IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-1201

TUNIS E. DEN HARTOG, SHIRLEY ANN SCHWEERTMAN, LEONARD G. LYBBERT, MARY ELLEN MOLINARO-BLONIGAN, EXECUTOR OF THE ESTATE OF MARY ELLEN MOLINARO, WILLIAM JAMES ROBERT & 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
FOR BLACK HAWK COUNTY
BLACK HAWK COUNTY NO. EQCV117886
THE HONORABLE RICHARD STOCHL PRESIDING

FINAL BRIEF OF APPELLEE

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CERTIFICATE OF FILING

The undersigned hereby certifies that the Final Brief of the Appellee was electronically filed on the 4th day of January, 2019, with the Clerk of the Iowa Supreme Court, 1111 East Court Avenue, Des Moines, Iowa 50319.

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CERTIFICATE OF SERVICE

It is hereby certified that on the 4th day of January, 2019, the undersigned party, or person acting on its behalf, did serve the within Final Brief of Appellee on all the other parties to this appeal by e-mailing a copy thereof to the following counsel for said parties:

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in compliance with the provisions of Rule 6.901, Iowa Rules of Appellate Procedure. In addition, an electronic copy was filed and served via EDMS on January 4, 2019.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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ROUTING STATEMENT

The City of Waterloo ("City") does not agree with the Routing Statement in the brief of Den Hartog, et al. ("Den Hartog"). This case concerns settled matters of law and should be assigned to the Court of Appeals.

STATEMENT OF THE CASE

This case arises from a City's failed attempts to convey property to a developer in exchange for the development of a residential subdivision and relocation of an existing roadway. The City acknowledges that procedural errors were made in its prior attempts to comply with Iowa Code Section 306.23, the

statutory preference of sale procedures, as it relates to this property conveyance. As a result of these procedural errors, an injunction was entered by the district court on July 7, 2014, enjoining the City "from selling or transferring the property involved in this proceeding without first following the procedures prescribed in Iowa Code Section 306.23." App. 24.

Iowa Code Section 306.23 provides:

> 1. The agency in control of a tract, parcel, or piece of land, or part thereof, which is unused right-of-way shall send by certified mail to the last known address of the present owner of adjacent land from which the tract, parcel, piece of land, or part thereof, was originally purchased or condemned for highway purposes, and to the person who owned the land at the time it was purchased or condemned for highway purposes, notice of the agency's intent to sell the land, the name and address of any other person to whom a notice was sent, and the fair market value of the real property based upon an appraisal by an independent appraiser.
>
> 2. The notice shall give an opportunity to the present owner of adjacent property and to the person who owned the land at the time it was purchased or condemned for highway purposes to be heard and make offers within sixty days of the date the notice is mailed for the tract, parcel, or piece of land to be sold. An offer which equals or exceeds in amount any other offer received and which equals or exceeds the fair market value of the property shall be given preference by the agency in control of the land. If no offers are

> received within sixty days or if no offer equals or exceeds the fair market value of the land, the agency shall transfer the land for a public purpose or proceed with the sale of the property.

In May of 2017, the City of Waterloo again endeavored to complete the real estate transaction at issue in this matter. Once it had completed the necessary procedural steps outlined by Iowa Code Section 306.23, and the prior directives issued by the Iowa Supreme Court, the City filed a motion requesting that the injunction in this matter be lifted and the case dismissed. App. 28-30. Den Hartog resisted the City's motion and responded with an application for rule to show cause alleging procedural deficiencies in the City's actions. App. 33-57.

A hearing was held on March 29, 2018, regarding the City's motion to dissolve the injunction and Den Hartog's application for rule to show cause. On June 14, 2018, the district court entered an Order dissolving the injunction and dismissing the contempt action. App. 708-715. Den Hartog now appeals that order.

STATEMENT OF FACTS

The City has, in all respects, complied with the requirements of the preference of sale statute and the directives of the Iowa Supreme Court in its most recent opinion in this matter. *See Den Hartog v. City of Waterloo*, 891 NW2d 430 (Iowa 2017).

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE CITY HAS COMPLIED WITH THE PREFERENCE OF SALE PROCEDURES OUTLINED IN IOWA CODE § 306.23 AND DISSOLVING THE INJUNCTION.

Preservation of Error. The City does not contend there is any preservation of error problem.

Standard of Review. The standard of review for the issuance or dissolution of an injunction is normally de novo. *State ex rel. Miller v. Grady*, 698 NW2d 336 (Iowa App. 2005). In the opinion dated March 10, 2017, the Iowa Supreme Court stated that the interpretation of the injunction's language in this matter is a question of law. *Den Hartog*, 891 NW2d at 436 (citing *Zimmermann v. Iowa Dist. Ct.*, 480 NW2d 70, 74 (Iowa 1992)). Whether the City has complied with the terms of the

injunction must therefore be reviewed for errors at law, and the fact-findings of the district court should not be disturbed if they are supported by substantial evidence. *Harrington v. University of Northern Iowa*, 726 NW2d 363, 365 (Iowa 2007).

Argument. Substantial evidence supports the district court's ruling that the City has "complied with the prior order of this court meriting the dissolution of the injunction." App. 713. In the last appellate decision issued in this case, the Iowa Supreme Court outlined the procedures to be followed to comply with the preference of sale statute contained within Iowa Code Section 306.23. The statute requires the City "to send notice of the agency's intent to sell the land to the two classes of persons entitled to preference." *Den Hartog*, 891 NW2d at 437. The two classes of persons include the present owner of adjacent land from which the tract was originally acquired, and the person who owned the land at the time it was acquired. "The notice must identify the name and address of any other person to whom the notice was sent and state 'the fair market value of the land based on an appraisal by an independent appraiser.'" Id.

The Court went on to specify the nature of the required appraisal in more detail. It said that "the statutory-notice process implies the fair market value would be the value at or near the time the notice of impending sale is given" and that it "would include the value of the improvements made to the land by Sunnyside prior to the notices." Id. at 438.

> Thus, the notices must state the present fair market value of the land to be sold. Any preferential offer would need to equal or exceed the fair market value of the land as improved by Sunnyside. If no such offers are received, the City may then proceed to confirm its prior sale to Sunnyside. Id.

At the hearing on March 29, 2018, the City presented evidence showing the procedural steps that had been taken by the City to comply with Iowa Code Section 306.23, and the directives of the Supreme Court.

On May 8, 2017, the Waterloo City Council, by Resolution, directed city staff to send the required notices regarding the proposed sale of the land in accordance with Iowa Code Section 306.23. App. 615-618. The Resolution further stated that any purchase offers would be due on July 13, 2017 at 1:00 pm, that a hearing would be held on July 10, 2017, regarding the

proposed sale of these properties, and that any purchase offers would be considered at the City Council meeting on July 17, 2017. App. 616-617.

There were four separate notices, one for each tract of land matching the original acquisition parcels. App. 540-600. These notices were sent by certified mail on May 10, 2017. Id. The notices included the fair market value for the individual parcels at issue, as determined by an appraisal report dated April 12, 2017. App. 464-539. The notices also included the name and address of each person to whom the notices were sent. App. 540-600.

The appraisal report identified the fair market value of the property as follows:

Tract 1: $318,248
Tract 2: $783,886
Tract 3: $500,561
Tract 4: $222,305
Total: $1,825,000

App. 468. The appraisal report described the subject property as "a developed subdivision on the south side of Waterloo with 24 lots which front the Sunnyside Country Club." App. 487.

The report additionally stated that the appraiser is "estimating the market value of the fee simple interest for the subject *as is*." App. 488. The total value of the overall property was then allocated into the four separate tracts, based on acreage. App. 533.

A public hearing regarding the proposed sale of the property was held on July 10, 2017. App. 627-628. On July 17, 2017, a public hearing was held to consider any purchase offers received regarding the proposed sale of land. App. 639-640. At the hearing, the City Clerk reported that no bids had been received. App. 640. The public hearing was closed and the City Council approved Resolution No. 2017-556, which directed the City to proceed with the disposal of the four tracts of land. App. 648-649.

On September 11, 2017, the Waterloo City Council held a public hearing regarding the proposed sale and conveyance of the land to Sunnyside South Addition, LLC, in the amount of $1.00. App. 655. At the close of the public hearing the City approved Resolution Nos. 2017-754 and 2017-755. App. 658-

666. Resolution No. 2017-754 authorized the sale and conveyance of the property while Resolution No. 2017-755 approved a Project Development Agreement between the City of Waterloo and Sunnyside South Addition, LLC. Id.

Aric Shroeder, Waterloo city planner, described the process that the City used to determine the individuals who were entitled to notice under Iowa Code Section 306.23. He testified as follows:

> "the first step was determining the original owners, so we looked at the deeds of who the property was acquired from by the State of Iowa when they acquired it for highway purposes. To then determine who adjacent – current adjacent property owners are, we went back to look at the deeds of when the original owners that the State acquired it from before the State acquired it, what was the total area that those original owners owned, and reviewed the legal descriptions from those deeds to then use that area to determine the adjacent, and then used the records of the Black Hawk County Assessor's Office to determine who the owners of current land within that adjacent area were." Transcript pp. 41-42.

This methodology was depicted in Exhibit I-D, which was offered and admitted at the hearing on March 29. App. 601-602. Mr. Schroeder further testified that he had considered the Supreme Court's opinion in obtaining the most recent appraisal

for the property and in sending the required notices under Iowa Code Section 306.23. Transcript pp. 51-52. Mr. Schroeder stated that the City had tried to do everything it could to comply with the statutory requirements, and that the property would not be conveyed until the legal matters were resolved in this case. Id. at 51-52.

In considering the evidence presented, the district court concluded that the City's appraisal method was "appropriate under the circumstances and consistent with the law of this case." App. 712. The value determination was made "at or near the time the notice of impending sale is given" and included "the value of the improvements made to the land by Sunnyside prior to the notices." *Den Hartog*, 891 NW2d at 438.

The district court considered and rejected the alleged deficiencies raised by Den Hartog in response to the City's actions. App. 712-713. Specifically, the district court rejected the claim that the notices were defective based on the City including itself as an adjacent owner. Id. The district court similarly rejected the claim that the notices were defective due

to the requirement that a 100% deposit was required at the time of bidding and that the City retained the right to reject offers. App. 713. The well-reasoned decision dissolving the injunction is supported by substantial evidence and must stand.

II. DEN HARTOG HAS FAILED TO PRESERVE ERROR IN ITS APPEAL OF THE DISTRICT COURT'S DISMISSAL OF THE APPLICATION FOR RULE TO SHOW CAUSE AND ITS REQUEST TO COMPEL PERFORMANCE PURSUANT TO IOWA CODE § 661.15.

Contempt. Den Hartog has failed to preserve error in its appeal of the contempt matter. Den Hartog claims that the district court's Order dismissing the application for rule to show cause is in error because it failed to consider the City's actions that predated the last appeal in this matter. Den Hartog Final Brief at 34. Specifically, Den Hartog alleges that "[t]he cumulative conduct of the City before, during and after the issuance of the Writ of Mandamus and the resulting Injunction should be considered in determining if the City's conduct was contemptuous in continuing to avoid the requirements of the Code." Brief at 35.

The district court engaged in some discussion with Den Hartog about this at the hearing. See Transcript pp. 77-80. When asked about the specific grounds supporting the contempt action, Den Hartog identified the following six items:

1. The notice was improper;
2. The property was improperly appraised;
3. The City improperly listed itself as a buyer;
4. The City reserved the right to reject bids;
5. The legal descriptions were improper; and
6. The City required a 100% deposit along with the bids.

Transcript p. 79. Den Hartog did not present any evidence at the hearing regarding "cumulative conduct" of the City.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 NW2d 532, 537 (Iowa 2002). Because no evidence was presented on this issue, Den Hartog's appeal on this basis is prohibited. The district court stated as much at the close of the hearing on March 29, when he said "you can't make a record on evidence that's not in the record." Transcript p. 129. There is absolutely no evidence in the record to support the assertions

of Den Hartog, and its appeal of the dismissal of the application for rule to show cause on this basis is unwarranted.

Compel Performance. Den Hartog has similarly failed to preserve error regarding the court's authority to compel performance pursuant to Iowa Code Section 661.15. Iowa Code Section 661.15 allows the court, in a mandamus action, to

> direct that the act required to be done may be done by the plaintiff or some other person appointed by the court, at the expense of the defendant, and, upon the act being done, the amount of such expense may be ascertained by the court … and the court may render judgment for the amount of the expense and cost, and enforce payment thereof by execution.

Den Hartog raised this issue for the first time in an Application for Sanctions and Relief filed on March 28, 2018. App. 163-167. That Application was denied by Order dated July 25, 2018. App. 722-723. Den Hartog filed its Notice of Appeal in this matter on July 12, 2018. App. 719-721. Den Hartog's Notice of Appeal was therefore filed before the court's Order denying the Application for Relief pursuant to Iowa Code Section 661.15.

Iowa Rule of Appellate Procedure 6.101(1)(b) requires that notices of appeal be filed "within 30 days after the filing of the final order or judgment." (emphasis added). Under Iowa law, "[r]ulings deciding collateral and independent claims are separately appealable as a final judgment." *Board of Water Works Trustees v. City of Des Moines*, 469 NW2d 700, 702 (Iowa 1991). Den Hartog was therefore required to file a separate appeal regarding the requested mandamus relief in order for this Court to retain appellate jurisdiction over that issue. Den Hartog did not, and consideration of the appeal is prohibited.

III. IF ERROR HAS BEEN PRESERVED REGARDING CONTEMPT, THE DISTRICT COURT WAS CORRECT NOT TO HOLD THE CITY OF WATERLOO IN CONTEMPT.

Standard of Review. The Iowa Supreme Court outlined the standard of review to be utilized in contempt actions in the last appellate decision issued in this case. *See Den Hartog*, 891 NW2d at 435. A finding of contempt must be established by proof beyond a reasonable doubt. *State v. Lipcamon,* 483 NW2d 605, 606 (Iowa 1992). "Substantial evidence to support such a finding is 'such evidence as could convince a rational trier of

fact that the alleged contemnor is guilty of contempt beyond a reasonable doubt.'" *Reis v. Iowa District Court*, 787 NW2d 61, 66 (Iowa 2010) (quoting *In re Marriage of Jacobo*, 526 NW2d 859, 866 (Iowa 1995)). Appellate review of a contempt action is not de novo, and while the Court must give "much weight to the trial court's findings of fact," it is not bound by them. *Patterson v. Keleher*, 365 NW2d 22, 24 (Iowa 1985).

Argument. When a court refuses, as the trial court did here, to hold a party in contempt for violating a court order, the question is whether the court acted within its sound discretion, and unless that discretion is "grossly abused" the decision of the district court "must stand." *State v. Lipcamon*, 483 NW2d 605, 607 (Iowa 1992). "The party requesting a contempt finding—the contemnee—has the burden of proving that the alleged violator—the contemner—(1) had a duty to obey a court order and (2) willfully failed to perform that duty." *In re Inspection of Titan Tire,* 637 NW2d 115, 132 (Iowa 2001). "A finding of willful disobedience requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or

wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not." *Ervin v. Iowa Dist. Court for Webster County*, 495 NW2d 742, 744 (Iowa 1993) (citations omitted).

The district court did not find that there was a willful failure to obey a court order in this matter. In fact, the district court determined that the City had complied with the court's Order, and dissolution of the injunction was warranted. Upon this record, failing to find the City in contempt was clearly not an abuse of discretion, let alone a "gross abuse." The record is replete with evidence showing that the City made every attempt to comply with the court's Order. The City considered the prior appellate decisions in this case, obtained a new appraisal for the property which complied with the most recent appellate decision, and sent the notices to the two classes of persons entitled to notice under Iowa Code Section 306.23. Two public hearings were held, and no offers were received for the property.

Den Hartog has failed to meet its burden of proof, and dismissal of the application for rule to show cause was proper.

CONCLUSION

The ruling of the trial court must be affirmed. The injunction should be dissolved, this case should be dismissed, and the City should be allowed to proceed with the sale of the property.

REQUEST TO BE HEARD ORALLY

The City of Waterloo requests to be heard orally upon submission of this appeal.

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