, in bad faith, arbitrary, or unreasonable. The evidence supports an inference the City issued the April and June, 2020 notices based upon the actions of pat Shannon during his term on the Bellevue City Council, just as it acted out of ill will when it demolished the building he was actively rehabilitating, and just as when the City demolished another building in a manner no reasonable person would direct and then imposed a lien 60% higher than the reasonable cost of the work. In addition to the foregoing evidence of ill will, the City admitted, when challenged during litigation, it could identify no reason consistent with the general welfare to restrict use

of a commercial building, located adjacent to other commercially zoned properties, to residential purposes. Finally, the City passed the ordinance to impose the unreasonable restriction rather than seek other more appropriate remedies, such as a judicial interpretation of the Agreement's disputed language and whether MSP committed, and was given proper notice of, three violations.

Standard of Review

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *McDonald v. DeCamp Legal Servs., C.,* 260 Neb. 729, 619 N.W.2d 583 (2000).

An appellate court reviews the district court's grant of summary judgment *de novo*, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor *Pine Tree Neighborhood Assn. v. Moses*, 314 Neb. 445 (2023); *Kaiser v. Allstate Indem. Co.*, 307 Neb. 562 (2020).

Accordingly, reviewing the district court's entry of summary judgment below, this Court views the evidence in a light most favorable to MSP and draws all reasonable inferences deducible from the evidence n MSP's favor. *Id.*

Argument

I. Ordinance 4004 is void because the City introduced and passed in violation of the statutory stay found at *Neb Rev Stat.* §19-909 while MSP's appeal of the June 19, 2020 notice was pending before the Board of Adjustment and district court. MSP is entitled to summary judgment on this issue.

The first issue presented by this appeal is whether *Neb Rev Stat* 19-909 prohibited the City from returning MSP's property to a residential zoning classification based upon its alleged violation of the development agreement. After entry into the agreement, a City Code Enforcement Inspector issued MSP a zoning violation notice alleging a violation based upon where U-Haul equipment was parked on the property. (E33, p. 1). MSP appealed to the Board of Adjustment. While the appeal was pending, the City introduced and passed Ordinance 4004, returning the property to a residential classification.

Section 19-909 limits the City's authority while an appeal from a zoning ordinance is pending:

> An appeal stays all proceedings in furtherance of the action [of any officer, department, board, or bureau of the municipality] appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment, after the notice of appeal shall have been filed with him or her, that by reason of facts stated in the certificate a stay would, in his or her opinion, cause imminent peril to life or property.

Neb Rev Stat §19-909. Read *in para materia,* the purpose of the statute is to maintain the status quo pending appeal of action by a municipality unless imminent peril would result.

Based on the statute, MSP alleges Ordinance 4044 is void because it was introduced by the City and passed while MSP's appeal was pending – in the absence of an "imminent peril" certification. The district court

awarded the City judgment on the issue. MSP contends summary judgment should have been granted in its favor on this basis. The two assignments of error will be argued together.

The issue presented by the statute is whether the City's rezoning of the property based upon alleged violations of the agreement was an action "in furtherance of" the notices relied upon to do so, and thereby violated the statutory stay. The facts leave no genuine dispute Ordinance 4004 was so passed. Each notice, including the June 19, 2020 notice was written on a citation titled, "Bellevue Code Enforcement, Official Notice – Zoning Violation." (E33; E45, p. 2, 5, 8, 16). Each notice was served by a Bellevue Code Enforcement official. Each notice either incorporates the language of the conditional zoning agreement or explicitly refers to it, or both. (E45, p. 2, 5, 8, 16). The June 19, 2020 Notice was issued by Daryl Kuhlman and states:

> YOU ARE HEREBY NOTIFIED THAT YOU ARE IN VIOLATION OF THE BELLEVUE ZONING ORDINANCE AS INDICATED BELOW:
>
> ☒ Zoning Ordinance Sec: Ref Contract Zoning Agreement with City of Bellevue

(E33, p. 1).

The City' s Answer admits MSP perfected an appeal from the notice to the Board of Adjustment on July 13, 2020. (E19; E47). The appeal remained pending until January 20, 2022. (E41, p. 4).

The City also admitted below the Planning Commission conducted hearing regarding the appeal on July 23, 2020, focusing upon whether MSP had parked trucks in violation of the agreement. (E35; E40).

The City Council hearings on Ordinance 4004, and its passage, all occurred in August and September, 2022 while MSP's appeal before the Board of Adjustment remained pending; all concerned the alleged violations. (E38; E39).

The purpose of the contract was to impose zoning restrictions. The purpose of the Notices was to allege violation of the zoning restrictions. The purpose of MSP's appeal to the BOA, and subsequently to the district court, was to challenge whether there was a violation on June 19, 2020. The City treated the appeal accordingly – except when it passed Ordinance 4004 while the appeal was pending, and the statutory stay was effective.

Finally, if the argument can be accepted that the City somehow acted in furtherance of the Development Agreement, and not the notice issued by Code Enforcement officials, it is still true that MSP appealed from an action by an "officer, department, board, or bureau of the municipality" and, as such, his appeal stayed any further action. Simply, if some city official caused the issuance of the June 19, 2022 notice in furtherance of pursuing remedy under the development agreement, then MSP's appeal stayed further proceedings in furtherance of that objective.

Ordinance 4004 is therefore void. The district court erred by denying MSP summary judgment on this issue and by granting the City summary judgment.

II. The district court erred by awarding the City summary judgment despite evidence creating a genuine dispute as to whether MSP committed, and was given proper notice of, three "violations" of the Agreement's provisions regarding parking and storage of U-Haul equipment.

The district court's award of judgment to the City is premised upon adoption of the City's interpretation of the agreement and its conclusion

MSP violated it. As to the interpretation of the agreement, the district court relies upon a misunderstanding of "judicial admissions" to hold MSP waived its position that the agreement's plain language did not prohibit parking in the northeast corner of the lot. As to whether MSP violated the agreement, when construed otherwise, the district court overlooked genuine issues of fact as to whether vehicles were parked in violation of the agreement.

a. The evidence does not establish that prior counsel for MSP made judicial admissions waiving MSP's position as to the meaning of the words "north of the north face of the building" in the development agreement.

The district court adopted the City's reliance upon comments made by an attorney representing MSP before the City Council on August 27, 2012, two weeks before an agreement was reached, regarding a display he presented that included a "No U-Haul Zone" covering the northeast corner of the lot. (T256, p. 261). The district court suggested, by citing *City of Ashland v. Ashland Salvage,* 271 Neb. 362 (2006), the lawyer's comments constituted judicial admissions precluding a genuine dispute of fact regarding meaning of the agreement.

"A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true." *O'Brien v. Cessna Aircraft Co*., 298 Neb. 109, 135 (2017). "Similar to a stipulation, a judicial admission must be unequivocal, deliberate, and clear." *Id.; see also, Wisner v. Vandelay Invs., L.L.C*., 300 Neb. 825 (2018)("Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence"). Mr. Forman's statements were not made in a pleading or in the course of a judicial proceeding.

More importantly, there is no evidence the statements were made in reference to the agreement ultimately reached. The agenda item was to amend the zoning code, with no reference to a conditional zoning agreement. (E27, p. 9). During the hearing, the attorney proposed drafting a restrictive covenant when speaking to the council and did not refer to any agreement. (E27, p. 14). At the September 10 final hearing on Ordinance 3682, two different agreements are mentioned and the record is unclear as to what, if any, agreement had been reached at that time. (E27, p. 17-18). Ms. Kluth, the City Clerk, does not identify in her testimony any agreement discussed at the August 27 meeting. (E53). The development agreement at issue was not signed until September 11, 2020. (E26).

In any event, the terms of the contract are clear, making consideration of extrinsic evidence inappropriate in the first instance. *Plains Radiology Servs., C. v. Good Samaritan Hos*, No. A-16-674, 2017 Neb. Ap LEXIS 93 (Ct. Ap May 9, 2017) ('When a contract is unambiguous, the parties' intentions must be determined from the contract itself, without the use of extrinsic evidence to explain the contract's terms").

Under the circumstances, the attorney's statements on August 27 do not change the fact the plain language of the agreement only prohibits parking "north of the north face" of the building and not, as examples, "north of the building", "in any area of the lot north of the building", "northeast of the building", or in the "northeast corner of the lot." The district court erred by finding otherwise.

b. **There is a genuine dispute as to whether MSP committed three or more zoning violations in violation of the agreement.**

Even if the Development Agreement could be interpreted to plainly prohibit parking in the northeast corner of the lot (rather than, as the plain language provides, "north of the north face" of the building), there exists genuine issues of fact regarding whether MSP violated the agreement three

times as well as whether MSP was given the required notice of prior alleged violations.

First, the district court erroneously found Shannon's employee Sara D'Amico signed the September 11, 2014 on MSP's behalf. (T257). This is inaccurate. Shannon testified he does not recall the 2014 notice and notes that Sarah D'Amico the signature purporting to Ms. D'Amico's is misspelled "Sara," a mistake almost certainly made by someone other than Ms. D'Amico. (E50, p. 48-50, 53, para. 12-16). Ms. D'Amico likewise testified she did not recall receiving the notice and does not spell her name without the "h". (E51, p. 14-16). Shannon also testified he does not recall receiving notice of the alleged violation on April 16, 2020 Notice. (E50, p. 50-51). As such, there is a genuine dispute regarding whether this notice was provided.

The district court also overlooked that MSP may claim the City is estopped from relying upon the alleged 2014 violation after agreeing he could park in the northeast corner of the lot. *Mun. Energy Agency v. Cambridge*, 230 Neb. 61 (1988) ("Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions, but exceptions are made where right and justice so demand"). *Hammer v. Dep't of Rds.*, 175 Neb. 178, 120 N.W.2d 909 (1963)("the doctrine of equitable estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done")

Shannon acknowledges that some event in 2014 triggered a conversation with city officials regarding whether the Development Agreement prohibited parking in the contested parking spots in the northeast corner. According to Shannon's testimony, City officials advised him in 2014 the contract did not prohibit parking in the northeast corner. His testimony is corroborated by the absence of alleged violations for six

years between 2014 and 2020. (Shannon deposition; (E50, p. 49-50, 62). The City only renewed issuing violations after Shannon's relationship with the City soured.

Even setting the issues of notice and estoppel aside, evidence creates a genuine issue of disputed fact as to whether MSP violated the agreement on three or more occasions. First, Code Enforcement records show the alleged violations were sometimes "closed" or "cleared" in the absence of any prosecution, administrative or judicial findings, formal proof, findings of adjudicative facts based upon such proof, imposition of any sanction, or appeal. (E45). For example, the City's record for the alleged violation October 18, 2012 shows Shannon disagreed and called Planning. A "violation corrected" entry followed. (E45, p. 3). (E45, p. 18-19). Regarding the April, 2020 violation, handwritten notes indicate Shannon expressed disagreement and asked to speak with "Legal." The notes on the next page say:

> **CE1 said this would not be enforced as a violation. Action will be closed at this time**.

(E45, p. 19). Additionally, Shannon testified there was no violation on June 19, 2020. (E50, p. 59-60).

As to whether vehicles were parked in violation of the agreement, as interpreted by the City, Shannon testified that sometimes customers drop off equipment during all hours of the day, sometimes parking in the restricted area, necessitating that MSP be given time to move the equipment. (Shannon depo., 56:14-19). When this occurs, the City is obligated to adhere to its contractual duty of good-faith. (E26, p. 4).

For these reasons, there remain genuine issues of disputed fact even if the agreement is interpreted in the City's favor. The City's motion for summary judgment on these issues should therefore be denied.

III. The district court erred by granting the City summary judgment despite evidence creating a genuine dispute as to whether the City's actions were in bad faith, arbitrary, capricious or unreasonable.

Without acknowledging or discussing the evidence of bad-faith presented by MSP, the district court awarded the City summary judgment denying MSP's claim the City acted arbitrarily and in bad-faith by passing Ordinance 4004. MSP submits the district court erred by entering judgment in favor of the City despite MSP's evidence.

The action of a city in the exercise of the police power is not absolute or final but is subject to judicial review. *Hillerege v. Scottsbluff, 164 Neb. 560 (1957*). Accordingly, a city's action in adopting an ordinance or entering an agreement can always be challenged as arbitrary or unreasonable. E.g., *Giger v. Omaha,* 232 Neb. 676 (1989)(recognizing conditional rezoning agreement subject to challenge based upon limitations of police power); *Hillerege, supra*.

MSP argued below the City's actions were unreasonable, discriminatory, or arbitrary, and that Ordinance 4004 bears no relationship to the purpose sought to be accomplished. *Coffey v. County of Oto*, 274 Neb. 796, 743 (2008). Simply, the agreement must be interpreted consistent with the general welfare of Bellevue citizens. There must be some interest related to the public good, such as the health and safety of city residents, furthered by interpretation and enforcement of the agreement to restrict use of the commercial building to residential purposes. Here, the evidence supports an inference no such interest related to the general welfare.

MSP's uncontroverted evidence established that though the property at issue was built for and always used for commercial purposes the City re-zoned it residential. The City did so though local residents supported its ongoing use as a U-Haul facility, a commercial use. (E20, p. 3; E24). The support of local residents is unsurprising because the property is positioned

on a main thoroughfare adjacent to areas zoned for business use. (E58, p. 14; E57, p. 5).

Though the law provides deference to a municipality's determination of what furthers the public good, neither the City nor the district court identified a single purpose furthered by enforcing the City's interpretation of the contract. While the City argued below that it "clear that when the City considered rezoning MSP's property to allow operation of a U-Haul business at the Property under certain conditions, it took into consideration the general welfare of the City and tenets of thoughtful city planning," it provided no explanation as to how rezoning the commercial building to residential use was consistent with the welfare of its residents, or any evidence to support the position. None.

Consistent with the nature of the building, its location, and its historic use, the City could not identify any concern related to the health, safety or welfare of the residents of the City of Bellevue favoring enforcement of a residential zoning ordinance to prohibit MSP from parking U-Haul equipment and conducting a U-Haul rental business at the location. (E58, p. 12-13, 17). Likewise, the City could not identify or describe a single occasion since September, 2012 involving investigation by City Code Enforcement of a concern MSP's use of its property threatened the health or welfare of residents of the City of Bellevue. (E58, p. 12).

In the absence of any reason to rezone the property related to the health, safety or welfare of City residents, MSP introduced uncontroverted evidence the City acted arbitrarily, with ill will, in bad faith. MSP's evidence supports the inference the City changed its position regarding the what the development agreement restricted only after Shannon had initiated, in 2019, a recall effort against a member of the city council. (E20, p. 5-6). To do so, the City relied upon alleged violations dating back to 2012, some of which were "cured" by MSP and "cleared" by inspection officials. (Ex. 45). It did so despite records – including the six-year

violation hiatus -- supporting MSP's claim it had been told the Agreement did not prohibit parking in the northeast corner.

Further, the City issued the June 19, 2020 notice in the middle of several other enforcement actions taken against MSP regarding other properties, one resulting in a judgment holding that a lien it imposed by the City was arbitrary and unreasonable, and one resulting in an acquittal. (E20, p. 5-6; E44). In fact, the City issued the June, 2020 violation the same month it approved the arbitrary, unreasonable lien amount. (E20, p. 5-6; E44).

The procedural means chosen by the City also suggests bad-faith. The City passed the ordinance after being put on notice of the stay imposed by Section 19-909. They also did so though there was a reasonable dispute about whether the language in the Development Agreement restricted parking in the northeast corner of the lot. Finally, the City could have sought enforcement through an injunction or other legal means rather than restricting use of the commercial building, located adjacent to property zoned commercial, to residential purposes.

Based on the foregoing, MSP respectfully submits the evidence rebuts any presumption in favor of the City and leaves no genuine dispute of material fact as to whether the City acted arbitrarily, unreasonably or in bad-faith in passing the Ordinance. At the very least, the evidence creates a genuine issue of fact preventing entry of summary judgment in the City's favor.

Conclusion

MSP respectfully submits the judgment of the district court should be reversed and judgment entered in favor of MSP declaring Ordinance 4004 void in violation of Section 19-909. Alternatively, the district court's judgment should be reversed because there exists a genuine dispute preventing summary judgment as to whether MSP violated the agreement

as well as whether the City acted with ill will, in bad-faith, or unreasonably by restricting the commercial property to residential use.

Main St. Properties, LLC,
Defendant

By: /s/ *Adam J. Sipple,* #20557

SIPPLE LAW
12020 Shamrock Plaza
Ste. 200
Omaha, NE 68154
402.778.5055
adam@sipple.law

Certificate of Compliance

The undersigned certified that he used Microsoft® Word for Microsoft 365 MSO (Version 2403 Build 16.0.17425.20124) 64-bit to prepare the brief and that his Brief complies with the typeface requirement of Neb Ct R App P § 2-103 by using Times New Roman 13 point, and consists of 7278 words excluding this certificate and including cover page, table of contents, and table of authorities and signature blocks.

/s/Adam J. Sipple

Certificate of Service

I hereby certify that on Monday, April 08, 2024 I provided a true and correct copy of this *Rccplmnt Brf Appt Main St Properties* to the following:

Bob Stinson represented by Annie E. Mathews (26602) service method: Electronic Service to **annie.mathews@bellevue.net**

Don Preister represented by Annie E. Mathews (26602) service method: Electronic Service to **annie.mathews@bellevue.net**

Heather Veik represented by Annie E. Mathews (26602) service method: Electronic Service to **annie.mathews@bellevue.net**
Heather Veik represented by Heather Brooke Veik (23463) service method: Electronic Service to **hveik@eslaw.com**

Kathy Welch represented by Annie E. Mathews (26602) service method: Electronic Service to **annie.mathews@bellevue.net**

Paul Cook represented by Annie E. Mathews (26602) service method: Electronic Service to **annie.mathews@bellevue.net**

Rusty Hike represented by Annie E. Mathews (26602) service method: Electronic Service to **annie.mathews@bellevue.net**

The City of Bellevue, Nebraska represented by Annie E. Mathews (26602) service method: Electronic Service to **annie.mathews@bellevue.net**

Thomas Burns represented by Annie E. Mathews (26602) service method: Electronic Service to **annie.mathews@bellevue.net**

Signature: /s/ Adam J. Sipple (20557)