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

Appellant's Reply Brief

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Propositions of Law

I. 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).

II. 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

Entry into Conditional Zoning Agreement

The City asserts, "At the time the Agreement was *entered into*, MSP was represented by an attorney, Larry Forman." (E50, 28:8-11). To be precise, in the testimony relied upon by the City Shannon answered "yes" to whether Mr. Forman was his attorney at the time the agreement "was created and signed in 2012." (Ex. 50:28:8-11). Given the somewhat vague nature of the question, it should be noted the agreement is not signed by Mr. Forman, though a line was provided for doing so. (Ex. 26). Further, after Mr. Forman mentioned the "No U-Haul Zone" during the August 27,

2012 City Council meeting, he referred to a "revised agreement" when appearing September 10, 2012. (E28, p. 14, 17-18), supporting an inference the "No U-Haul Zone" was limited in accordance with its current plain language. Otherwise, the parties could have simply appended and incorporated Mr. Forman's diagram.

Alleged Violations all Cleared

While noting a violation was issued in October, 2012, the City fails to acknowledge the evidence Shannon disputed the notice and a "violation corrected" entry followed his call to the Planning Department. (E45, p. 3, 18-19).

Without citing to the record, and without acknowledging contrary evidence, the City asserts, "The signature Sarah D. on the September 11, 2014 Violation Notice is Ms. D'Amico's signature that she received [sic] on behalf of MSP." (Brief of Appellee, p. 9). However, Ms. D'Amico testified she does not spell her "Sara" with an "h" and that she did not recall receiving the notice, creating a genuine dispute as to whether MSP was given notice of the violation. (E51, p. 14-16).

Argument

I. The City passed Ordinance 4004 in furtherance of the June, 2020 Violation Notice MSP appealed from.

The City argues it did not pass Ordinance 4004 "in furtherance of" the June, 2020 notice, arguing it would have been within its right to pass the ordinance based on three alleged violations preceding the June, 2020 violation, including one in April, 2020. (Brief of Appellee, p. 12-12).

Evidence contradicts the City's claim. First, Code Enforcement official Joe Bockman expressed in an email dated May 20, 2020 confusion about whether the April, 2020 violation constituted the "third violation or

just the second," (E45, p. 20). If only the second, then the rezoning decision would necessarily be based, in part, on the June, 2020 violation.

Second, minutes regarding the City Council's second reading of Ordinance 4004 show Mayor Hike asked the Clerk if there had been more than one violation over the years and Ms. Veik replied "four to five violations since the agreement has been in place." (E53). Four or five violations would necessarily have included the June, 2020 notice. (E30, p. 2, Answer to Interrogatory 1). Further, the Planning Manager, Ms. Palm, testified she prepared a memorandum for the planning commission regarding rezoning the property [to residential use]. In her affidavit, Ms. Palm testified:

> The memorandum recommended that the Property be rezoned back to RG-50-OTO pursuant to the Development Agreement, based on documented violations. The documented violations occurred on or about October 18, 2012 (with notice date of October 23, 2021), September 11, 2014, April 14, 2020 (with a notice date of April 16, 2020), *and June 19, 2020*. The Property was also in violation on May 21, 2020.

E52, pages 3-4)(*emphasis* added). Further, Ms. Palm notes in her Memorandum that:

> Staff has included copies of the zoning violation paperwork from Code Enforcement on the following dates: October 23, 2012, September 11, 2014, April 1, 2020, *and June 19, 2020*.

(E52, p. 23). The City also identifies the June, 2020 violation as a basis for breach of the agreement in its discovery responses. (E30, p. 2). Of course, the June, 2020 violation appealed from also refers to the Zoning Agreement.

This evidence therefore shows the June, 2020 alleged violation was, in fact, a basis for the passage of Ordinance 4004, that is, that Ordinance 4004 was passed "in furtherance of" the June, 2020, notice and is therefore void. Accordingly, the record discloses that the City's argument is built upon an inaccurate factual premise and should be rejected.

II. There exists either an error of law or a genuine dispute of fact regarding whether MSP violated the agreement.

A. The language "North of the North Face" is clear and does not include the northeast corner of the lot.

MSP reasserts its position that the Development Agreement is clear and does not prohibit parking in the northeast corner of the property, making consideration of extrinsic evidence inappropriate. If his position is accepted by the Court, he is entitled to judgment in his favor, as there could be no basis for either the Notices issued or passage of Ordinance 4004.

If the Court holds the agreement is ambiguous, and evidence of Mr. Forman's comments can be considered, Mr. Forman's statements made to the City Council (and not in a pleading) long before the "revised agreement" was signed do little to inform the issue.

Likewise, MSP's honest, accurate, concessions that Mr. Forman presented the picture to the City Council do not constitute judicial admissions or support the City's position for the reasons regarding doctrine of judicial admissions set forth in its initial brief. Contrary to the City's argument, MSP admitted Mr. Forman presented the diagram to the City Council – not that the prohibited parking areas subject to the Agreement included all areas to the north of the building line (i.e., both the yellow and red areas depicted above)." (Brief of Appellee, p. 16). There is simply no pleading evincing an admission by MSP, clearly and purposefully or otherwise, the agreement reached both the yellow and the red boxes in the

diagram at E50, p. 54-55, Ex. 7. Even his Amended Complaint expressly alleges his position the agreement reaches only the area in the yellow square. (E18, para. 17). The City's argument misses the mark.

B. There is a genuine issue as to whether the City is estopped from relying upon the 2012 and 2014 Violation Notices.

Attempting to dismiss Mr. Shannon's testimony city officials agreed to leave MSP alone when equipment is parked in the northeast corner of the lot as "unsupported allegations", the City fails to acknowledge a host of evidence that directly supports the allegation.

The evidence includes the fact the City's record for the alleged October 18, 2012 violation supports an inference Shannon disagreed, called Planning, and that a "violation corrected" entry followed. (E45, p. 3); evidence that MSP's use of its property never threatened public health or welfare, supporting an inference there was no reason to interpret and enforce the agreement to prohibit parking in the northeast corner (E58, p. 12); evidence that no violation notices were issued between 2014 and 2020, supporting an inference his 2014 discussions were as claimed by Shannon and the City's position only changed due to political differences (E45); and evidence Shannon also expressed disagreement regarding the April, 2020 violation, spoke with "Legal," and the action was closed. (E45, p. 19). The foregoing evidence supports an inference that, as Shannon testified, city officials have previously agreed with his interpretation and chose to forego enforcement. Indeed, prior to pursuit of Ordinance 4004 no action had ever been taken by the City other than the issuance of subsequently cleared notices.

The City's other contemporaneous actions toward Shannon, including a Judgment holding the City was unreasonable with

respect to a demolition occurring the same month as the June, 2020 violation notice, also support his allegation.

Mr. Shannon renews his argument that the evidence creates a genuine issue of fact regarding the issue of estoppel.

III. The evidence establishes a genuine issue of fact as to whether the City's actions were in bad faith, arbitrary, capricious or unreasonable.

In opposition to MSP's argument the City acted in bad-faith, the City's brief begins by mischaracterizing MSP's argument to be that "the District Court should have found that the City's actions were in bad faith." (212-22). That is not the issue. The issue is whether there is evidence leaves a genuine issue of fact.

The City further claims a lack of evidence presented by MSP that the other actions taken against him are related to passage of Ordinance 4004. As suggested above, however, the other actions MSP has proven occurred close in time to the passage of Ordinance 4004. MSP is not required to present a confession by a city official to create a genuine issue. The timing of the events, coupled with the fact the City cannot identify a single reason that limiting the commercial building to residential use was in the public interest, supports an inference they did so out of ill will and not as a valid exercise of the police power.

In its attempt to make the argument, the City also mischaracterizes the minutes related to passage of Ordinance 3682. First, the minutes referred to summarize Mr. Forman's comments, not those of city officials. The City misreads the minutes as concerns "voiced" by city officials. (Brief of Appellee, 23). Second, according to Mr. Forman, the City "wanted large-scale rezoning," not to prevent it, as Appellee asserts. (E53, p. 8). And as to the visual impact of the equipment, he noted the existence of an 8-foot-tall

hedge that visually obstructs view of the equipment from the east. *Id;* E25). Moreover, the City fails to identify any evidence a single public interest was asserted in favor of rezoning the property.

MSP stands by its position that its evidence creates a genuine dispute regarding whether the City acted in bad faith, arbitrarily or unreasonably.

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.

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Defendant

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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 1740 words (and 9,241 words when combined with its initial brief) excluding this certificate and including cover page, table of contents, and table of authorities and signature blocks.

/s/Adam J. Sipple

Certificate of Service

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