IN THE COURT OF APPEALS OF IOWA

No. 6-1039 / 06-0979
Filed February 28, 2007

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EDWARD SEBSATIAN, DENNIS BEST, DON & CAROL LACY, RONALD & MARY SNELL, GENE & KAREN ZACH, TERRY & JUDITH POTTER, RONALD SHIMON, MARCELLA MARTINSON, JOHN & DOROTHY MONAHAN, JERRY & LULUBEE KING, VERLA BENISH, RONALD & MARY SCOTT, HAROLD SCHRADER, RODNEY & DEBRA CLARK, MYRTLE NOVAK, HENRY & JUDITH BURESH, LEO LAMPAREK, RICHARD & NADINE THOMPSON, DALE MESKIMEN, KAREN VOLESKEY, GILBERT BOXA, JOYCE LINS, ROBERT & ANGELA RODREGUEZ, RICHARD & NADINE THOMPSON, DOROTHY LEMASTER, RONALD & BETTY MOORE, ADAM MORTZ, ELDON VOLESKY and CLARENCE J. MESKIMEN TESTAMENTARY TRUST,
Plaintiffs-Appellants,

vs.

CITY OF FAIRFAX, IOWA, and CITY OF CEDAR RAPIDS, IOWA,
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, David M. Remley, Judge.

Plaintiffs appeal from a ruling granting defendants' motions for summary judgment and dismissal. **AFFIRMED.**

Jon M. McCright of Fisher, Ehrhart & McCright, Cedar Rapids, for appellants.

Terry Abernathy and Stephanie L. Hinz of Pickens, Barnes & Abernathy, Cedar Rapids, for appellee-City of Fairfax.

James H. Flitz, Cedar Rapids, for appellee-City of Cedar Rapids.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Plaintiffs appeal the district court's ruling dismissing their petition on summary judgment. Plaintiffs contend the district court erred in finding the City of Fairfax and the City of Cedar Rapids substantially complied with Iowa Code section 368.4 (2001) when they entered into an intergovernmental annexation moratorium agreement. We affirm.

I. Facts and Prior Proceedings

On March 14, 2001, Cedar Rapids and Fairfax entered into an intergovernmental agreement providing that Cedar Rapids would allow Fairfax to connect to a sewer line within an area of land situated between the two cities. The agreement also limited future annexations between the two cities. The agreement drew a line between the cities and imposed a twenty-four-year moratorium on annexing land located on the other side of the line.

On June 10, 2004, plaintiffs, owners of property in an area between the cities, filed a petition for declaratory judgment requesting the court find the intergovernmental agreement invalid. Plaintiffs filed a motion for summary judgment, asserting the agreement was invalid for the following reasons: (1) the notices published by the cities were deficient, (2) the agreement provided for a twenty-four-year moratorium, while Iowa Code section 368.4 limits such agreements to ten-year periods, and (3) a copy of the agreement was not submitted to the City Development Board within thirty days, as set forth in section 368.4. Plaintiffs also argued the deficient notice violated their constitutional rights. Fairfax and Cedar Rapids filed cross-motions for summary judgment, arguing the agreement was legal and enforceable because it substantially

complied with statutory requirements. The district court entered a ruling denying plaintiffs' motion for summary judgment and granting the cities' motions for summary judgment, resulting in dismissal of plaintiffs' case.

II. Standard of Review

When reviewing a district court's decision to grant summary judgment, our task is to determine whether a genuine issue of material fact exists and whether the law was correctly applied. *Iowa Grocery Indus. Ass'n v. City of Des Moines*, 712 N.W.2d 675, 678 (Iowa 2006). In this case, the parties agree there is no dispute with respect to the material facts of the case; the disagreement centers on the interpretation of the law. Our role is to decide whether we agree with the district court's application of the law to the undisputed facts before us. *Id.* Therefore, our review is for correction of errors at law. *Id.*

III. Merits

A. Improper Notice

Plaintiffs contend the agreement is invalid because the notices published by the cities did not contain a legal description of the land potentially affected by the intergovernmental agreement.

At the outset, we note that "a failure to literally comply with every word of our annexation statutes is not fatal." *City of Des Moines v. City Dev. Bd.*, 473 N.W.2d 197, 200 (Iowa 1991). "Substantial compliance with prescribed procedural law is sufficient, and legislation establishing the method by which municipal corporate boundaries may be extended is to be liberally construed in favor of the public." *Id.* (citations omitted).

At the time the cities entered into the intergovernmental agreement,[1] section 368.4 provided:

> A city, *following notice and hearing*, may by resolution agree with another city or cities to refrain from annexing specifically described territory for a period not to exceed ten years and, following notice and hearing, may by resolution extend the agreement for subsequent periods not to exceed ten years each. Notice of a hearing shall be served on the board, and a copy of the agreement and a copy of any resolution extending an agreement shall be filed with the board within thirty days of enactment. If such an agreement is in force, the board shall dismiss a petition or plan which violates the terms of the agreement.

(Emphasis added.) The cities published independent, yet nearly identical, hearing notices in the *Cedar Rapids Gazette* on March 3, 2001. The Cedar Rapids notice stated:

> NOTICE OF PUBLIC HEARING
>
> NOTICE IS HEREBY GIVEN that the City Council of the City of Cedar Rapids, Iowa, will hold a Public Hearing in Council Chambers, 4th Floor City hall, Cedar Rapids, Iowa at 9:00 A.M. on the 14th day of March, 2001 to consider an intergovernmental agreement (28E Agreement) with the City of Fairfax, regarding the provision of sanitary sewer to a specific area and the future annexation of properties between the two cities.
>
> Any person interested in this matter may appear at the public hearing and be heard.

Plaintiffs claim this notice was insufficient and improper. Plaintiffs claim two decisions of the Iowa Supreme Court, *Anderson v. City Development Board*, 631 N.W.2d 671 (Iowa 2001), and *Gorman v. City Development Board*, 565 N.W.2d 607 (Iowa 1997), imply that "notice" requires either a published notice

[1] Iowa Codes section 368.4 has been amended numerous times since the agreement was signed. It now provides that notice must be published in an official county newspaper and the notice "shall include the time and place of the hearing, describe the territory subject to the proposed agreement, and the general terms of the agreement." Iowa Code § 368.4 (2007).

setting forth the proper legal description of the land subject to the moratorium agreement or actual notice in the form of a map showing the boundaries of the proposed area. We do not read these cases to establish such a requirement.

Gorman is easily distinguishable from the present case. *Gorman*, 565 N.W.2d at 609, analyzes the procedures for voluntary annexation of property under section 368.7, while the present case concerns moratorium agreements between neighboring cities under section 368.4. *Id.* Also, section 368.7 specifically requires that notice of the application for voluntary annexation must be published in an official county newspaper and such notice must include a legal description of the property, while section 368.4 only requires "notice and hearing" before a city may "agree with another city or cities to refrain from annexing" property. *Gorman* does not discuss the procedural requirements for moratorium agreements, let alone imply any specific requirement that the published notice for such agreements contain a legal description of the land subject to the agreement. We therefore find it inapplicable to the case at hand.

Anderson does analyze section 368.4, but it does not establish any affirmative duty to publish a legal description or a map of the land affected by the agreement. In *Anderson*, a property owner filed a petition to involuntary annex the unincorporated territory of "West Carlisle" into the City of Carlisle. *Anderson*, 631 N.W.2d at 672. The petition was dismissed because an existing moratorium agreement between Carlisle and the City of Des Moines precluded the annexation of West Carlisle by Carlisle for a period of ten years. *Id.* at 673. On appeal, the property owner argued the moratorium agreement was invalid because statutory procedures were not followed. *Id.* at 675. The alleged errors

included: (1) a typographical error in the description of the land subject to the moratorium agreement presented to the Des Moines City Council and in the notice published by Carlisle, (2) inadequacy of the description of the affected land in the actual moratorium agreement, and (3) failure to provide notice to the Board as required to effectuate the moratorium agreement. *Id.*

The supreme court rejected these arguments and did not invalidate the agreement. *Id.* at 676-77. The court noted the typographical error stemmed not from an improper description of the territory, but from an inconsistent statement as to what direction the territory lays from each city. *Id.* at 676. The court found this error was "inconsequential to the notice of the citizens of West Carlisle" because the map clearly showed what directions were implicated. *Id.* Also, the court rejected Anderson's argument that the agreement was invalid due to the ambiguous description of the affected land. *Id.* The court held "insufficiency in the description of the land is not enough to invalidate [a moratorium] agreement." *Id.* Instead, "a showing that the description is in fact incorrect is required" to invalidate the agreement. *Id.*

We do not read *Anderson* to stand for the proposition that notice under section 368.4 requires publication of a *legal* description or map of the property affected. The facts in *Anderson* do not distinguish whether the published notice contained a legal description of the properties affected by the moratorium or a generic description of the affected property. Consequently, we cannot impute that our supreme court heightened the notice requirement in 368.4 to include a published legal description of all potentially affected property.

Here, the published notice clearly states that a public hearing would be conducted regarding an agreement as to "future annexation of properties between the two cities." As noted by the district court, "the plain language of the notice indicates that all property lying geographically between the two cities would be affected by the agreement."[2] This notice was sufficient to alert residents who lived between the cities that the cities were considering a measure that might affect their property's future. Residents could have contacted either city to learn whether their land was the subject of the agreement. In addition, the agreement considered at the public hearings included both an accurate legal description of the subject property as well as a map indicating the subject area.

We find the published notice substantially complied with the statutory procedure set forth in section 368.4.

B. Improper Length of Moratorium

Plaintiffs also argue the moratorium agreement is facially invalid because section 368.4 limits moratorium agreements to ten years and the duration of this agreement is twenty-four years. Cedar Rapids and Fairfax concede the duration provision was invalid, but argue the remaining portions of the agreement can be enforced.

Under Iowa law, "when a portion of an agreement is deemed invalid, the remaining portions of the agreement can be enforced as long as they can be separated from the illegality." *Miller v. Marshall County*, 641 N.W.2d 742, 752 (Iowa 2002) (citations omitted). The illegality of a provision in a contract does not vitiate the entire contract. *Sisters of Mercy v. Lightner*, 274 N.W. 86, 95 (Iowa

[2] The agreement and corresponding map indicate that virtually all property between Cedar Rapids and Fairfax was affected by the agreement.

1937). "For example, if the invalid portion is merely incidental to the primary purpose of the contract, the contract remains in effect." *Miller*, 641 N.W.2d at 752. However, if the contract would not have been entered into independent of the invalid portion, the entire contract is void. *Id.*

The agreement's duration provision states that the cities could mutually agree to extend or curtail the duration of the contract. Plaintiffs do not contend that the agreement would not have been entered into absent the twenty-four-year term. We deem the invalid portion of the agreement to be incidental to the primary purpose of the contract. At the time of trial, the agreement had been in effect for only five years. Therefore, enforcement of the agreement would not run counter to the ten-year limitation set forth in section 368.4.

Because the cities had the statutory authority to enter into a moratorium agreement and followed the proper procedure to do so, we find the agreement was not facially invalid and the district court properly separated the duration provision from the agreement. *See, e.g.*, *Deering v. Hyde*, 563 P.2d 693, 695 (Or. 1977) (holding that third party could not challenge a twenty-year franchise for garbage collection even though ordinance limited such agreements to five years); *Cartersville Improvement, Ga. & Water Co. v. City of Cartersville*, 16 S.E. 25 (Ga. 1892) (holding that although state constitution prohibited city from contracting for natural gas for longer than one-year period without an election, twenty-year agreement remained operative from year-to-year).

C. Failure to Timely File Agreement with City Development Board

Plaintiffs also argue the agreement is invalid because the cities did not provide a copy of the agreement to the City Development Board (Board) within thirty days of its enactment[3] as required by section 368.4. Cedar Rapids and Fairfax contend this filing provision is directory, rather than mandatory, therefore the failure to file the agreement in a timely manner does not constitute sufficient grounds to invalidate the agreement.

The difference between mandatory and directory statutes is in the consequences of failing to perform the duty which is imposed. *Taylor v. Department of Transp.*, 260 N.W.2d 521, 522 (Iowa 1977). If the duty imposed by the provision is essential to the main objective of the whole statute, the provision is mandatory, and failure to perform the duty will invalidate subsequent proceedings under the statute. *Id.* at 522-23. Conversely, "[i]f the duty is not essential to accomplishing the principal purpose of the statute but is designed to assure order and promptness . . . the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown." *Id.* at 523. This "dichotomy does not refer to whether a statutory duty is obligatory or permissive but instead relates to whether the failure to perform an admitted duty will have the effect of invalidating the governmental action which the requirement affects." *Id.*

Whether a statutory provision is mandatory or directory depends upon legislative intent. *Id.* at 522. When statutes do not resolve the issue expressly, statutory construction is necessary. *Id.*

[3] Cedar Rapids filed a copy of the agreement with the Board thirty-three months after the agreement was signed.

Chapter 368 explicitly states the general assembly's intent behind annexation legislation. Section 368.6 provides:

> It is the intent of the general assembly to provide an annexation approval procedure which gives due consideration to the wishes of the residents of territory to be annexed, and to the interests of the residents of all territories affected by an annexation.

In light of this express intent, we conclude the main purpose of section 368.4 is to give due consideration to the residents of the territory affected by the annexation moratorium. *See City of Clinton v. Owners of Prop. Situated within Certain Described Boundaries*, 191 N.W.2d 671, 674 (Iowa 1971) (stating "statutes providing for the method of extending corporate boundaries are to be construed liberally in favor of the public"). Our supreme court made a similar conclusion in *Anderson* when the plaintiffs argued a moratorium agreement was invalid because the Board was not properly notified of the agreement. *Anderson*, 631 N.W.2d at 675-76. [4] The court found the Board's involvement in the process was "incidental to the greater purpose of providing those affected by the agreement with notice" and concluded the lack of notice to the Board did not substantially affect the validity of the moratorium agreement. *Id.* at 676.

Because the main purpose of providing notice and due consideration to affected property owners can still be attained when a copy of the agreement is not forwarded to the Board in a timely manner, we hold this provision is directory and prejudice must be shown before violation of the provision can be grounds for invalidating the contract. Plaintiffs point to no reason why the delay prejudiced them in any way. Therefore we do not find the agreement invalid.

[4] At the time *Anderson* was decided, section 368.4 stated the Board was to receive two copies of the agreement. Anderson argued the agreement was invalid because the Board only received one copy.

D. Deprivation of Constitutional Rights

Plaintiffs contend they were deprived their constitutional rights because the notice given by Cedar Rapids and Fairfaix could not be reasonably expected to alert those affected by the proposed agreement to the exact location of the proposed boundaries and the deficient notice deprived the property owners of the opportunity to be heard.

The fundamental elements of due process are notice and an opportunity to be heard. *City of Des Moines*, 473 N.W.2d at 201. Both elements were satisfied in this case. As discussed above, the plaintiffs received sufficient notice when Cedar Rapids and Fairfax each published notice that a public hearing would be held on a proposed agreement addressing "annexation of properties between the two cities." Each city held a public hearing on the agreement at the date and time specified by the notice. All property owners were given sufficient opportunity to be heard and present arguments. We find no constitutional violation here.

IV. Conclusion

We have considered all of the parties' arguments on appeal, and except as discussed above, we find them waived, without merit, or unnecessary to the disposition of this case. For the foregoing reasons, we find the district court did not err in granting summary judgment. The district court's ruling dismissing plaintiffs' claim on summary judgment is affirmed.

AFFIRMED.