**IN THE COURT OF APPEALS OF IOWA**

No. 8-1056 / 08-0986
Filed April 8, 2009

**NT HOME BUILDERS, L.L.C., a Limited Liability Corporation,**
Plaintiff-Appellant,

**vs.**

**CITY OF BUFFALO, IOWA, an Iowa Municipality,**
Defendant-Appellee.

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Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

The plaintiff appeals from the district court's order denying its request for specific performance and denying its full request for damages. **AFFIRMED.**

Stephen Fieweger of Katz, Huntoon & Fieweger, P.C., Moline, Illinois, for appellant.

Michael Walker of Hopkins & Hueber, P.C., Davenport, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ.

**MANSFIELD, J.**

This case requires us to interpret the terms of a pre-annexation agreement between NT Home Builders (the plaintiff-appellant, hereafter NT) and the City of Buffalo (the defendant-appellee). Because we find that the agreement did not entitle NT to "B-1 Residential" zoning, we affirm the judgment of the district court.

## I. Background Facts and Proceedings

In 2004, NT, a real estate development company, purchased real estate adjacent to the City of Buffalo intending to develop the rural land into residential lots. On June 12, 2006, Buffalo and NT entered into a pre-annexation agreement, which was approved by the Buffalo City Council. That agreement required NT to "request that the property be zoned for single family residences" and stated that NT "shall be subject to and comply with all other ordinances of the Buffalo Municipal Code."

Attached to the pre-annexation agreement was Exhibit B, a development agreement. The pre-annexation agreement stated that the parties had agreed to enter into a further agreement containing "the substantially same terms and conditions" as Exhibit B. Exhibit B in turn contained exhibits which showed that NT would be building approximately eighty-two homes on an equal number of lots on the property in question.

On September 28, 2006, NT applied for annexation. NT also reimbursed the City $2643.10 for attorney and engineering fees. On November 13, 2006, Buffalo granted NT's application. Buffalo's zoning code provides that newly annexed land shall be considered "A–Country Home." This is a form of single

family residence zoning that requires each individual lot to have a frontage of 100 feet and a total square footage of at least 20,000 square feet.

Subsequently, NT requested that Buffalo re-zone the property to B-1 Residential, a single family residence zoning that requires each individual lot to have a frontage of seventy-five feet and a total square footage of at least 7500 square feet. On May 7, 2007, the city council denied NT's request to re-zone the property.

On July 20, 2007, NT filed suit naming Buffalo as the defendant. NT alleged that the pre-annexation agreement required Buffalo to zone the property B-1 Residential and requested that Buffalo be ordered to re-zone the property from A-Country Home to B-1 Residential. In the alternative, NT requested damages in excess of $1,000,000. NT contends Buffalo's refusal to modify the A-Country Home zoning to B-1 Residential has rendered the project economically infeasible.

On May 13, 2008, this case went to trial before the district court without a jury. The district court found the pre-annexation agreement was unambiguous on the zoning issue. It required NT to "request the property be zoned for single family residences." However, that requirement was met because "[t]he effect of the annexation is that the property is presently zoned for single family residences." The district court also found the agreement did not specifically waive (1) public hearing; (2) city council review and consideration; (3) city council vote; (4) the requirement of an appropriate water study; (5) DNR requirements; (6) zoning considerations; (7) the requirement of an appropriate preliminary and final plat; or (8) lot size considerations. Accordingly, the district court denied

NT's request for specific performance and money damages except for the $2643 attorney/engineering fee reimbursement, which it ordered Buffalo to return to NT. NT appeals.

**II. Standard of Review**

Our review is for correction of errors at law. Iowa R. App. P. 6.4.

**III. Analysis**

In recent years, there has been considerable controversy over whether a municipality may enter into an agreement with a private party binding the municipality to specific zoning in the future. We will assume, without deciding, that Buffalo's city council could enter into an agreement obligating it to take certain zoning actions. After all, the city council is Buffalo's final zoning authority. 8 McQuillin Mun. Corp. § 25.93.50, at 318-19 (3d ed. 2000) (noting that contract zoning, where permitted, "requires an agreement between the ultimate zoning authority and the zoning applicant or property owner"). The question thus presented is whether Buffalo failed to comply with any zoning requirements set forth in the pre-annexation agreement.

NT argues that the pre-annexation agreement expressly required Buffalo to grant "single family residence" zoning,[1] and that this provision was ambiguous because there are two different types of single family residence zoning: A-Country Home and B-1 Residential. Respectfully, we disagree with NT's reasoning. A condition is not ambiguous just because there are two different

[1] The agreement actually provided, "The Developer agrees to *request* that the property be zoned for single family residences." (Emphasis added.) We accept for purposes of our analysis, as do the parties, that this clause implicitly required the City to *permit* single family residential zoning.

ways of meeting it. If a father promises in writing to take his son to a "Hawkeyes football game," he has fulfilled his promise whether he takes his son to an Iowa/Minnesota game or to an Iowa/Wisconsin game. The son does not get to claim breach of contract because he would have preferred to see Iowa play Illinois. In short, we agree with the district court that while the pre-development agreement may be interpreted as requiring single family residence zoning, it contains no explicit requirement for B-1 Residential zoning.

NT argues further that the pre-development agreement anticipated eighty-two homes, and that A-Country Home zoning could not accommodate that number of homes. To the contrary, because of a pond and unusable land, NT contends that only about sixty homes can be built on the property under A-Country Home zoning.

However, Buffalo's witnesses testified that they did not know whether eighty-two homes could or could not be built on the land under "A" zoning but they assumed they could be. NT apparently was not aware of how many homes could be built under "A" zoning, either, until much later. It does not appear that there was any discussion between the parties about "B-1" zoning until 2007, *after* the pre-annexation agreement was signed.[2] The district court's finding that both parties were proceeding in "good faith" is supported by substantial evidence.

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[2] NT's representative testified as follows regarding his discussions with the city council prior to the approval of the pre-annexation agreement:

> From almost day one when we talked to them, we indicated that we were wanting – and *I don't know whether we used B-1*, but it was indicated we needed – or wanted the 83 lots to keep the price point where it needed to be.

(Emphasis added.)

In effect, NT argues that it has a legal right to whatever zoning is needed to erect eighty-two homes on the property. However, if we accepted this proposition, it would place an unfair burden on the municipality. A municipality would have to analyze the developer's plans in detail (apparently, in more detail than either NT or Buffalo examined those plans prior to June 2006) to determine what zoning they are consistent with. We think this duty properly rests on the developer. To the extent that contract zoning is permissible under Iowa law, again an issue we do not here decide, we believe it should be the developer's obligation to contract expressly for the zoning it needs. *See Century Circuit, Inc. v. Ott*, 317 N.Y.S.2d 468, 471 (N.Y. Sup. Ct. 1970) ("In order to sustain the claim of zoning by contract there must be clear cut evidence of an agreement binding upon the parties and the bargaining away of the legislative power of the Board."), *aff'd*, 327 N.Y.S.2d 829 (N.Y. App. Div. 1971).[3]

NT argues that this case is like *City of Orange Beach v. Perdido Pass Developers, Inc*., 631 So. 2d 850 (Ala. 1993), but in fact there are significant differences. In *Orange Beach*, there was no written pre-annexation agreement approved by the town council. Instead, the parties' agreement consisted of correspondence and discussions, culminating in a town council vote. *City of Orange Beach*, 631 So. 2d at 852-53. The minutes for that meeting memorialize an "agreement" whereby the developer would receive "whatever zoning [was] appropriate for his project." *Id*. at 852. Here, by contrast, the agreement was

[3] That is especially true when the written agreement, as here, provided that NT would be "subject to and comply with all other ordinances of the Buffalo Municipal Code." This language indicates that except as otherwise specifically contracted, Buffalo would retain its general police power.

reduced to a single writing, so the relevant inquiry is what that writing requires. Like the district court, we are not willing to hold that later statements made by individual city officials – but never formalized in a city council vote – constitute legally binding commitments upon the city.

Finally, NT argues that even if the pre-annexation agreement does not compel the rezoning it requests, it should be entitled to damages under either equitable estoppel or the vested rights doctrine. Again, we respectfully disagree.

In Iowa, equitable estoppel is "generally unavailable against a governmental body and is applied against a city only under exceptional circumstances." *City of Akron v. Akron Westfield Sch.*, 659 N.W.2d 223, 226 (Iowa 2003). That is especially true when, as here, the city is acting in a sovereign or governmental role rather than a proprietary role. *ABC Disposal Sys., Inc. v. Department of Natural Res*., 681 N.W.2d 596, 607 (Iowa 2004). In addition to proving the traditional elements of equitable estoppel, such as false representation or concealment of material facts, the party raising estoppel against the government must prove "affirmative misconduct or wrongful conduct by the government or government agent." *Fennelly v. A-1 Mach. & Tool Co*., 728 N.W.2d 163, 180 (Iowa 2007) (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 140, at 559 (2000)). We do not believe the facts here rise to the level of "affirmative misconduct or wrongful conduct;" indeed, the district court's finding of good faith on the part of both parties would appear to foreclose liability on this basis.

The vested rights doctrine, as explicated in *Kempf v. City of Iowa City*, 402 N.W.2d 393, 400-01 (Iowa 1987), applies when a municipality "down zones"

property. The property owner may be able to challenge that action on the ground that it had a "vested right" in the existing zoning. *Id*. However, this case involves not "down zoning," but a failure to approve "up zoning." NT's rights, if any, to that "up zoning," must be based upon the pre-annexation agreement.

For the foregoing reasons, we affirm the judgment of the district court.

**AFFIRMED.**