IN THE SUPREME COURT OF IOWA

No. 18-1201
Black Hawk County Case No. EQCV117886

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
OF BLACK HAWK COUNTY
THE HONORABLE RICHARD D. STOCHL

FINAL BRIEF OF SUNNYSIDE SOUTH ADDITION, LLC, INTERVENOR PLAINTIFF

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ROUTING STATEMENT

The Iowa Supreme Court has previously addressed this case in two prior decisions, and in its most recent decision gave some express directions on what the City should do with its next set of notices. *Den Hartog v. City of Waterloo*, 891 N.W.2d 430 (Iowa 2017). Because the only issue presented is whether the City complied with those Supreme Court directives, this case presents the application of existing legal principles, and is appropriate for summary disposition. As a result Intervenor Sunnyside South requests that the case be transferred to the Court of Appeals for disposition pursuant to Iowa Rule of Appellate Procedure 1.61101(3).

STATEMENT OF THE CASE

Sunnyside South adopts the statement of the case set forth by the City of Waterloo in its Brief, and has nothing to add.

STATEMENT OF THE FACTS

Sunnyside South accepts the statement of facts set forth by the City of Waterloo in its Brief, as expanded upon in its Brief Point I, and has nothing to add.

I. THE PLAINTIFFS DO NOT HAVE STANDING.

Preservation of Error

This issue was preserved by Sunnyside South in its Motion to Dismiss starting at trial transcript p. 121 and it's Brief filed in Support of that Motion, App. 679.

Standard of Review

The Court reviews rulings on motions to dismiss for correction of errors at law. *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001), *as amended on denial of reh'g* (July 3, 2001).

Argument

The pending lawsuit is actually the second filed by the Molinaro family in an effort to block this development. The first, filed by Robert Molinaro, was dismissed on summary judgment. Robert Molinaro was asking for a writ of mandamus. Summary judgment was granted at the District Court level, and on appeal the Iowa Court of Appeals affirmed, stating that Robert Molinaro lacked standing to sue. *Molinaro v. City of Waterloo*, 834 N.W.2d 871 (Table), 2013 WL 2145983 (Iowa Ct. App.).

At the hearing held on March 29, 2018, Bryan Dale Molinaro-Blonigan, the spokesperson for the Plaintiffs, and in particular for the Molinaro family (trial transcript p. 80) testified that the lots now owned by the Molinaro family, which are the basis of their claim for standing, and for a right to bid on the property, were owned by Robert Molinaro while he was

alive. Blonigan also testified that when Robert Molinaro passed (as he did while the first appeal was pending) the property passed to Mary Ellen Molinaro. She has since passed, and those lots, according to Blonigan's testimony, have passed to Mary Ellen Molinaro's Estate. Trial transcript p. 84-87.

It follows that if Robert Molinaro, owner of those lots at the time of the first lawsuit, did not have standing, subsequent owners of those lots do not have standing.

The other named Plaintiffs are similarly situated. They claim to be owners of lots who are entitled to notice.

The Court of Appeals decision indicates that the intent of the original suit was to vindicate public interest through his challenge of illegal governmental action. *Molinaro,* 2013 WL at *3. But, as the Court of Appeals acknowledged, to bring such an action Molinaro had to have suffered some type of injury different than the population in general. *Molinaro,* 2013 WL at *3.

Molinaro claimed standing based on his assertion that the City was not receiving as much money as possible for the land. This is identical to the motivation testified to by Bryan Dale Molinaro-Blonigan, when called to the stand by Sunnyside South, and when asked the purpose of the present

litigation. Trial transcript p. 120. The Court of Appeals has expressly held that that is a generalized grievance which is not sufficient for standing. *Molinaro*, 2013 WL at *3.

Robert Molinaro, in lawsuit number one, also complained that he suffered a loss of opportunity to buy the property based upon the City's failure to follow Code §306.23. The Court of Appeals also held that's insufficient for standing. *Molinaro*, 2013 WL at *3.

Once again, this is identical to the motivation for the pending lawsuit as testified to by Molinaro-Blonigan. He said the purpose of the lawsuit was two-fold: to maximize the return to the city on the property and to afford the Molinaro family an opportunity to bid on the property. Trial transcript p. 120. These are exactly the issues that were addressed by the Court of Appeals in the earlier decision, and that were found not to confer standing on the Molinaro family.

Sunnyside South Addition, LLC, contends this is the law of the case. Law of the case was discussed in *Lee v. State*, 874 N.W.2d 631, 646 (Iowa 2016), which states that an appellate decision becomes the law of the case and is controlling on both the trial court and on any further appeals in the same case. This is the same case. Although the named Plaintiffs are different, given the passage of time and given deaths that have occurred in

the meantime, the named Plaintiffs are the same in that they are owners of lots that came from one of the parent parcels. The Court of Appeals decision that there is no standing controls the case. And, as was announced by the Iowa Supreme Court in *Lee v. State*, legal principles announced and the views expressed by the reviewing court, right or wrong, are binding on further progress of the case.

Should the court decide that law of the case is not the applicable doctrine, the parties should still be bound by the outcome in lawsuit number one by the doctrine of issue preclusion. The elements of issue preclusion are set forth in *George v. D.W. Zinger Co.*, 762 N.W.2d 865, 868 (Iowa 2009) and include:

1. The issue concluded must be identical;

2. The issue must have been raised and litigated in the prior action;

3. The issue must have been material and relevant to the disposition of the prior action; and

4. The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Issue preclusion prevents parties from re-litigating issues raised and resolved in a previous action. *Employers Mutual Casualty Company v. Van*

Haaften, 815 N.W.2d 17, 22 (Iowa 2012). The doctrine serves a dual purpose. It protects litigants from the vexation of re-litigating identical issues with identical parties or those with a significant connected interest to the prior litigation, and it furthers the interest of judicial economy and efficiency by preventing unnecessary litigation. *Id.*

Iowa Code §306.23 requires notice to the person who owned the land at the time it was condemned for highway purposes and also notice to 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. The City, following the habit of the DOT, has been issuing notice to any owner of a residential lot that has been carved out of the initial parent parcel. While such steps are commendable for the abundance of caution (and fly in the face of Plaintiffs' contention that the City is in contempt for not trying to comply with the statute), it's clearly beyond code requirements.

This does not make the notices defective. As argued by counsel for Sunnyside South before the Trial Court, under inclusion (not naming somebody who was entitled to notice) would be a fatal mistake, since someone entitled to bid would not receive notice. But inclusion of someone who is not entitled to bid is not an error if that person doesn't act on the notice. It's harmless error.

The parent parcels, from which these tracts were condemned, no longer exist. The land has been divided and re-divided on numerous occasions. The only adjacent property, to the north, as established by the undisputed evidence at the hearing, is the Sunnyside Country Club, which is not a named party, and not raising an objection.

"Adjacent" as defined by The Winston Dictionary, College Addition, means: lying near; close; contiguous. By no stretch of the imagination is someone who owns a residential lot that does not butt up against the property in question an owner of "adjacent" property.

The Supreme Court has now spoken to the purpose of the statute. In its decision of March 10, 2017, the Supreme Court said:

> The statutory sales preference makes it possible for the land taken for highway purposes to be returned to the particular tract of land or to the particular owner from which it was acquired. Thus, the "present owner of adjacent land from which" the unused tract or unused part of a tract controlled by the agency "was originally purchased or condemned" refers to the present owners of land that lies adjacent to the unused right-of-way because the right-of-way was acquired from that land.
>
> 891 N.W.2d at 437

And later: "The statute prefers restoration of the unused rights-of-way to either the original tract or original owner from which it was acquired before selling it to another person." 891 N.W.2d at 437.

Understanding that to be the purpose of the statute, that purpose is largely frustrated, in this instance, by the passage of time. None of the original owners remain alive. And none of the particular and original tracts from which this land was first condemned exist either, given the passage of sixty years. The parent parcels have been divided and re-divided many times over.

With that background, it cannot be said that someone who owns a residential lot carved out from the original parent parcel is entitled to notice or has a right to bid. Assume, hypothetically, that someone acquired a residential lot, with or without a house on it, in 2010, before any of these proceedings were underway. Further assume that the lot is carved out of what was one of the parent parcels, but is a quarter of a mile away from the property at issue in this case. By no stretch of the imagination can one say that the property in question in this sale ever came from that "tract." If the owner of that residence were to bid on the property, he/she would not be returning the property to the parcel from which it was originally taken. The parcel was never taken from that residential lot. He/she would wind up

owning an odd shaped piece of ground a quarter of a mile away that is no way adjacent to his or her property acquired in 2010.

The purpose of the statute, which is to restore the property to the original parcel, would not be accomplished.

This is consistent with the Court of Appeals decision discussed earlier, where the Court found that Molinaro was not an adjacent property owner, and this analysis is also consistent with the Supreme Court's interpretation of the purpose of the statute.

II. PLAINTIFFS HAVE WAIVED THEIR RIGHT TO COMPLAIN IN THESE PROCEEDINGS BY FAILING TO APPEAR AND PARTICIPATE AT THE HEARING ORDERED BY THE COURT IN THIS MATTER, AND BY FAILING TO SUBMIT ANY BID AT ALL BY JULY 13, 2017.

Preservation of Error

Sunnyside South preserved error on this issue by raising it in its Motion to Dismiss at the end of the proceedings. Trial transcript p. 122 to 124 and Brief of Sunnyside South, App. 679.

Standard of Review

The Court reviews rulings on motions to dismiss for correction of errors at law. *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001), *as amended on denial of reh'g* (July 3, 2001).

Argument

As a consequence of an earlier objection filed by Plaintiffs to the notice issued in conjunction with an earlier proposed sale, the District Court found that the notice should provide a right to be heard, consistent with the statute. See Judge Dryer's Order of June 4, 2015, App. 25.

Consistent with Judge Dryer's directive, the notice that is being challenged in this case did provide for a hearing on July 10, 2017. See, for example, p. 2 of Defendant's Exhibit E-D, App. 541. Similar provisions are found in every notice that went out for each of the four parcels.

This was the Plaintiffs' opportunity to be heard on the matter, and to express any issues they had with the notice or with the sales procedures that the City was following.

Plaintiffs did not appear and complain at that hearing.

In a presumed effort to circumvent this fatal mistake, the Plaintiffs marked and offered as an exhibit (Plaintiff's Exhibit 36, App. 462) a letter addressed to Waterloo City Attorney David Zellhoefer dated July 7, 2017. That letter is no substitute for appearance and participation in the hearing. Imagine, by analogy, that someone didn't show up for their court date, and tried to excuse that by saying that his/her lawyer had earlier submitted a letter to opposing counsel outlining their positon, and alleged that should have sufficed.

The letter of July 7, 2017, makes no legitimate objections to the proceedings.

The first point made by Mr. Nagle in his letter of July 7, 2017, is that the City should use the appraisal obtained by the Plaintiffs as opposed to the appraisal obtained by the City. There is no requirement under Iowa Code §306.23 that the City use the appraisal offered by the Plaintiffs. Further, the appraisal offered by the Plaintiffs was performed in 2016, before the latest Supreme Court decision. That Supreme Court decision came down March 10, 2017, and confirmed that the fair market value should be determined at or near the time the notice of impending sale is given. The appraisal used by the City was closer to the time of sale than the appraisal offered by the Plaintiffs. Further, the Iowa Supreme Court also said that the fair market value in this case would include the improvements made to the land by Sunnyside South prior to the notices, and observed that the purpose of the statutory framework was to protect the City and its taxpayers by obtaining the best price for the lot land. See *Den Hartog v. City of Waterloo*, 891 N.W.2d 430, 438 (Iowa 2017). So the City, by using the higher appraisal, the one closer in time to the actual sale, and the one that took into account the value of the improvements, was following the directive of the Iowa Supreme Court.

Mr. Nagle's second point in his letter of July 7, 2017 was that the City should not have been included as an eligible bidder. There are two responses to that.

First, as established unequivocally at the hearing on March 29, 2018, the City does own property from the parent tracts in each of the four quadrants. As a consequence, given its interpretation of who "eligible" bidders are, it is an eligible bidder. It is certainly as eligible as any of the property owners who own property descended from the parent parcel but who are not directly adjacent to the Sunnyside South Addition.

More importantly, any alleged mistake in this regard is academic, since the City did not bid. Any error in the notices by giving a notice to someone who was not eligible is beside the point if an ineligible bidder did not bid. No bids were submitted by anyone, eligible or not, so the City's inclusion as a bidder is entirely academic and beside the point.

The letter from Mr. Nagle of July 7, 2017 (Plaintiff's Exhibit 36, App. 462) also makes a vague reference to other portions of the notice not being in conformity with Chapter 306 without identifying what portions or how they are not in conformity. That paragraph of the letter effectively puts the City on notice of absolutely nothing.

As recited earlier, none of the Plaintiffs nor their attorney showed up at the hearing on the matter on July 10, 2017. No complaints were expressed as to the appraisal used or the form of the notices.

No bids were received by the bid deadline, which was July 13, 2017.

If Plaintiffs contended that the fair market value of the property was something less than the City indicated in its appraisal, the Plaintiffs, to keep the issue alive, needed to submit a bid in the amount that they contended was the fair market value. By failing to bid at all they've waived any right to object in these proceedings.

The matter came in front of the City Council again on July 17, 2017, at which time the City voted to go forward with the sale to Sunnyside South. Defendant's Exhibit K-D, App. 619, 640. Once again, neither the Plaintiffs nor their attorney appeared at that City Council meeting to voice any objection to the City's handling of the project.

A new Development Agreement was negotiated with Sunnyside South on September 11, 2017, and was approved by the City Council. See Defendant's Exhibit L-D, App. 650, 655.

Although Attorney Nagle had threatened, in his letter of July 7, 2017, that if the City went forward with the bidding process on July 13, 2017, he would file an Application to Show Cause why the City should not be held in

contempt, he filed no such action in advance of the bid opening (as he had on prior occasions, in an attempt to block the sale), and he filed no such action in July, August or September, 2017. In the face of this inaction by Plaintiffs, the City moved forward. Having received no bids on the property, and having complied with Iowa Code §306.23, the City proceeded to enter into a new Development Agreement with Sunnyside South. Defendant's Exhibit L-D, App. 650, 655.

After the new Development Agreement was approved by the City Council the City filed a Motion on September 25, 2017 asking the Court to lift the injunction and dismiss the pending legal challenge so it could go forward with the transfer to Sunnyside South pursuant to the new Development Agreement. App. 28. It was only after this Motion was filed, and on October 4, 2017, that the Plaintiffs filed the pending Application for Rule to Show Cause. This is too late. The Plaintiffs have waived their position by failing to appear at the hearing, by failing to submit a bid and then by sitting on their hands until after the City had entered into a new Development Agreement with Sunnyside South. The Plaintiffs waited nearly three months before filing an Application to Show Cause, and waited nearly five months from when they first received notice of the proposed sale pursuant to Iowa Code §306.23. Surely the point of a sixty day notice as

required by the code is to give the Plaintiffs time to object to defects in the notice before the bids are opened, rather than after. And surely the point of a sixty day notice is to give people sixty days to act, not five months.

Waiver has generally been defined as the voluntary or intentional relinquishment of a known right. *Anderson v. Low Rent Housing Commission of Muscatine*, 304 N.W.2d 239, 249 (Iowa 1981).

Closely related to the doctrine of waiver is the doctrine of estoppel by acquiescence, defined in *Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005) as follows:

> " '[E]stoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such time as would imply an intention to waive or abandon the right.' " *Garrett v. Huster*, 684 N.W.2d 250, 255 (Iowa 2004) (quoting *In re Marriage of Fields*, 508 N.W.2d 730, 731 (Iowa 1993)). "Although this doctrine bears an 'estoppel' label, it is, in reality, a waiver theory." *Westfield Ins. Cos. v. Econ. Fire & Cas. Co.*, 623 N.W.2d 871, 880 (Iowa 2001). Unlike equitable estoppel, estoppel by acquiescence does not require a showing of detrimental reliance or prejudice. *Id.* Estoppel by acquiescence applies when (1) a party "has full knowledge of his rights and the material facts"; (2) "remains inactive for a considerable time"; and (3) acts in a manner that "leads the other party to believe the act [now complained of] has been approved." 28 Am. Jur. 2d *Estoppel and Waiver* § 63, at 489–90 (200); *accord Anthony v. Anthony*, 204 N.W.2d 829, 834 (Iowa 1973) (stating estoppel by acquiescence "is applicable 'where a person knows or ought to know

> that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right' " (quoting *Humboldt Livestock Auction, Inc. v. B & H Cattle Co.*, 261 Iowa 419, 432, 155 N.W.2d 478, 487 (1967))).

The Plaintiffs have waived their right to object to this sale and are estopped by acquiesce for the reasons outlined above.

III. THE CITY HAS COMPLIED WITH IOWA CODE §306.23 THIS LAWSUIT SHOULD BE DISMISSED, AND THE INJUNCTION SHOULD BE LIFTED SO THE CITY CAN PROCEED WITH THE SALE TO SUNNYSIDE SOUTH, PURSUANT TO THE LATEST DEVELOPMENT AGREEMENT, AND THIS LEGAL CHALLENGE SHOULD BE DISMISSED.

Preservation of Error

Sunnyside South does not agree that the Plaintiffs have preserved error on this issue. To the contrary, Sunnyside South contends the Plaintiffs have not preserved error, and have waived all right to complain. See the discussion under Brief Point II.

Standard of Review

The standard of review for whether or not error has been preserved, which is a legal question, would be for errors at law. Interpretation of the injunctions language in this matter is a question of law. *Den Hartog v. City of Waterloo*, 891 N.W.2d at 436 (Iowa 2017). As such, the question of

whether the City has complied with the terms of the injunction should be reviewed for errors of law, and the findings of the District Court should not be disturbed if they are supported by substantial evidence. *Harrington v. University of Northern Iowa*, 726 N.W.2d 363, 365 (Iowa 2007).

Argument

On September 25, 2017 the City filed a Motion to lift the injunction so it could proceed with the sale to Sunnyside South pursuant to the most recent Development Agreement. It also requested a dismissal of this pending legal challenge. App. 28.

That request was joined in by intervenor Sunnyside South. App. 31.

That Motion has been resisted by the Plaintiffs. App. 33.

At the hearing on March 29, 2018, the City presented clear evidence that it has complied with Iowa Code §306.23. The Supreme Court, in its March 2017 decision, addressed the then pending objections to the notice. That time, as this time, there were four objections, which are dealt with at p. 438 of the decision. *See* 891 N.W.2d at 438.

The first objection was that the notices were deficient because Sunnyside South had been included as someone entitled to get notice. That objection is no longer relevant, since Sunnyside South was not included as a party entitled to have notice in the latest sale process.

The second objection, the last time around, was that Sunnyside South should not get a bid credit. The Supreme Court said that claim did not need to be addressed because Sunnyside South was not a preferential bidder under the statute, and Sunnyside South's interests only need to be addressed if and when there is a qualified bid submitted under the statute. This has never happened, and is one of the reasons the Plaintiffs now have no reason to complain. See discussion under Brief Point II.

The third objection, the last time around, was an insufficient legal description. The Supreme Court found that the legal description was adequate.

The final objection, the last time around, was that the appraisal was inadequate, and should not have included the value of the land as improved. Again, that objection was overruled.

Looking at the Application to Show Cause this time (the one filed October 4, 2017) the Plaintiff listed the following four objections:

A. Once again, an improper party was listed as an eligible bidder;

B. An improper and or inaccurate appraisal has been completed and provided as part of the Notice of the Proposed sale;

C. The Notices failed to comply with the conditions of sale as provided for in Iowa Code §306.23 & §306.24;

D. That the property purports to convey title subject to easements and restrictions which have not been established by law.

See paragraph 6 of the Application to Show Cause filed October 4, 2017, by Plaintiffs, App. 35, 36.

At the hearing on March 29, 2018, Plaintiffs modified their position somewhat and claimed that the notices were improper for the following four reasons:

1. The appraisal was improper.

2. The city was listed as an eligible bidder.

3. The legal description was inadequate.

4. The notice contained a statement that the city reserved the right to reject all bids.

Trial transcript p. 77-80.

On appeal we are now down to two issues: that the City used an improper method of appraisal and that the City improperly gave notice of sale and opportunity to bid to improper parties such as the City of Waterloo. Page 7 of Plaintiffs' Proof Brief.

The appraisal issue has been resolved by the decision received from the Iowa Supreme Court. It expressly calls for fair market value at or near the time of the notice of the impending sale, and for fair market value that

includes the value of the improvements made to the land by Sunnyside prior to the notices. *Den Hartog v. City of Waterloo*, 891 N.W.2d 430, 438 (Iowa 2017). The improvements made by Sunnyside include moving the road and platting the property as a residential development. These improvements were taken into account by the City's appraisal, as directed by the Supreme Court. They were not taken into account by the 2016 appraisal proffered by the Plaintiffs, which sought to treat these as "remnant parcels." Indeed, the appraiser who did the 2016 appraisal, Kyran "Casey" Cook could not have taken into account the Supreme Court decision of March 10, 2017, because his appraisal was issued one year before it came down. Plaintiffs' Exhibit 33, App. 378.

On the appraisal issue, it is more than a little ironic that at the hearing in front of Judge Dryer, back on May 28, 2015, the City tried to submit a retroactive appraisal, which would have estimated the value of the land that was to be transferred prior to the improvements. Of course this was a much lower appraisal, since it did not include the value of the improvements made by Sunnyside South in the meantime. At that time the Plaintiffs' position was that the appraisal process was improper because the resulting appraisal was too low. Judge Dryer agreed, and in her ruling filed June 4, 2015, held that the fair market value should be the value of the property at the time the

notice is sent. App. 25. The Supreme Court has affirmed on that point. 891 N.W.2d at 438. So initially Plaintiffs complained that the City's appraisal was too low. Now they complain that the City's appraisal is too high.

The City's appraisal is in compliance with the Supreme Court decision. In reviewing the District Court's finding on this issue, the reviewing Court should consider the two options available to the District Court. One was a 2016 appraisal (Plaintiffs' Exhibit 33, App. 378) which treated these as remnant parcels, giving no value whatsoever to the value of the improvements. This was an appraisal that came down before the latest Supreme Court decision on the matter. The other appraisal in front of the Court, and the one that it found was proper, is Mr. Herink's appraisal, Exhibit D-D, App. 464. This appraisal was issued after the Supreme Court decision, and took it into account, and in accordance with the Supreme Court directive took into account the fair market value including the value of the improvements made to the land by Sunnyside prior to the notices.

Plaintiffs were urging the Trial Court to accept an appraisal performed by Kyran "Casey" Cook performed on March 8, 2016 (Plaintiffs' Exhibit 33). Mr. Cook was deposed on December 12, 2017, and his deposition testimony was offered and received into evidence at the hearing of March 29, 2018. Trial transcript p. 119.

While the Plaintiffs take the City appraisal to task primarily because the City appraiser, James Herink, came up with a value for the entire parcel, and then prorated it, it is clear that Plaintiffs' appraiser did exactly the same thing. Mr. Cook did one appraisal (not four). Cook deposition, App. 133. He defined the "subject property" as all four parcels. Cook deposition, App. 134 and p. 4 of Exhibit 33, App. 382. The summary of his values can be found at p. 6 of Exhibit 33, in the table. He mechanically said the value of the land was $20,000 an acre. If you add his columns for total value the total value of the subject property is $194,400. Exhibit 33, electronic p. 6, App. 383.

If you use the "use" numbers he came up with, which are rounded up in three instances and down in one instance you come up with the total value of the subject property as $195,000.

To get the value of any one parcel you simply take the value per acre times the number of acres. In other words, he prorated it, based upon the size of each respective parcel. This is exactly the procedure used by the City's appraiser.

Cook conceded that the highest and best use of the property is as development for residential homes. Cook deposition, App. 144.

Cook conceded that the City's estimate of value is reasonable if you assume the four tracts will eventually be united into a single housing development. Cook deposition, App. 112, 113 and 145 ("I've probably appraised fifty subdivisions. I'd be surprised if it was any less than that"). He admits that if you could sell these lots to a single purchaser, it would be worth "A hell of a lot more than $20,000 an acre. No question about it." Cook deposition, App. 146.

Cook also conceded that if someone was buying one of these remnant parcels, they would be buying it in anticipation of there being a reasonable chance that they could unite all four parcels. Cook deposition, App. 101-102. And in a candid admission, Cook eventually confessed to the game that's afoot here:

> Q: Well - - sorry. Parcel. They're going to pay $84,000 for parcel 2 when they aren't going to get clear title.
>
> A. That's your interpretation. That's not my interpretation. What I'm looking at is, they can buy that and then Sunnyside is going to have to work it out with them. Not vice versa.
>
> Cook deposition, App. 142.

So what Cook is trying to enable his clients to do is to buy this already improved land at a steep discount and then eventually sell that remnant parcel to Sunnyside South at a premium. Obviously we are now far

removed from the purposes of Iowa Code §306.23 and no longer in the realm of what's best for the City of Waterloo or its taxpayers. Now we are talking about money the Molinaro family can make by buying the property at a steep discount and extorting a high price from Sunnyside South to go forward with the project.

Cook took the City appraiser to task for assuming clear title and yet he made the identical assumption. He appraised the property in fee simple. Cook deposition, App. 133.

While Cook claimed out of the other side of his mouth that the lots do not have clear title (Cook deposition, App. 142 lines 7-9), he still suggests that somebody would pay $20,000 an acre for ground for which they are not getting clear title. Cook deposition, App. 142 lines 10-15. This testimony is inconsistent and unpersuasive.

Cook can hardly be faulted for failing to take in the Supreme Court's decision of 2017, since he issued his appraisal in March of 2016. But he wasn't deposed until December 12, 2017. On the issue of whether or not his appraisal takes into account the value of the improvements, he made it clear that it does not:

> So that person is buying an individual remnant parcel with the potential of unifying it and, by doing that, capitalizing on the value of the infrastructure that is there. That is what's integral

> to these improved lots. That value isn't there until they get to the point where they can actually sell these lots. That's not the case right now, and it wasn't the case when I was appraising this property.
>
> Cook deposition, App. 100.

In other words, he is assigning no value to the improvements made by Sunnyside South, in direct contravention of the Supreme Court's directive to do so.

The District Court was right in rejecting Cook's appraisal, and by no stretch of the imagination can it be said that the District Court erred in upholding the City's appraisal.

The fact that the appraisals vary is hardly newsworthy, and certainly no basis for overturning the District Court's decision. Mike Jackson, the Plaintiffs' witness from the Department of Transportation, admitted on cross examination that two different values for any particular parcel is not unusual. It's the norm. Trial transcript p. 113-114. And of course it's common that appraisers might use different methods for coming up with those different values. Trial transcript p. 114.

Plaintiffs complained that the City of Waterloo was listed as an eligible bidder, but unequivocal evidence at the hearing showed that the City owns property in each of the four tracts which makes it eligible to receive

the notice. The City, perhaps a bit gun-shy by now, was fearful that if it did not include itself the Plaintiffs would object to the notices on that basis.

The property owned by the City in the adjacent parcels was clearly outlined and described in Exhibit I-D. App. 601, 602.

Finally, the Plaintiffs now complain about the notice because it contains a "right to reject" clause. This was a new theory that Plaintiffs first introduced on the day of the hearing. It is not mentioned in Dave Nagle's letter to the City (Exhibit 36, App. 462); the Plaintiffs' Application to have the City held in Contempt or the Plaintiffs' Resistance to the City's Motion to have the Injunction Lifted. Once again, the duplicity of Plaintiffs' position is readily apparent. The Plaintiffs called a witness from the DOT, apparently in an effort to suggest to the Court that the City of Waterloo had some legal obligation to act in accordance with the policies and procedures established by the DOT. There is no such legal obligation. The DOT witness called by the Plaintiffs, Mike Jackson, testified to a four-step process it follows. Trial transcript p. 105. But only the first step has anything to do with compliance with Iowa Code §306.23. Trial transcript p. 105. Step one is determining the owner at the time of the acquisition and the present owner of the remaining tract if it is a parcel acquisition. Then they send out an offer to buy. If they receive an offer from someone who is eligible to

receive it that equals or exceeds the appraised amount, then they sell to them. That's step one, and that fulfills the code. Trial transcript p. 105. The City has done all of those things to the extent that it could. Of course it couldn't sell to someone who made an offer, since no offers were received.

But as acknowledged in Jackson's testimony, the other three steps that the DOT follows are not code requirements.

That said, it's more than a little ironic that the Plaintiffs would now argue that the City should follow DOT practices and procedures in the one breath, and in the next breath ignore the fact that the right to reject clause is found in the DOT notices which were used as a template by the City of Waterloo as it prepared its notices. The Plaintiffs submitted the DOT manual. A copy of the template of the notice used by the DOT is found in the Appendix, p. 332. The DOT always includes this very language. Plaintiffs complain at length if the City does anything to deviate from the way DOT does things, but then in this instance, when it suited them, the Plaintiffs complained when the City acted in accordance with the way the DOT did things.

The objection is without merit.

All of these objections are beside the point in any event. The City did not bid. The City did not reject any bids. None of the preferred bidders,

however that class of people is defined, made bids by the deadline established in the notices. The City never had to reject a bid because no bids were ever received.

IV. THE TRIAL COURT CORRECTLY HELD THAT THE CITY OF WATERLOO SHOULD NOT BE HELD IN CONTEMPT.

Preservation of Error

Intervenor, Sunnyside South, does not concede that the Plaintiffs have preserved error on this issue. It is the position of Sunnyside South that Plaintiffs waived all right to complain about the notice, including any opportunity to argue contempt, by failing to object to the notices at the hearing prescribed for that purpose, within the sixty days as allowed by the statue. See the argument under Brief Point II.

Standard of Review

The Iowa Supreme Court has attempted to discuss the special standard of review of facts in contempt cases in the earlier decision in this case, *Den Hartog v. City of Waterloo*, 891 N.W.2d 430 (Iowa 2017). Proof beyond a reasonable doubt must be established for a finding of contempt, and a ruling on the contempt issue must be supported by substantial evidence. The Supreme Court reviews the District Court's conclusions of law for errors at law.

However, the matter is complicated by the fact that the error urged by Plaintiffs in their Appeal Brief is a failure of the District Court to consider evidence predating the last Supreme Court decision. That's an evidentiary ruling. A District Court's rulings on evidence are reviewed under the standard of abuse of discretion. *Hutchison v. American Family Mutual Insurance Co.*, 514 N.W.2d 882, 885 (Iowa 1984); *Henkel v. R&S Bottling Co.*, 514 N.W.2d 185, 193 (Iowa 1992). In order to show an abuse of discretion the Appellant must show that the Court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Martinez*, 621 N.W.2d 689 (Iowa App. 2000).

Argument

It follows, logically and legally, that if the Court is persuaded that the City complied with Iowa Code §306.23, then it cannot be held in contempt.

Since the District Court found that the City had complied with Iowa Code §306.23, it follows that the City has not acted in contempt. It has complied with the statute. If the District Court is affirmed on the first issue, i.e. that the City has complied with 306.23 (as it should be), then this issue is moot.

As the last Supreme Court decision in this case stated, for a party to be found in contempt of a Court Order there must be findings, beyond a

reasonable doubt, that the party acted in willful disobedience of that Court Order. *Reis v. Iowa District Court*, 787 N.W.2d 61 (Iowa 2010). What the City has tried to do here, repeatedly, is comply with the code section so that this long-stalled housing development can go forward. It is instructive that while the Supreme Court in its last decision found the notice to be inadequate in two respects, it did not find those shortcomings to be contemptuous. *Den Hartog v. City of Waterloo*, 891 N.W.2d 430, 439 (Iowa 2017). In so finding the Supreme Court noted the limited interpretive guidance available on this seldom-cited statute. *Den Hartog v. City of Waterloo*, 891 N.W.2d 430, 439 (Iowa 2017).

All of the shortcomings noted in the last Supreme Court decision have been addressed by the City of Waterloo in its recent notice. Sunnyside South is no longer listed as an eligible bidder and the property has been appraised to include the value of improvements made by Sunnyside South prior to the notice going out.

As a further observation, Plaintiffs, in their Brief, wander into many factual arguments that were not in evidence at the hearing in front of Judge Stochl. To the extent that they have gone well beyond the record in their Brief, that issue will be addressed in part V of this Brief. But there is also an underlying legal point which cannot be overlooked. As Judge Stochl

observed, up to the time of the Iowa Supreme Court decision of 2017, the City was found not to be in contempt. Plaintiffs do not get a second crack at that argument. Any conduct preceding that decision is beyond the pale here. The Supreme Court's 2017 decision is the law of the case on whether or not the City had acted in contempt of court by conduct preceding that decision. As such it is binding on all further proceedings in the case. See *Lee v. State*, 874 N.W.2d 631, 646 (Iowa 2016). Further, and alternatively, Plaintiffs are prohibited from rearguing things that have already been decided by the doctrine of issue preclusion. See *George v. D.W. Zinger Co.*, 762 N.W.2d 865, 868 (Iowa 2009).

Plaintiffs' argument in part II of its Brief that the Trial Court erred by limiting evidence on contempt to those actions taken by the City after Den Hartog II is not well taken. To the contrary, it would have been a violation of the doctrines of law of the case and issue preclusion for the Trial Court to consider actions that have already been litigated, and already determined not to be contempt.

As a final observation on this issue, the Plaintiffs did not preserve error on the issue. The Trial Court observed that it was not going to re-litigate everything that's happened over the last eight years. Trial transcript

p. 79. Plaintiffs' counsel's response was "I have no intention of doing that…" Trial transcript p. 79.

The conduct of Plaintiffs' counsel in arguing facts beyond the record was pointed out in his closing comments to the Court. See the exchange at transcript p. 129-133. When reminded of the fact that he was arguing facts beyond the evidentiary record, the response of Plaintiffs' counsel was "Oh. Oh, dear." Trial transcript p. 129.

Confronted with this glaring deficiency, there was no offer of proof. To the contrary attorney Nagle argued he would bring these issues up at a subsequent hearing. Trial transcript p. 132. That subsequent hearing was never held, and the issue has never been preserved for this Court to rule upon. To the contrary, the Application filed on the eve of hearing by the Plaintiffs was dismissed on July 25, 2018, by Judge Dryer, App.722, and no appeal has been taken from that Ruling.

The issue on the Plaintiffs' application for contempt was whether or not the City of Waterloo had engaged in contemptuous behavior from the date of the last Supreme Court decision to the date of the hearing in front of Judge Stochl. Clearly the City had not engaged in such behavior, and Judge Stochl was correct to so find.

V. PLAINTIFFS HAVE GONE BEYOND THE RECORD IN THEIR STATEMENT OF FACTS AND ARGUMENT IN THEIR APPEAL BRIEF.

Argument

Rule of Appellate Procedure 6.801 provides: "Only the original papers and exhibits filed in the district court, the transcripts of proceedings, if any, and a certified copy of the docket and court calendar entries prepared by the Clerk of District Court in the case from which appeal is taken shall constitute the record on appeal." Iowa Rule of Appellate Procedure 6.801.

Plaintiffs have veered from the record made in front of Judge Stochl in their appeal Brief. Starting at the bottom of page 16 of their Proof Brief and continuing over to page 18 they cite numerous facts that are not in the record. The deposition of Noel Anderson, whenever it was taken, was not offered into evidence at the hearing on March 29, 2018. Although exhibits from that deposition were identified as trial exhibits by the Plaintiffs, they were not offered. Transcript p. 3, 63 and 64.

Further, there is a statement at the bottom of page 26 that states "For the investment company in which the then City Attorney was a major owner, the value of his land was enhanced." The reference there is Cook deposition, App. 117-118. Those are not facts established by Cook, who had no idea who owned the property, or what the former City Attorney's interest was in

Sunnyside South. The "facts" were part of a hypothetical question posed by attorney Nagle which was objected to at the time for assuming facts not in the record and misstating the record. And those facts were never established at the hearing in front of Judge Stochl. To restate them now as established facts, and citing an objected to hypothetical as the portion of the record that does that, is misleading.

Plaintiffs also took a radical departure from the record at p. 37-39 of their Proof Brief. Several rhetorical questions are raised, with an answer eventually suggested. Most of the facts referred to in that sequence are before the 2017 Supreme Court decision, and were not in evidence at the hearing in front of Judge Stochl. As such they cannot be considered by the reviewing Court on this appeal.

Appellate Courts cannot consider materials that were not before the District Court when the Court entered its judgment. *Alvarez v. IBP, Inc.*, 696 N.W.2d 1, 3 (Iowa 2005).

Sunnyside South requests that those portions of Appellants' Brief that go beyond the record be stricken and not considered by the Appellate Court in the disposition of this appeal.

VI. PLAINTIFFS ARE NOT ENTITLED TO ANY RELIEF UNDER IOWA CODE §661.15.

Preservation of Error

No error has been preserved on this issue. The matter was first raised in a filing on the eve of this hearing, and was not heard at the hearing in front of Judge Stochl. The Motion raising this suggestion was later dismissed by Judge Dryer, and there was no appeal from that Order. There is nothing in front of this Court to review.

Argument

At 3:11 p.m. on March 28, 2018, Plaintiffs filed an Application for Sanctions & Relief, Application for Fines for Violation of the Writ of Mandamus. This was the eve of the hearing in front of Judge Stochl. In Division II of that Application Plaintiffs sought relief under Iowa Code §661.13. It was agreed that this late filing would not be addressed by Judge Stochl and would be taken up later. Trial transcript p. 132-133. So this matter was never in front of Judge Stochl, and, as such, was never ruled upon by Judge Stochl.

After Judge Stochl's ruling Sunnyside South, on June 22, 2018, moved the Court to dismiss the March 28, 2018 filing. That Motion was on June 22, 2018. App. 716.

On July 25, 2018, Judge Dryer entered an Order dismissing the March 28 filing. There has been no appeal from Judge Dryer's Order.

Matters cannot be raised for the first time on appeal. *Stammeyer v. DNE, Department of Public Safety*, 721 N.W.2d 541 (Iowa 2006) (issues must ordinarily be both raised and decided by the District Court before Appellate Court will decide them on appeal). *Stewart v. Sisson*, 711 N.W.2d 713 (Iowa 2006) (Supreme Court's limited role as an Appellate Court acts to constrain its ability to decide issues not presented to the District Court).

Because this matter was never addressed by the Trial Court, Plaintiffs cannot be heard to argue it on appeal now.

Further, given the fact that the City of Waterloo prevailed at the hearing, and that Judge Stochl specifically found that the City of Waterloo had complied with Iowa Code §306.23, there would be no basis for the Motion filed on March 28 in any event. The findings of the District Court make moot all of the complaints in the March 28 filing.

CONCLUSION

To the extent that the Plaintiffs initial objective in bringing this litigation was to stall out the project, at great expense to the City and the developer, they have succeeded. The matter has drug on for years. But it is time to bring it to an end. At p. 39 of their Proof Brief, the Plaintiffs refer to protracted and expensive litigation. This has certainly been that. But it has

been initiated at every step by Plaintiffs, not the City, and has cost the City untold resources that could have been put to better use.

This lawsuit should be dismissed because Plaintiffs have no standing. In the alternative, it should be dismissed because Plaintiffs have waived their position by not appearing at hearings and not submitting a bid, all as outlined in Brief Point II. Finally, the District Court should be affirmed in its findings that the City has complied with Iowa Code §306.23 and that the City of Waterloo is no longer enjoined. The injunction previously issued by the District Court should be lifted so the City can proceed with the sale of the property in accordance with the most recent Development Agreement.

REQUEST FOR NON-ORAL SUBMISSION

Sunnyside South requests that the issue be submitted to the Court of Appeals for decision without oral argument.

CERTIFICATE OF FILING AND SERVICE

I, David L. Riley, hereby certify that I filed the attached Intervenor Plaintiff's Final Brief through EDMS on the 4th day of January, 2019.

/s/ David L. Riley

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CERTIFICATE OF COMPLIANCE

1. This Final Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because:

   - This Proof Brief contains 8,350 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Final 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 Final Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.