IN THE SUPREME COURT OF THE STATE OF NEBRASKA

Case No. S-23-940
Case No. S-23-951

MAIN ST PROPERTIES, LLC

Appellant,

v.

CITY OF BELLEVUE

Appellee.

BRIEF OF APPELLEE CITY OF BELLEVUE

On Appeal from the District Court of Sarpy County, Nebraska
District Case No. CI 20-1853
District Case No. CI 20-1855
The Honorable George Thomson

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PROPOSITIONS OF LAW

1. An appellate court should affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Echo Grp., Inc. v. Tradesmen Int'l*, 312 Neb. 729, 980 N.W.2d 869 (2022).

2. A judicial admission is an admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues. *City of Ashland v. Ashland Salvage, Inc.*, 271 Neb. 362, 369, 711 N.W.2d 861, 868 (2006).

3. When a contract is clear and unambiguous, its terms must be accorded their "plain and ordinary meaning as an ordinary or reasonable person would understand them." *Benjamin v. Bierman*, 305 Neb. 879, 888, 943 N.W.2d 283, 291 (2020).

4. If a court determines that a contract term or phrase is ambiguous, or that it is subject to at least two reasonable but conflicting interpretations or meanings, then extrinsic evidence may be permitted to explain the ambiguous term. *See Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 265 Neb. 133, 147, 655 N.W.2d 390, 403 (2003) (internal citations omitted).

5. On motions for summary judgment, a court has the discretion to disregard unsupported allegations. *See Midland Props., LLC v. Wells Fargo, N.A.*, 296 Neb. 407, 409-10, 893 N.W.2d 460, 463 (2017).

6. "[T]he primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity, expense, and delay of trial, those cases where there is no genuine claim or defense." *Partridge v. Younghein*, 202 Neb. 756, 760, 277 N.W.2d 100, 103 (1979) (citing *Pfeifer v. Pfeifer*, 195 Neb. 369, 238 N.W.2d 451 (1976)).

7. The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence that the conditions imposed by the city in adopting the zoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose sought to be accomplished by the ordinance. *Coffey v. Cnty. of Otoe*, 274 Neb. 796, 803, 743 N.W.2d 632, 637 (2008).

8. The public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere. *Omaha v. Cutchall*, 173 Neb. 452, 457, 114 N.W.2d 6, 9 (1962) (citing *City of Omaha v. Glissman*, 151 Neb. 895, 39 N.W.2d 828 (1949).

STATEMENT OF FACTS

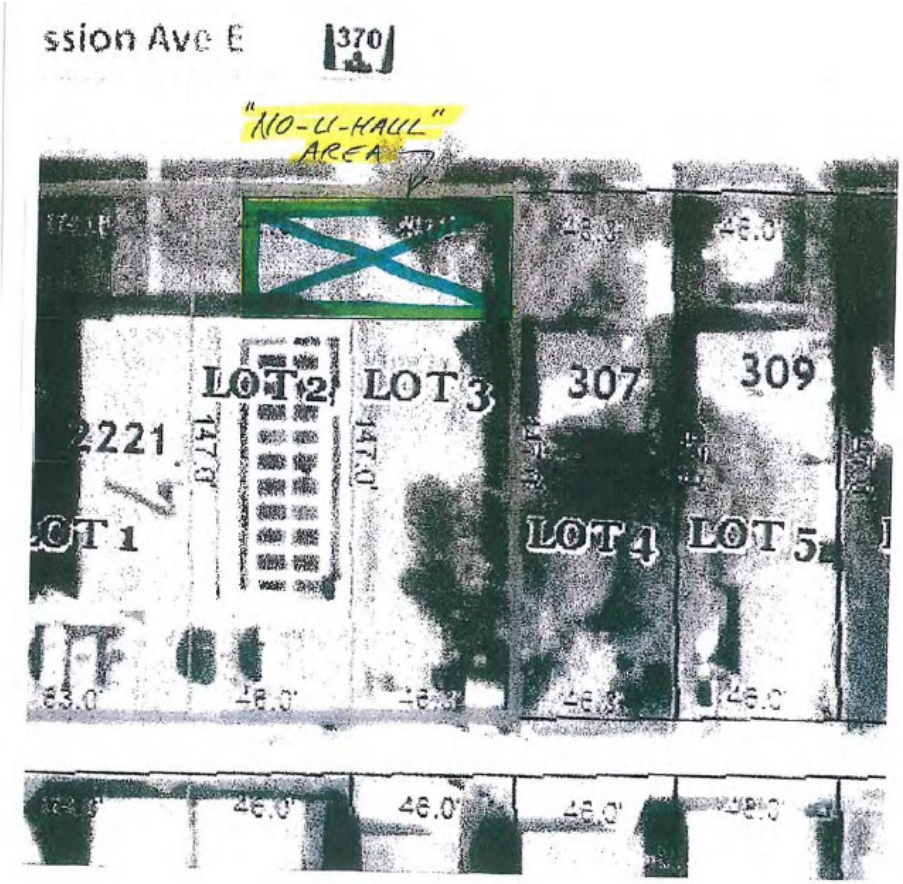
I. The Property

Patrick Shannon ("Mr. Shannon") is the owner and president of Appellant Main St Properties, LLC ("MSP"). (E50, 6:24-7:7). MSP is a Wyoming limited liability company registered to do business and doing business in Bellevue, Nebraska. (E18, at ¶ 1; E19, at ¶ 1). Appellee The City of Bellevue (the "City") is a political subdivision of the State of Nebraska. (E18, at ¶ 2; E19, at ¶ 2). MSP is the owner of certain real property located at 2221 Main Street, Bellevue, Nebraska 68005 (hereinafter, the Property). (E18, at ¶ 5; E19, at ¶ 5). When MSP purchased the Property in 2005, it was zoned for residential purposes (RG-50-OTO). (E18, at ¶ 8; E19, at ¶ 8).

II. The Development Agreement

On or about September 10, 2012, the City and MSP entered into a Development Agreement (the "Agreement"), whereby the City agreed

to conditionally rezone the Property from residential zoning (RG-50-OTO) to general business zoning (BGM-OTO) under certain terms and conditions. (E26, pp. 1-6). Thus, pursuant to the Agreement, the City passed Ordinance 3682, which conditionally rezoned MSP's property from RG-50-OTO to BGM-OTO. (E26-27). At the time the Agreement was entered into, MSP was represented by an attorney, Larry Forman ("Mr. Forman"). (E50, at 28:8-11). During the public hearing on August 27, 2012, wherein the City Council considered MSP's request to rezone the Property to BGM-OTO, Mr. Forman, on behalf of MSP, spoke and presented to the City Council. (E28). During Mr. Forman's presentation at the August 27, 2012, City Council meeting, Mr. Forman submitted the below picture of the Property, which depicted a "'NO-U-HAUL' AREA." (*See* E53, pp. 2-3, 15).



Similarly, the Agreement provides that "no parking or storage of U-Haul vans, trucks, or trailers shall be permitted on the portion of the Parcel north of the north face of the building currently situated on the Parcel." (E26, p. 2). Despite such provision, MSP contends that the Agreement allows U-Haul parking in the red square depicted below, while it is the City's position that the Agreement prohibits parking in **both** the yellow and red squares depicted below:

(E18, ¶ 17; E19, ¶ 19).

III. The Notices

On October 23, 2012, MSP was issued a Zoning Violation Notice for parking or storing U-Haul vehicles in violation of the Agreement. (E54, p. 3-4, 13-15). On November 27, 2012, Chris Shewchuk, the Planning Director for the City of Bellevue at the time, emailed Mr. Shannon in reference to the October 23, 2012 Violation Notice.

Mr. Shannon acknowledged he was aware of the October 23, 2012 Violation Notice at that time. (E50, at 48:4-7, Exhibit 4). MSP did not file a lawsuit or any other claim against the City in 2012 or 2013 based on the October 23, 2012 Violation Notice. (E50, at 48:4-18).

On September 11, 2014, MSP was issued a Zoning Violation Notice for parking or storing U-Haul vehicles in violation of the Agreement. (E54, at pp. 4-5, 16-19). The September 11, 2014 Violation Notice was signed by Sarah D., identified as Sarah D'Amico ("Ms. D'Amico"), who has been employed by Mr. Shannon since September 2011 in the position of comptroller. (E51, at 7:7-23, 14:18-25, 15:1-10, Exhibit 2). The signature Sarah D. on the September 11, 2014 Violation Notice is Ms. D'Amico's signature that she received on behalf of MSP. Ms. D'Amico would give any notices received on behalf of MSP to Mr. Shannon. (E51, at 15:4-7; E50, at 50:5-10). MSP did not file a lawsuit or any other claim against the City in 2014 or 2015 based on the September 11, 2014 Violation Notice. (E50, at 50:14-16).

On April 16, 2020, Darryl Kuhlman ("Mr. Kuhlman"), a Bellevue Code Enforcement Officer for the City, issued and delivered a Zoning Violation Notice to MSP at the Property for parking or storing U-Haul vehicles in violation of the Agreement. (E55, pp. 3-6, 9-20; E54, at p. 5).

On June 19, 2020, Mr. Kuhlman issued and delivered another Zoning Violation Notice to MSP at the Property for parking or storing U-Haul vehicles in violation of the Agreement. (E55, pp. 6-7, 21-23).

IV. Rezoning of the Property

Because the City had a record of more than three violations of the Agreement, the City chose to exercise its rights under the Agreement to rezone the Property for residential purposes (RG-50-OTO). (E60, at p. 3, ¶ 7). The Bellevue Planning Commission held a hearing on July 23, 2020, to consider whether to rezone the Property from BGM-OTO to RG-50-OTO. (E52, pp. 3-4, at ¶ 6). Following the hearing, it was the Planning Department's recommendation that the Planning Commission rezone the Property to RG-50-OTO based on

MSP's three or more documented violations of the Agreement. (E52, pp. 3-4, at ¶ 6, pp. 13-15).

After holding a hearing on the matter during which Mr. Shannon voiced his opposition, the Planning Commission recommended that the Property be rezoned from BGM-OTO to RG-50-OTO based on MSP violating the Agreement on three or more occasions. (E52, pp. 3-4, 13-15). On August 4, 2020, the Bellevue City Council heard its first reading of proposed Ordinance No. 4004, which would rezone the Property to its prior zoning of RG-50-OTO. (E53, p. 3, ¶¶ 7-8, pp. 24-25). At the City Council Meeting on August 18, 2020, Mr. Shannon gave testimony in opposition to the rezoning. (E53, at p. 4, ¶ 10, pp. 26-30). On September 1, 2020, the City Council heard its third reading of Ordinance No. 4004 and voted to approve the Ordinance. (E53, at p. 4, ¶ 11, pp. 33-36). Ordinance No. 4004, as approved, rezoned the Property to its prior zoning of RG-50-OTO. (E53, at p. 5, ¶ 13, p. 37).

V. Procedural History Relevant To Appeal

MSP filed two Complaints against the City, which were joined in the District Court and consolidated for purposes of appeal. (*See* Transcript from CI 20-1853, at pp. 22-23) (hereinafter, T); (*see also* Transcript from Case No. CI 20-1855, at pp. 1-2) (hereinafter, 20-1855 T). On or about December 1, 2022, MSP filed a Motion for Summary Judgment against the City, requesting that the Court render Ordinance 4004 void and unenforceable and finding that the enforcement of Ordinance 4004 would violate MSP's constitutional rights. (T71-73). On or about March 7, 2023, the City filed a competing Motion for Summary Judgment against MSP, wherein it asserted it was entitled to judgment as a matter of law on all claims asserted against it by MSP. (T99-101; 20-1855 T43-66). On October 24, 2023, the District Court entered an Opinion and Order (the "Order"), determining that the City's Motion for Summary Judgment should be granted and dismissing MSP's claims against it. (T255-262).

The Order additionally denied and dismissed MSP's Motion for Partial Summary Judgment as moot. (*Id.*). MSP now appeals the Order.

STANDARD OF REVIEW

"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." *Pitts v. Genie Indus.*, 302 Neb. 88, 921 N.W.2d 597 (2019). An appellate court should affirm a lower court's grant of summary judgment if "the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law." *Echo Grp., Inc. v. Tradesmen Int'l*, 312 Neb. 729, 980 N.W.2d 869 (2022).

ARGUMENT

I. The District Court Correctly Determined That the City Did Not Violate the Statutory Stay Imposed by Neb. Rev. Stat. § 19-909.

In its first and second assignments of error, MSP contends that the District Court erred in awarding summary judgment to the City and denying MSP's Motion for Partial Summary Judgment because the passage of Ordinance 4004 violated the statutory stay imposed by Neb. Rev. Stat. § 19-909. However, the District Court correctly determined that the City did not violate the statutory stay. (T260). Because MSP's first and second assignments of error concern the same underlying argument, they will be addressed together herein.

Pursuant to Neb. Rev. Stat. § 19-909, an appeal to the board of adjustment will:

> stay[] all proceedings in furtherance of the action 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.

MSP argues that Ordinance 4044 is void because it was introduced while MSP's appeal of the June 19, 2020 Zoning Violation Notice (the "June 2020 Violation") was still pending. (Appellant Brief, at 17; E33-34). The record is clear, however, that MSP was cited with more than three violations of the Agreement ***prior to*** the June 2020 Violation. Specifically, those earlier violations can be summarized as at least the following:

1. A violation on October 23, 2012, which instructed all U-Haul trucks or trailers to be parked or stored South of the North Face of the Building. (E45, p. 2);

2. A violation on September 11, 2014, which again instructed all U-Haul vans, trucks, and/or trailers to be parked or stored South of the North Face of the Building. (E45, p. 5);

3. A violation on April 16, 2020, which for the third time, instructed all U-Haul vans, trucks and/or trailers to be parked or stored South of the North Face of the Building. (E45, p. 8) (collectively, the "Violations").

Further, paragraph 6 of the Agreement provides as follows:

> In the event that [MSP] should violate any of the provisions of this Agreement, then, after providing [MSP] written notice of such violation, and upon [MSP'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, the City shall have the following rights:
>
> (a) To schedule a hearing to rezone the Parcel to its prior RG-50-OTO zoning and, at such hearing, rezone the Parcel back to RG-50-OTO zoning;

> (b) To deny the approval of any additional permits or certificates with respect to the Parcel;
>
> (c) To bring a legal action to prohibit and/or enjoin an unlawful use and/or development from continuing upon the Parcel; and
>
> (d) To utilize any and all other remedies provided to the City by law.

(E 26, p. 3).

Despite the Violations noted above, MSP solely appealed the June 2020 Violation. As such, the City was not limited by the stay in exercising its rights under the Agreement with respect to the earlier Violations. Rather, Neb. Rev. Stat. § 19-909 merely prevented the City from taking any action in furtherance of ***the action appealed from***, which, in this case, was only the June 2020 Violation. Because there were at least three total Violations preceding the June 2020 Violation, the City, pursuant to the Agreement, had the right to remedy the Violations, including by rezoning the Property to its prior zoning of RG-50-OTO. (*See id.*).

Accordingly, the City did not act in furtherance of the June 2020 Violation but instead acted in furtherance of its rights under the Agreement with respect to the record of Violations committed by MSP. (E60, p. 3, ¶ 7). In fact, the June 2020 Violation was neither the sole basis for the City's decision, nor necessary to the City's decision, as there was a record of three Violations preceding the June 2020 Violation, all of which constituted the basis for the request to rezone the Property. (E52, pp. 3-4, ¶ 6, pp. 13-15). In addition, had the City performed an act in furtherance of the June 2020 Violation, the City would have abated the violation by removing the U-Haul vehicles parked in violation of the Agreement, as the face of the Notice of Zoning Violation provided. (E55, p. 6, at ¶ 10, p. 21).

Based on the foregoing, Ordinance 4004 is not void, as its

passage did not violate the stay contained in Neb. Rev. Stat. § 19-909. Accordingly, the District Court was correct in determining that Ordinance 4004 was a valid exercise of the City's rights under the Agreement, and its decision granting the City's Motion for Summary Judgment and denying MSP's Motion for Partial Summary Judgment should be affirmed. (*See* T255-261).

II. There Is No Genuine Issue of Material Fact that MSP Violated the Agreement.

In its third assignment of error, MSP contends that the City should not have been awarded summary judgment because there was evidence creating a genuine dispute as to whether MSP committed or had proper notice of three violations of the Agreement. (Appellant Brief, at p. 19). First and foremost, such an argument is a thinly veiled attempt – having long missed the window to challenge the Violations – to evade proper appellate procedure and collaterally attack the Violations. Had MSP disagreed with any action taken by the City, MSP should have appealed the Violations. However, MSP did not appeal the Violations, and the statute of limitations to file a petition in error regarding the Violations has lapsed. *See Luet, Inc. v. City of Omaha*, 247 Neb. 831, 834, 530 N.W.2d 633, 635 (1995); *see also* Neb. Rev. Stat. §§ 25-1901, 1931. As such, MSP can no longer contest the validity of the Violations, and the Court should not consider its challenge of the Violations on appeal.

Even if, assuming *arguendo*, MSP may challenge the validity of the Violations, the record is clear that MSP violated the Agreement on at least three occasions, and as such, the City was within its rights to rezone the Property based on MSP's repeated violations of the Agreement. (E26, p. 3, ¶ 6; E52, pp. 3-4, ¶ 6, pp. 13-15). The District Court's decision should be affirmed.

A. The Meaning of the North of the North Face of the Building Was Properly Decided.

The District Court properly determined that there was no genuine issue of material fact as to the meaning of the "north of the north face of the building," as specified as the prohibited parking area in the Agreement. By doing so, the District Court determined that MSP made a judicial admission that the "[n]orth of the north face of the building includes both the 'red' and 'yellow' marked areas." (T261). The Nebraska Supreme Court has defined judicial admissions as follows:

> an admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues.

City of Ashland v. Ashland Salvage, Inc., 271 Neb. 362, 369, 711 N.W.2d 861, 868 (2006).

During the public hearing before the Bellevue City Council on August 27, 2012, where the City Council considered MSP's request to rezone the Property to BGM-OTO, Mr. Forman, on behalf of MSP, spoke to the City Council proposing a "No U-Haul Zone," which would preclude parking of U-Haul vehicles in an area encompassing everything in front of the building line. (E28, 17:11-22). In its Statement of Undisputed Facts submitted in support of its Motion for Summary Judgment, MSP submitted the below picture, and conceded that Mr. Forman 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 it the "No U-Haul Zone." (T83-84, ¶¶ 34-37).

Further, in its Statement of Disputed Facts submitted in opposition to the City's Motion for Summary Judgment, MSP did not dispute that Mr. Forman spoke on behalf of MSP or that it submitted a picture depicting a No U-Haul Zone. (20-1855 T57, ¶¶ 10-11). Such statements were considered by the District Court and accepted as undisputed material facts. (T256, ¶¶ 10-11). Accordingly, MSP, through its submissions and concessions related to undisputed facts on record before the District Court, made a judicial admission 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).

Even if this Court determines that there was no judicial admission made by MSP, MSP's desired interpretation of the meaning of the phrase "north of the north face of the building" is not relevant to this appeal. MSP correctly notes that when a contract is clear and unambiguous, its terms must be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.

Benjamin v. Bierman, 305 Neb. 879, 888, 943 N.W.2d 283, 291 (2020). However, if a court determines that a contract term or phrase is ambiguous, or that it is subject to at least two reasonable but conflicting interpretations or meanings, then extrinsic evidence may be permitted to explain the ambiguous term. *See Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 265 Neb. 133, 147, 655 N.W.2d 390, 403 (2003) (internal citations omitted).

Here, MSP contends that the terms of the Agreement are clear, and that the use of extrinsic evidence is inappropriate. (Appellant Brief, at p. 21). As set forth above, the Agreement prohibits parking or storing of U-Haul vans, trucks or trailers on the north of the north face of the building. (E26, p. 2). By its plain terms, such provision prohibits the parking of U-Haul vehicles anywhere to the north of the north face of the building, which necessarily includes the parking spots to the northeast of the building.

Even if, assuming *arguendo*, the Court finds that examination of extrinsic evidence is necessary to determine the intent of the parties, the evidence establishes that the City's interpretation of the meaning of the north of the north face of the building is correct and was mutually understood by the parties. As noted above, Mr. Forman's testimony on August 27, 2012, regarding the No U-Haul Zone, even if not considered a judicial admission, establishes MSP's understanding of the intent of the Agreement, which was executed on September 10, 2012, just fourteen days after Mr. Forman's statements made on behalf of MSP. (*See* E26, E28).

Further, all of the Notices of Zoning Violations provided by the City to MSP instructed MSP to park or store its U-Haul vehicles on the "South of the North Face of the Building." (*See* E45, pp. 2, 5, 8). As such, MSP was put on notice since at least October 23, 2012, when it received the first notice of violation, that it could not park or store its U-Haul vehicles anywhere to the north of the building. (*See* E45, p. 2). It was not until after the City exercised its rights with respect to rezoning the Property that MSP now seemingly disputes the clear meaning of the Agreement. In fact, it is undisputed that MSP does not

have any contract claim or breach of contract case pending against the City to challenge the terms or interpretation of the Agreement. (*See* 20-1855 T61, ¶ 24).

Based on the foregoing, the District Court appropriately determined that Mr. Forman made a judicial admission that "[n]orth of the north face of the building includes both the 'red' and 'yellow' marked areas." (T261). However, even without such judicial admission, the plain meaning of the Agreement, and as necessary, the extrinsic evidence, demonstrates that the City's interpretation of the Agreement is correct. The District Court's decision should be affirmed.

B. There Is No Genuine Dispute That MSP Committed More Than Three Violations of the Agreement.

MSP's argument that there is a genuine issue of material fact as to whether it committed and received notice of more than three violations of the Agreement can be summarized as follows: (1) an issue regarding whether it actually received the April 16, 2020 notice or whether the June 19, 2020 violation occurred; (2) that there was some 2014 event or side agreement wherein a City official allegedly advised that MSP could park in the northeast corner (*see* Argument, Part II(C), *infra*); (3) Code Enforcement closed or cleared the Violations; and (4) the City acted in bad faith (*see* Argument, Part III, *infra*). (MSP Brief, at 22-23).

The Agreement states that the City shall have the right to remedy violations of the Agreement if:

> In the event that [MSP] should violate any of the provisions of this Agreement, then, after providing [MSP] written notice of such violation, and upon [MSP'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 . . . .

(E26, p. 3).

By such provision, the Agreement is silent as to whether the violations must be upheld to a certain standard of proof, or that notice in a specified manner is a prerequisite. In fact, the only guideline regarding parameters of any notice is that it be written. *See id.* Accordingly, whether MSP disagrees with the merits of the June 19, 2020 violation or whether it actually received notice of the April 16, 2020 violation is not relevant to the undisputed fact that the City found that MSP violated the Agreement on more than three occasions. (E26, p. 3, ¶ 6; E52, pp. 3-4, ¶ 6, pp. 13-15). Moreover, as discussed above, MSP, having failed to appeal the Violations preceding the June 2020 Violation, can no longer challenge the validity of the Violations.

Further, MSP cites to instances where violations of the Agreement were noted as "closed" or "cleared" to somehow contend that MSP did not violate the Agreement on three or more occasions. (Appellant Brief, p. 23). However, the Agreement expressly provides that after three or more violations have occurred, the City may exercise its rights, including rezoning the Property, "regardless if the violations are cured[.]" (E26, p. 3, ¶ 6). As such, whether or not the violations were cured by MSP is not relevant to the City's decision to exercise its rights and remedies under the Agreement.

C. There Is No Genuine Issue of Material Fact That the City Was Not Estopped from Claiming the Violations.

In claiming that the City is "estopped from relying upon the alleged 2014 violation after agreeing [Mr. Shannon] could park in the northeast corner of the lot," MSP cites to some alleged event in 2014 that triggered a conversation with city officials and Mr. Shannon's testimony explaining the same. (Appellant Brief, at 22-23). In its Annotated Statement of Disputed Facts in Opposition to the City's Motion for Summary Judgment, MSP cited to Mr. Shannon's deposition at 49:2-50:13 and 62:6-64:8 to purportedly provide evidence to support this contention. (20-1855 T5). To be clear, the testimony to which MSP points is regarding whether Sarah D'Amico received the violation dated September 11, 2014 (E50, 49:2-50:13), and regarding

the alleged side agreement with city officials (E50, 62:6-64:8). When discussing the allegation relevant to the estoppel issue, Mr. Shannon could not provide any detail to make such an agreement probable:

> Since 2010 when we started U-Haul, the trailers have always been here. I ***think*** we met and came to terms and they agreed to leave these alone . . . .

(E50, 62:14-19) (emphasis added).

> . . . .
>
> Q: And when was that -- who did you talk to when it was agreed that those three spots contained in the circle were going to be left alone by the City?
>
> A: I don't recall a specific meeting or date, but I know we came up and discussed them and they -- their interpretation was wrong. It wasn't what the contract said, and they agreed to leave them alone, and they did.
>
> Q: Who was with you when this conversation occurred?
>
> A: I don't know.
>
> Q: Was anyone with you?
>
> A: It's very possible I was on my own. I don't know.
>
> Q: Who was representing the City or who was in the room for the City when this conversation occurred?
>
> A: I don't recall . . . .

(E50, 62:23-63:12).

> . . . .

Q: Did you receive that confirmation in writing from anybody from the City?

A: I don't know if I did.

(E50, 63:23-25).

On motions for summary judgment, a court has the discretion to disregard unsupported allegations. *See Midland Props., LLC v. Wells Fargo, N.A.*, 296 Neb. 407, 409-10, 893 N.W.2d 460, 463 (2017) ("The court disregarded certain statements offered in [appellant's] affidavit and deposition as hearsay and otherwise found that appellants offered only general allegations unsupported by the evidence."). Further, "the primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity, expense, and delay of trial, those cases where there is no genuine claim or defense." *Partridge v. Younghein*, 202 Neb. 756, 760, 277 N.W.2d 100, 103 (1979) (citing *Pfeifer v. Pfeifer*, 195 Neb. 369, 238 N.W.2d 451 (1976)). Here, any allegations related to a so-called 2014 agreement is unsupported by any competent evidence and is merely an effort to create an issue of material fact where there simply is none. As such, the Court should disregard any testimony by Mr. Shannon related to the same.

Moreover, the Agreement itself plainly states that it "may not be amended, modified or altered unless by written agreement signed by the City and [MSP]." (E26, p. 4, ¶ 16). As such, any purported modification to the terms of the Agreement is not valid, as there is no evidence in the record that the City and MSP made any written amendments to the Agreement. Accordingly, this Court should find that the City was not estopped from enforcing the Agreement pursuant to its clear terms. The District Court's decision should be affirmed.

III. The City's Actions Were Not in Bad Faith, Arbitrary, Capricious or Unreasonable.

For its final assignment of error, MSP contends that the District Court should have found that the City's actions were in bad faith,

arbitrary, capricious and unreasonable. (*See* Appellant Brief, at 24). However, the validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence that the conditions imposed by the city in adopting the zoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose sought to be accomplished by the ordinance. *Coffey v. Cnty. of Otoe*, 274 Neb. 796, 803, 743 N.W.2d 632, 637 (2008). The burden of demonstrating a constitutional defect in the zoning ordinance rests with the challenger. *Id.*

Courts have, further, given much deference to the police power of a municipality as it relates to imposition of zoning ordinances. As such, decisions of municipalities will rarely be disturbed. The Nebraska Supreme Court has discussed that,

> What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere.

Omaha v. Cutchall, 173 Neb. 452, 457, 114 N.W.2d 6, 9 (1962) (citing *City of Omaha v. Glissman*, 151 Neb. 895, 39 N.W.2d 828 (1949).

In the instant case, the zoning ordinance at issue is Ordinance 4004, which rezoned the Property from the conditional zoning the Property held under the Agreement (BGM-OTO) to the zoning the Property held at the time MSP purchased the Property in 2005 (RG-50-OTO). (E52, pp. 3-4, ¶ 6; T27, ¶ 8; T63, ¶ 8). As discussed above, the City's decision to exercise its right under the Agreement to rezone the Property was based on three or more zoning violations by MSP at the Property, a decision that was made in good faith and authorized pursuant to the clear terms of the Agreement. (E26, p. 3). There is also no competent evidence, beyond mere speculation, to suggest that any unrelated actions involving the City and Mr. Shannon are at all relevant to the City's decision, which was again, based on the remedies

afforded to it by the Agreement and a series of well-documented violations of the Agreement. (*See* E26, p. 3, ¶ 6; E52, pp. 3-4, ¶ 6, pp. 13-15).

The Agreement restricts MSP's ability to park U-Haul vehicles on the Property. Specifically, it states, "no parking or storage of U-Haul vans, trucks, or trailers shall be permitted on the portion of the Parcel north of the north face of the building currently situated on the Parcel[.]" (E26, p. 2, ¶ 4). Evidence of the reasoning behind such restriction can be found in the discussion that took place at the City Council meeting on August 27, 2012. During this meeting, the Agreement was discussed during the second reading of Ordinance 3682 – the ordinance to rezone MSP's property to allow operation of the U-Haul business, conditioned upon the terms of the Agreement. (E52, p. 12). During this discussion, the City voiced its valid reasons for the parking restrictions in the Agreement, which included, but were not limited to, minimizing the impact of the business on the surrounding neighborhood, preventing large-scale rezoning requests in the area, preventing subsequent offensive or liberal uses of the Property, and avoiding U-Haul trailers from being "the first thing people would see when entering the city from the east[.]" (E35, p. 3; E53, p. 8).

Thus, when the City considered rezoning MSP's property to allow operation of a U-Haul business at the Property under certain conditions, it is clear the City took into consideration the general welfare of the City and tenets of thoughtful city planning. Nebraska has long recognized that zoning ordinances enacted by a city, as a lawful exercise of police power, must be consistent with public health, safety, morals, and the general welfare of the city. *See Cutchall*, 173 Neb. at 457, 114 N.W.2d at 9. Courts, further, give great deference to a city's determination of which laws should be enacted for the welfare of the people. See *Giger v. City of Omaha*, 232 Neb. 676, 694-95, 442 N.W.2d 182, 196 (1989). The City should be given deference to its determination that MSP's compliance with the Agreement in order to maintain its conditional zoning, and thus continue to operate its U-Haul business, was necessary for the general welfare of the City.

When MSP repeatedly violated the terms of the Agreement over a course of years, as discussed herein, the City's ultimate decision to exercise its right under said Agreement and revert the Property to its prior zoning was not arbitrary, capricious, or unreasonable.

As set forth herein, the City simply availed itself of the remedies it had available to address MSP's continued noncompliance under the Agreement – that is, the passage of Ordinance 4004. The City's passage of Ordinance 4004 was not in bad faith, arbitrary, capricious, or unreasonable, as it was undertaken with valid considerations for the public welfare. The District Court's decision should be affirmed.

CONCLUSION

Based on the foregoing, the District Court correctly granted the City's Motion for Summary Judgment and denied MSP's Motion for Partial Summary Judgement as moot. (T255-262). There additionally exists no genuine dispute of material fact that MSP violated the Agreement; that the passage of Ordinance 4004 violated a statutory stay; or that the City acted in bad faith, unreasonably, or arbitrarily when rezoning the Property to its prior use. The District Court's Opinion and Order, dated October 24, 2023, should be affirmed in its entirety.

Dated June 6, 2024.

CITY OF BELLEVUE,
Appellee,

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CERTIFICATE OF COMPLIANCE

Pursuant to Neb. Ct. R. App. P. § 2-103(C)(4), the undersigned counsel certifies that this Brief:

1. Complies with the type-volume limitation of Neb. Ct. R. App. P. § 2-103(C)(3)(a), (c) and § 2-103(C)(4) because it contains 6,233 words, excluding the parts of the Brief exempted by Neb. Ct. R. App. P. § 2-103(C)(3)-(4).

2. Complies with the type requirements of Neb. Ct. R. App. P. § 2-103(A)(4) because it was prepared using Microsoft Word 2019 in Century font, 12-point.

/s/ *Ryan M. Kunhart*
Ryan M. Kunhart

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 6th day of June, 2024, the foregoing document was electronically filed with the Clerk of the Court, using the Justice e-file system which sent notification of said filing to counsel for the parties.

/s/ *Ryan M. Kunhart*
Ryan M. Kunhart

Certificate of Service

I hereby certify that on Thursday, June 06, 2024 I provided a true and correct copy of this *Brief of Appellee City of Bellevue* to the following:

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