IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

CITY OF UNIVERSITY CITY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No.: 17SL-CC03831
	)	
TIM O'DONNELL,	)	Division: 21
	)	
Defendant,	)	
	)	

ORDER AND JUDGMENT

This matter is before the Court on cross-motions for summary judgment. Plaintiff City of University City (the "City") filed its motion for summary judgment on October 22, 2018. Defendant Tim O'Donnell filed his motion for summary judgment on February 12, 2019. The motions were called, heard and submitted on April 26, 2019. The Court, having heard the arguments of counsel, read the memoranda of law submitted and being now fully advised, enters the following Order and Judgment:

Background

This dispute involves the title to real property commonly known as 7596-7579 Olive Boulevard, St. Louis, Missouri 63130 (the "Property") and more fully described as:

> Part of Lots 14 and 15 of Mount Olive Subdivision:
>
> Tract 1 - Recorded in Plat Book 16973, Page 0004; Tract 2, Parcel 1 - Recorded in Plat Book 17550, Page 4301; Tract 2, Parcel 2 - Recorded in Plat Book 17550, Page 4301; Tract 3 - Recorded in Plat Book 17702, Page 720; Tract 4 - Recorded in Plat Book 17550, Page 4307 in the Office of the St. Louis County Recorder of Deeds; Mount Olive Lot PT 15 - Recorded in Plat Book 21949, Page 0592 in the Office of the St. Louis County Recorder of Deeds.

On April 27, 2016, the City and O'Donnell executed a Purchase and Sale Agreement (the "Agreement"), wherein the City agreed to sell the Property to O'Donnell for $100,000. The Property was subsequently conveyed to O'Donnell via quit claim deed.

After O'Donnell incurred over $150,000 in out-of-pocket expenses attempting to develop the Property as a microbrewery, he came to the conclusion that St. Louis was oversaturated with microbreweries and decided to market the Property for alternative uses. O'Donnell received an $890,000 offer for the Property from Moran Foods, LLC, which intended to use the Property as a grocery store. Prior to responding to the offer from Moran Foods, O'Donnell offered to sell the Property back to the City for $890,000, citing the City's right of first refusal in the Agreement. At the same time, O'Donnell also expressed his belief to the City that the right of first refusal was unenforceable.

The City responded by notifying O'Donnell that he was in default of the Agreement's "substantial completion" warranty and that it was enforcing its right of first refusal to purchase the Property for $100,000. The City also initiated this action. The City requests a declaratory judgment that the right of first refusal is enforceable and may be exercised by the City for $100,000 (Count I); a declaratory judgment that the Agreement is void under section 432.070 RSMo (Count II); or specific performance compelling O'Donnell to convey the Property back to the City in exchange for $100,000. Both parties now move for summary judgment.

Discussion

"Summary judgment is proper when the moving party demonstrates there is no genuine dispute about material facts and, under the undisputed facts, the moving party is entitled to judgment as a matter of law." *Parr v. Breeden*, 489 S.W.3d 774, 778 (Mo. banc 2016).

The City argues it is entitled to summary judgment because the Agreement is void under section 432.070 RSMo, which requires the underlying authority for a municipal contract to be in writing:

> No county, city . . . or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and *such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.*

(Emphasis added). Indeed, both the contract and the underlying authority for the contract must be in writing. *City of Dardenne Prairie v. Adams Concrete & Masonry, LLC*, 529 S.W.3d 12, 19 (Mo. App. E.D. 2017). Thus, even if a contract is in writing and signed by an agent of the city, such as the City Manager, the contract is not valid unless duly authorized by the City's governing body, the City Council. *Id.*; *Rail Switching Servs., Inc. v. Marquis-Missouri Terminal, LLC*, 533 S.W.3d 245, 261 (Mo. App. E.D. 2017). "Where no statute requires the passage of an ordinance to authorize a contract, it is sufficient, but necessary, that the authorization be entered of record upon the minutes of the Board of Aldermen." *City of Dardenne Prairie*, 529 S.W.3d at 19. (*citing Board of Pub. Works of Rolla v. Sho-Me Power Corp.*, 244 S.W.2d 55, 60 (Mo. 1951)). "[T]he authorization by the Board of Aldermen must not be vague and uncertain; rather, it must sufficiently identify the subject matter under consideration with reasonable exactitude and specificity." *Id.* "The requisite authorization must be specific and definite and must include an outline of the terms of the proposed contract." *Ballman v. O'Fallon Fire Prot. Dist.*, 459 S.W.3d 465, 468 (Mo. App. E.D. 2015); *see also Langlois v. Pemiscot Mem'l Hosp.*, 185 S.W.3d 711, 713 (Mo. App. S.D. 2006).[1]

[1] The City Council may only act at an official meeting and may only speak through its minutes and records. *Moynihan v. City of Manchester*, 265 S.W.3d 350, 356 (Mo. App. E.D. 2008); *Langlois*, 185 S.W.3d at 714;

The terms of the Agreement differ from the outline of proposed terms approved by the City Council. According to the minutes of the April 18, 2016 City Council meeting, the City Council discussed the possibility of a new development on the Property that would consist of a microbrewery and restaurant. The developers, including O'Donnell, joined the discussion. In discussing contract terms, the Council asked for a "Right of First Refusal" stating that if the development's ground breaking did not occur within one year of the contract date, the City could buy back the Property at the same price at which it was sold. O'Donnell and the other developers then left the room and the Council briefly discussed the contract language and sale price. The Council then unanimously approved the contract as amended "to state the City could buy back the property for the same price at which the City sold it for if the development's ground breaking has not taken place within one year from signed contract date."

There is no dispute that the Agreement, signed on behalf of the City by the City Manger on April 27, 2019, does not include the buy-back provision approved by the Council. Instead, the Agreement contains a "substantial completion" warranty and a right of first refusal. The "substantial completion" warranty contemplates something other than "ground breaking" and does not specify that the City has the right to purchase the Property for $100,000 upon default:

> [O'Donnell] represents and warrants that [O'Donnell] will have substantial completion of the commercial development of the property completed within one (1) year from the closing date of this Agreement, subject to force majeure. Substantial completion includes, but is not limited to, site preparation, construction, renovation, repairing, equipping and construction of the commercial development ("Work") and such Work has been substantially completed in a workmanlike manner.[2]

CHARTER OF THE CITY OF UNIVERSITY CITY, Art. II, Sec. 9. The Court takes judicial notice of the City's Charter. *Schmitt v. City of Hazelwood*, 487 S.W.2d 882, 886 (Mo. App. 1972).

[2] Agreement, section 8.b.

Similarly, the right of first refusal does not specify that the City has the right to buy back the property for $100,000 if the development's ground breaking fails to occur within one year:

> The Seller shall have the right of first refusal to purchase the entire Property for $100,000, or any portion of the Property valued at a percentage of the original purchase price based on the portion of the area purchased. Should Purchaser decide to sell the Property, Purchaser shall notify Seller in writing of the terms on which Landlord is willing to sell. Within fifteen (15) business days after receipt of written notice, Seller shall have the right to notify Purchaser that it is exercising its Right of First Refusal. Seller shall only be required to purchase that portion of the Property which it identifies to Purchaser in its notice of intent to purchase. If Seller fails to exercise its Right of First Refusal within the time stated above; this Right of First Refusal shall have no more force and effect and Purchaser shall have the right to sell the premises to a third party on the same terms stated in the notice to Seller. Any sale on different terms reinstates Seller's Right of First Refusal.[3]

Clearly, the outline of terms authorized in writing by the City Council differs from the terms in the Agreement. As a result, the Agreement is void for failing to comply with the written authorization requirement in section 432.070.

O'Donnell argues that the Agreement is valid because it substantially complies with the requirements in section 432.070 RSMo. "In some circumstances, substantial compliance with the statute may be sufficient to create a valid contract." *Moynihan*, 265 S.W.3d at 354. In determining whether substantial compliance is sufficient, courts examine the purpose of section 432.070 and consider whether enforcement of the contract would frustrate that purpose. *See Kindred v. City of Smithville*, 292 S.W.3d 420, 427 (Mo. App. W.D. 2009) (*citing Investors Title Co. v. Hammonds*, 217 S.W.3d 288, 295 (Mo. banc 2007)).

Section 432.070 has the purpose of "safeguarding the public from 'needless and extravagant demands' as well as restraining public officials from 'ill-considered actions.'" *Rail Switching Services Inc.*, 533 S.W.3d at 260. Moreover, section 432.070 "recognizes that municipal corporations represent the public and should be protected from the unauthorized

[3] Agreement, section 17.

actions of their agents." *Pemiscot Cty. Port Auth. v. Rail Switching Servs., Inc.*, 523 S.W.3d 530, 535 (Mo. App. E.D. 2017); *see also France v. Podleski*, 303 S.W.3d 615, 618 (Mo. App. S.D. 2010) (stating the purpose of section 432.070 "is to guard against an official obligating a municipality to pay for or perform unauthorized actions."). Enforcing the Agreement—even though it does not contain the buy-back provision as specifically authorized in writing by the City Council—would frustrate the statute's purpose.

O'Donnell further argues that the Agreement is valid because the City Manager had apparent authority to execute the Agreement. The doctrine of apparent authority does not help O'Donnell. Compliance with section 432.070 is mandatory. *Muncy v. City Of O'Fallon*, 145 S.W.3d 870, 873 (Mo. App. E.D. 2004). Further, a party contracting with an entity subject to section 432.070 is charged with knowing the statutory requirements, which courts should not hesitate to enforce even if doing so yields a harsh result for the individual. *Pemiscot Cty. Port Auth.*, 523 S.W.3d at 530. This rule is consistent with Missouri public policy:

> Missouri public policy considers the rights of the public paramount to the rights of the individual; that is, it is better to adopt, by legislation, a rule under which individuals may suffer occasionally than to permit a rule subjecting the public to injury through the possibility of carelessness or corruptness of public officials.

Id. (internal citation omitted).

Finally, O'Donnell argues the City is now estopped from denying the validity of the Agreement. However, "equitable remedies such as estoppel are not available to overcome the requirements of section 432.070, even where the municipal entity has received the benefit of the other party's performance." *Ballman*, 459 S.W.3d at 467. The City is not estopped from denying the validity of the Agreement. Moreover, the Court notes the City will not unfairly retain the benefit of the bargain, as it must tender to O'Donnell the purchase price of $100,000.

The City argues it is entitled to attorney's fees under section 10 of the Agreement. Ordinarily, a litigant bears the expense of his own attorney's fees. *Home Serv. Oil Co. v. Cecil*, 513 S.W.3d 416, 421 (Mo. App. S.D. 2017). An exception exists where a contract states that the prevailing party is entitled to recover attorney's fees. *Id.* Here, the Agreement has been found void *ab initio* and is without effect. Accordingly, each party must bear the expense of their own attorney's fees.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED, that the Agreement is void under section 432.070 RSMo. Plaintiff City of University City's Motion for Summary Judgment is hereby GRANTED and Defendant Tim O'Donnell's Motion for Summary Judgment is hereby DENIED. Each party to pay their own attorney's fees.

SO ORDERED:

Nancy W. McLaughlin

Date: 7/9/19

Hon. Nancy Watkins McLaughlin
Circuit Judge, Div. 21

cc: Attorneys of Record