ELECTRONICALLY FILED JAN 08, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
NO. 18-1201

TUNIS E. DEN HARTOG,
SHIRLEY ANN SCHWEERTMAN,
LEONARD G. LYBBERT,
MARY ROBIN MOLINARO-BLONIGAN, EXECUTOR OF THE ESTATE OF MARY ELLEN MOLINARO,
WILLIAM JAMES ROBERT, and
MARK D. FISHER
Plaintiffs/Appellants,

vs.

CITY OF WATERLOO, IOWA
Defendant/Appellee.

SUNNYSIDE SOUTH ADDITION, LLC,
Intervenor Plaintiff,

vs.

CITY OF WATERLOO,
Intervenor Defendant.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR BLACK HAWK COUNTY
No. EQCV117886

THE HONORABLE RICHARD D. STOCHL
1ST JUDICIAL DISTRICT OF IOWA

PLAINTIFFS-APPELLANTS' AMENDED REPLY BRIEF

Dave Nagle, AT0005716
501 Sycamore Street, Suite 704
P.O. Box 792
Waterloo, Iowa 50703
Telephone: 319-234-3623
Facsimile: 319-236-2228
Email: DaveNagleLaw@aol.com
Attorney for Plaintiffs/Appellants

TABLE OF CONTENTS

Table of Authorities……………………………………………...……….4

Statement of Issues Presented for Review…………………………………..5

Argument

WHILE THE CITY OF WATERLOO MAY HAVE GONE TO GREAT LENGTHS TO PROVIDE NOTICE OF SALE, THE NOTICES ARE IMPROPER IN THEIR CONTENT DUE TO THE IMPROPER APPRAISAL METHOD………………………………..6

PLAINTIFFS PROPERLY PRESERVED THEIR RIGHTS TO APPEAL……………………………………………………...…11

PLAINTIFFS PROPERLY PRESENTED EVIDENCE OF THE DEFENDANT WATERLOO'S CONDUCT IN SEEKING TO EVADE AND THWART THE ORDER OF THIS COURT AS TO JUSTIFY A FINDING OF CONTEMPT…………………………...12

Conclusion…………………………………………………………………15

Request for Oral Argument……………………………………………...…15

Certificate of Service……………………………………………………..…16

Certificate of Compliance with Typeface Requirements and Type-Volume Limitation……………………………………………………………...…17

TABLE OF AUTHORITIES

Cases

Den Hartog v. City of Waterloo, 891 N.W.2d 430 (Iowa 2017)……..…7, 8, 13

Eggiman v. Self-Insured Servs. Co., 718 N.W.2d 754 (Iowa 2006)………..11

In Re Marriage of Erpelding, 917 N.W.2d 235 (Iowa 2018)………………..8

City of Nevada v. Slemmons, 59 N.W.2d 793 (Iowa 1953)…………………8

Orkin Exterminating Co. (Arwell Div.) v. Burnett,
160 N.W.2d 427 (Iowa 1968)…………………………………….…14

Palmer Coll. of Chiropractic v. Iowa Dist. Court for Scott Cty.,
412 N.W.2d 617 (Iowa1987)………………………………..……14

Patterson v. Keleher, 365 N.W.2d. 22 (Iowa 1985)………………………..14

Statutes

Iowa Code Chapter 6B………………………………………..………..8

Iowa Code §6B.59…………………………………………………...9

Iowa Code Chapter 306……………………………………………..…8

Iowa Code §306.23………………………………………………...….6,8

Iowa Code Chapter 661…………………………………………...12, 14

Secondary Sources

Op. Iowa Att'y Gen. N. 97-11-1 (Nov. 4, 1997), 1997 WL 816849……....12

5 AM JUR 2D APPELATE REVIEW Sec. 357……………………………7

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHILE THE CITY OF WATERLOO MAY HAVE GONE TO GREAT LENGTHS TO PROVIDE NOTICE OF SALE, THE NOTICES ARE IMPROPER IN THEIR CONTENT DUE TO THE IMPROPER APPRAISAL METHOD.

Den Hartog v. City of Waterloo, 891 N.W.2d 430 (Iowa 2017)

In Re Marriage of Erpelding, 917 N.W.2d 235 (Iowa 2018)

City of Nevada v. Slemmons, 59 N.W.2d 793 (Iowa 1953)

Iowa Att'y Gen. 97-11-1 (Nov. 4, 1997), 1997 WL 816849

Iowa Code Chapter 6B

Iowa Code Section 6B.59

Iowa Code Chapter 306

Iowa Code §306.23 (2)

II. PLAINTIFFS PROPERLY PRESERVED THEIR RIGHTS TO APPEAL.

Eggiman v. Self-Insured Servs. Co., 718 N.W.2d 754 (Iowa 2006)

5 Am. Jur 2nd APPEALLANT REVIEW SEC. 357

III. PLAINTIFFS PROPERLY PRESENTED EVIDENCE OF THE DEFENDANT WATERLOO'S CONDUCT IN SEEKING TO EVADE AND THWART THE ORDER OF THIS COURT AS TO JUSTIFY A FINDING OF CONTEMPT.

Orkin Exterminating Co. (Arwell Div.) v. Burnett,
160 N.W.2d 427 (Iowa 1968)

Palmer Coll. of Chiropractic v. Iowa Dist. Court for Scott Cty.,
412 N.W.2d 617 (Iowa 1987)

Patterson v. Keleher, 365 N.W.2d. 22 (Iowa 1985)

Iowa Code Chapter 661

ARGUMENT

I. WHILE THE CITY OF WATERLOO MAY HAVE GONE TO GREAT LENGTHS TO PROVIDE NOTICE OF SALE, THE NOTICES ARE IMPROPER IN THEIR CONTENT DUE TO THE IMPROPER APPRAISAL METHOD.

Defendant and Intervenor argue that the Notices sent out by the City were proper. The Defendant City spelled out in great detail the length they had gone to identify current adjacent and previous owners, the content of the notices, and the procedures followed by the City Council in holding a hearing and approving a resolution authorizing the sale.

But Plaintiffs do not contend that procedures for notification were in error, Molinaros and others submit that it is the content of the notices that was in error because, first and foremost, the appraisal in which notices was based was faulty. This is because the method of determination of value did not conform to the requirements of the Statute.

The first fundamental question of the case is how is fair market value determined for purposes of adhering to a statute providing preference to"[a]n offer which equals or exceeds in amount any other offers received and which equals or exceeds the fair market value of the property . . . ." Iowa Code § 306.23(2).

It is a given that in *Den Hartog v. City of Waterloo,* 891 N.W.2d 430 (Iowa 2017)(hereinafter "*Den Hartog II*"), this Court properly decided, that fair market is the value of the property, including any improvements made. Defendants have taken this to mean that for purposes of appraisal, they can combine multiple unique tracts into one lump valuation, equally divide the value amongst the tracts, and thereby artificially increase the fair market value of each individual tracts. This, regardless of whether any of those individual tracts if, if independently purchased, would benefit from the improvements made to benefit the lump of tracts or would be worth anything close to its "fair market value" when held in isolation from the rest of the parcels.

To resolve this issue, aside from examining the practices of the Iowa Department of Transportation and Op. Iowa Att'y Gen. N. 97-11-1 (Nov. 4, 1997), 1997 WL 816849, a fair look at the history of this section compels a different conclusion. Namely, each parcel, tract or piece of land must be appraised individually in isolation from each other. This is consistent with eminent domain principles, discussed *infra*, as well as the attorney general opinion which limits the right of an individual to buy back only the particular land previously taken. Attorney general opinions are "entitled to careful consideration the court and [are] generally regarded as highly

persuasive" despite not being binding precedent or authority. *City of Nevada v. Slemmons*, 59 N.W. 2d. 793, 794 (Iowa 1953).

The statutory language "fair market value" appears to be ambiguous given the divergence of opinion in this case. The proper method of appraisal for "fair market value" in this case should be discerned from determining the meaning to be given to § 306.2, including legislative intent, object sought to be obtained, circumstances under which the statute was enacted, and other background information. *See In Re Marriage of Erpelding*, 917 N.W. 2d 235, 239 (Iowa 2018)("When interpreting a statute, we seek to ascertain the legislature's intent . . . [i]f the statute is ambiguous, we consider such concepts as the 'objects sought to be obtained'; 'circumstances under which the statute was enacted'; common law or former statutory provisions, including laws upon the same or similar subjects'; and 'consequences of a particular construction'")(internal citations and quotations omitted).

As the Supreme Court previously did in *Den Hartog II*, it is instructive to look at Iowa's eminent domain laws for guidance. *See Den Hartog*, 891 N.W.2d at 437; Iowa Code Ch. 6B. Both Iowa Code Chapter 6B and Iowa Code Chapter 306 deal with the return of land previously taken by a governmental entity. Under eminent domain, the rights of an individual are specific to that individual alone and the law makes clear that the

landowner is not to be shorted on any profit made if an agency later sells the acquired land for more than originally purchased from the landowner. Iowa Code §6B.59. In that situation, the landowner's rights are held in high esteem and the landowner is to be afforded every opportunity to receive the land back or benefit from any profit—as opposed to the acquiring agency receiving benefit.

Consider also that throughout the process of land acquisition by a government agency, the right to a fair determination of value, the right to appeal an adverse appraisal, the right to pursue the matter through the Courts belong only to the individual whose land is being acquired. Each individual tract acquired is limited that one owner. The owner or owners are not permitted to have the land evaluated in relation to others whose land is being taken as if they were all one unit.

Nowhere in either Chapter 6B or Chapter 306 does the code speak to multiple lots being used as the basis for valuation of one. If the several individual owners of multiple land parcels cannot combine their lots to increase the value of each when selling to an acquiring agency, the acquiring agency should not get to lump lots when selling back to original owners.

Under the City's appraisal method, tracts that are not adjacent to or served by the roadway improvements are essentially paying for such improvements because the improvements were calculated in to their fair market value through the lot combinations. The City has valued the lots as one single area of development. The single development area's value only exists if all lots are sold together and benefit from the improvements made to serve the whole development. No individual in the group that has preferential bid rights actually has the right to purchase all four lots. An analogy is that the City has a $40,000 car and wants to sell Plaintiffs the back seat for $20,000, without an engine or steering wheel or anything else that makes the car worth $40,000.

The purpose of combining the parcels into one was not done by the City to conform to the statute, but to abrogate the rights of individual property owners by making it an irrational choice for any prior or adjacent landowner to purchase back their one lot, whose fair market value has been artificially increased by improvements that the City unilaterally authorized during pending litigation over this land. These improvements were made because the City just assumed, they would prevail and that they would be able to dispose of this land however they wanted.

This chapter and the others, including eminent domain and urban renewal, confers rights to a specific group of individuals, each with independent rights of the others within the group. It is, to coin a phrase, "beneficiary specific" and this Court should re-affirm that principle.

II. PLAINTIFFS PROPERLY PRESERVED THEIR RIGHTS TO APPEAL.

As Defendants sought to lift the injunction in this case, Plaintiffs sought sanctions for violation of the injunction and relief under Chapter 661. Before the court could rule on the issue of sanctions and the requested relief the Honorable Judge Stochl lifted the injunction, making the issue of sanctions moot. (App. p. 708). The order entered on July 25, 2018 by the Honorable Judge Dreyer clearly recognized this as she summarily denied Plaintiffs' motion for sanctions and relief because the injunction had been lifted and rendered the issues moot. (App. p. 722).

Timely appeal was taken from Judge Stochl's ruling and no additional appeal from Judge Dryer's ruling was needed. Implicit in Judge Stochl's ruling was that Plaintiffs requested relief relative to the entire situation was denied. Parties are not required to litigate an issue or "hypothecate" on issues rendered moot by a preliminary finding. *Eggiman v. Self-Insured Servs. Co.*, 718 N.W.2d 754, 759 (Iowa 2006). The Supreme Court ordered

the initial injunction, and the Court retains jurisdiction of this issue and has authority to order additional remedies if appellants prevail, including relief under Chapter 661.

The Court is respectfully reminded that the issues in this case are two: The construction given to the Court's language in granting the injunction and the need to resolve two different interpretations as to how a tract, parcel or piece of land should be appraised; the way only these Defendants have done or the way every other city in the Iowa and the Iowa DOT does. *See* 5 AM. Jur. 2d Appellate Review § 357.

III. PLAINTIFFS PROPERLY PRESENTED EVIDENCE OF THE DEFENDANT WATERLOO'S CONDUCT IN SEEKING TO EVADE AND THWART THE ORDER OF THIS COURT AS TO JUSTIFY A FINDING OF CONTEMPT.

City of Waterloo contends that the Plaintiffs did not offer evidence of contempt. The standard, of course, is that a defendant accused of contempt must be found to have acted willfully in disobeying an order of Court.

Plaintiffs would respectfully argue that using a new real estate appraisal standard, which even their own appraiser admitted he had never done before, to inflate and make unaffordable individual parcels to be returned to previous or adjacent owners was in fact a clear attempt to defeat the purpose of this Court's order. This irrespective of the motive or

intention of the Defendant as established by the evidence. Likewise, the Defendant's use of this method contrary to the practice of every other government agency in the state, shows bad faith.

The trial court was assigned, at the last minute, to hear a complicated and prolonged litigation matter. The court restricted the inquiry to only what had happened since the Supreme Court's ruling in *Den Hartog II*. Judge Stochl refused to consider any other prior evidence of bad acts but did take judicial notice of the entire court file.

It is the entire file that is before this Court and the arguments therefrom contained in Appellants' Appeal Brief. For example, the photos that show the improvements to the roadway, water, sewer, etc. were placed on the former City Attorney's side of the road near his property are contained in Plaintiffs' Exhibits 25 & 26 (App. pp. 279-80); the disclosure that the City proceeded initially against the advice their own attorney and the DOT disclosed in the Community Planning Development Director, Noel Anderson's deposition from the prior hearing. The fact that the then City Attorney was the principle owner of Sunnyside South Addition LLC, which signed the development agreement with the City shown at Plaintiff's Exhibit 34. (App. pp. 460).

Plaintiffs will not repeat here the arguments made as to why the City's conduct was contemptuous, but simply incorporate them by reference. Plaintiff would note, however, that this Court has the right to review the Trial Court's conclusion, particularly if based on an error at law. See *Patterson v. Keleher*, 365 N.W.2d. 22 (Iowa 1985).

In equity, the appellate court still retains the right, while giving weight to the trial court's determination of facts, to make their own determination as the court "is not bound" by the trial court's findings of fact. *Id.* at 24. This especially true if the injunction was issued by this court and this court can enforce its prior order and injunction through remedies in Chapter 661. *See Palmer Coll. of Chiropractic v. Iowa Dist. Court for Scott Cty.*, 412 N.W.2d 617, 622 (Iowa 1987). A violation of an injunction issued by a trial court upon language from the Supreme Court is a violation of the Supreme Court's decree. *Orkin Exterminating Co. (Arwell Div.) v. Burnett*, 160 N.W.2d 427, 432 (Iowa 1968). In such a circumstance the Supreme Court can fashion a remedy or penalty itself and direct entry of the order by the district court. *Id.*

CONCLUSION

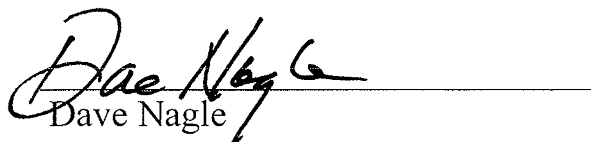
Plaintiffs-Appellants respectfully request the court grant the relief requested in Appellant's Final Brief.

By:

Dave Nagle, AT0005716
501 Sycamore Street, Suite 704
P.O. Box 792
Waterloo, Iowa 50704
Telephone: 319-234-3623
Facsimile: 319-236-2228
Email: DaveNagleLaw@aol.com
Attorney for Plaintiffs/Appellants

ATTORNEY'S COST CERTIFICATE

I hereby certify that the actual cost of printing the foregoing Plaintiffs-Appellant's Reply Brief was $N/A (e-filed) (exclusive of sales tax, delivery and postage).



Dave Nagle

CERTIFICATE OF FILING AND SERVICE

I certify a copy of Plaintiffs'-Appellants' Reply Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 21st day of December, 2018.

Copy to:

Kristine Stone
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, IA 50309-2231

David Zellhoefer
City Attorney for Waterloo
715 Mullbery Street
Waterloo, Iowa 50703-5714
Attorneys for City of Waterloo

David L. Riley
SWISHER & COHRT, PLC
528 West Fourth Street
PO Box 1200
Waterloo, Iowa 50704
Attorneys for Sunnyside South

Dave Nagle

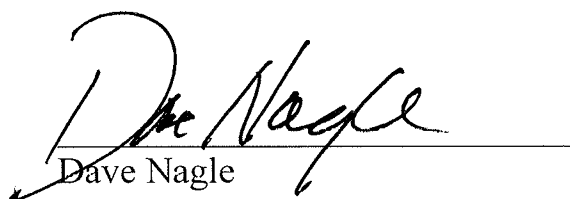
<u>CERTIFICATE OF COMPLIANCE</u>

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 1,945 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word in Times New Roman 14 pt.

Dated:



Dave Nagle