UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARY DEWS, *et al.*,	**§**	
	§	
Plaintiffs,	**§**	
v.	**§**	**3:88-CV-1604-O**
	§	
THE TOWN OF SUNNYVALE, TEXAS,	**§**	
	§	
Defendant.	**§**	

ORDER

Pending before the Court are:

1. Plaintiff's Motion for Injunctive Relief From the Town of Sunnyvale's Violations of the Settlement Stipulation and Order ("Pl. Mot.") (Doc. # 195);

2. Plaintiff's Appendix in Support (Doc. # 196);

3. Defendant's Rule 12 Motion to Dismiss Plaintiff's Motion for Injunctive Relief, Motion to Strike and, Subject Thereto, Response to Plaintiff's Motion for Injunctive Relief ("Def. Mot.") (Doc. # 198);

4. Defendant's Appendix in Support (Doc. # 199); Defendant's Brief in Support ("Def. Brief") (Doc. # 200);

5. Plaintiff's Response to the Town's Motions to Dismiss and to Strike ("Pl. Resp.") (Doc. # 201);

6. Appendix in Support (Doc. # 202);

7. Plaintiff's Reply to the Town's Response to Plaintiff's Motion for Relief to Remedy the Town's Failure to Comply with the Settlement Stipulation and Order ("Pl. Reply") (Doc. # 203); and

8. Defendant's Brief in Reply to Plaintiff's Amended Response to Sunnyvale's Motion to Dismiss and Strike Plaintiff's Motion for Injunctive Relief ("Def. Reply") (Doc. # 207).

In addition, the parties appeared and presented evidence on Plaintiff's motion on March 4, 2010. After reviewing the pleadings and the evidence, the Court finds and concludes as follows:

Factual Background

Plaintiff is the Inclusive Communities Project ("ICP"). Its predecessor in interest sued Defendant, The Town of Sunnyvale ("Sunnyvale"), in 1988 complaining that Sunnyvale's zoning laws were discriminatory and violated various federal statutes outlawing these acts. After a bench trial, Sunnyvale was found to have committed unlawful acts of discrimination. *See Dews v. The Town of Sunnyvale, Texas*, 109 F. Supp. 2d 526 (N.D. Texas. 2000). After making these findings, the Court prepared to address these violations in a remedial phase. Before beginning the remedial phase, Sunnyvale moved for a new trial on the merits. Prior to deciding either of these issues, the parties entered into a settlement agreement. *See* Docs. # 155, 156, 169. The terms of the settlement agreement were included in the final order disposing of this case entered by Judge Jerry Buchmeyer on April 15, 2005. *See* Settlement Stipulation and Order (the "Order") (Doc. # 194). After ICP filed the instant motion, this case was transferred to the undersigned. *See* Doc. # 206.

The dispute between the parties centers, in pertinent part, on the following portion of the Order:

II. A. Town agrees as follows:

1. Identification of Sites. The Town shall identify sites for seventy (70) dwelling units ("Target Units") that will allow the rental or sale of the Target Units at an estimated monthly cost ("Target Rate") to the purchaser or tenant of the housing that is no more than the greater of: (1) $713.00/month for a one-bedroom dwelling unit; $868.00/month for a two-bedroom dwelling unit; $1,147.00/month for a three-bedroom dwelling unit; $1,412.00/month for a four-bedroom

dwelling unit; $1,623.00/month for a five-bedroom dwelling unit; and $1,813.00/month for a six-bedroom dwelling unit or (2) the maximum monthly fair market payment/subsidy standards for dwelling units in Dallas, Texas as established by the Dallas Housing Authority or the United States Department of Housing and Urban Development for the Section 8 Voucher Program.

2. Infrastructure and Amenity Cost. The Town shall provide through ordinance or other official policy, that, if necessary, the infrastructure and amenity cost for a new development of the Target Units will be defrayed, abated, mitigated or otherwise absorbed into the total cost of such new development, or other incentives shall be offered to the developer of such Target Units, if necessary, such that the Target Rate for the Target Units can be achieved. Nothing herein shall prevent cost averaging to achieve the Target Rates.

3. Quality. All Target Units shall meet the housing quality and neighborhood standards set by the current Town Zoning and Building Ordinances.

4. Willingness of Owner. The owners of any Target Unit or Target Unit site shall express a willingness, in writing, to sell or lease Target Units at the Target Rates or to sell such property to someone who is willing to develop the Target Units for sale or lease at the Target Rates.

5. Zoning. The Town shall approve a zoning map change, in accordance with lawful process, which allows Target Units at Target Rates.

6. Notice. The Town shall notify ICP of the location of the Target Units within three years of the Effective Date hereof.[1]

Order at II. A. The Order did not "[I]mpose on the Town any duty, obligation, or requirement to produce any particular result other than to perform the specific obligations that are imposed on the Town by the express terms of this Order ...." *Id.* at III. D. 1.

ICP argues Sunnyvale failed to comply with the Order because it did not identify sites for the low income housing units within the specified time frame. ICP contends this is a breach of the Order and seeks, *inter alia*, enforcement of the Order and a Court finding that Sunnyvale is in contempt.[2]

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[1]The effective date of the Order was signed April 15, 2005. *See* Doc. # 194.

[2]ICP's motion includes allegations that in addition to violating the Settlement Agreement, Defendant's "conduct also constitutes a separate violation of the Fair Housing Act and other relevant laws." Pl. Mot. at 15. Defendant's Rule 12 motion seeks, among other things, to dismiss any claims Plaintiff presents unrelated to a request to enforce the settlement agreement because that would require the filing of a new suit. In its reply brief, Plaintiff concedes that it does not seek to litigate new claims in this lawsuit. *See generally* Pl. Resp. ("ICP's motion seeks

Sunnyvale opposes ICP's motion. Sunnyvale argues it timely provided ICP the identity of Target Units when on March 12, 2008, it identified more than three hundred properties that could be used as Target Units and two hundred Target Units CIS Ltd. ("CIS") planned to develop within the town. Sunnyvale contends that once it identified these potential properties, it satisfied its obligations under the Order. It argues the remaining provisions of the Order required the parties to work together to bring the projects to fruition. For instance, the parties would work together and with third parties to obtain the commitments of the owners of the Target Units to sell or lease them at Target Rates, obtain appropriate zoning alterations, or abate infrastructure costs. *See* Transcript ("Trans."), p. 5, 141-142.[3] Therefore, Sunnyvale argues it complied with the Order even though these projects were subsequently abandoned or never came to fruition.

Plaintiff disagrees with this interpretation of the Order, and further asserts Sunnyvale's delays caused CIS to abandon the project.

Authority

A party may be held in contempt when (1) a court order was in place; (2) the order

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an order requiring the Town to take actions required by the Settlement Stipulation and Order that are necessary for the provision of 'Target Units' - the low income affordable units defined by the Settlement Stipulation and Order ¶II.A.1"). In an earlier order, the Court concluded Plaintiff was not asserting new claims here and denied Defendant's Rule 12 motion as to these allegations. *See* Doc. # 208. In addition, the Court rejected Defendant's argument that Plaintiff's only remedy for a breach of the Settlement Agreement was a new lawsuit. *Id.* Finally, although Plaintiff characterizes the relief it seeks as an injunction, it requests a finding of contempt and ultimately an order requiring Sunnyvale to re-zone the ICP property. Pl. Mot. at 13. The Court will first consider whether Sunnyvale is in breach, and if so, will then determine what the appropriate remedy should be.

[3]For purposes of this Order, "Transcript" refers to the March 4, 2010 Unofficial Transcript of the Hearing on Plaintiff's Motion for Injunctive Relief, which the Court uses to expedite resolution of Plaintiff's motion. The page numbering in the Unofficial Transcript may ultimately differ from that in the Official Transcript.

required specified action; and (3) a party failed to comply with the order. *United States v. City of Jackson*, 359 F.3d 727, 731 (5th Cir. 2004). To determine whether Sunnyvale failed to comply with the Order, the Court must first interpret the Order. A settlement agreement is a contract that is interpreted based on the rules of interpretation applicable to contracts. *Guidry v. Halliburton Geophysical Servs., Inc.*, 976 F.2d 938, 940 (5th Cir. 1992)*; Khouw v. Methodist Hospitals of Dallas*, 126 Fed. Appx. 657, 659 (5th Cir. 2005). It is well-settled law that the interpretation of an unambiguous contract is a question of law for the court to decide. *Id.* at 660. This settlement was executed in Texas, therefore its law will apply. *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 603, n.4 (5th Cir. 1986).

Under Texas law, a contract is not ambiguous when based on the plain language the Court can give it a certain or definite legal meaning or interpretation. *Universal Health Servs., Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742, 746 (Tex. 2003); *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 519 (Tex. 1980). When a contract is unambiguous, extrinsic evidence that creates an ambiguity or varies the meaning of the plain language is not considered. *Lewis v. East Tex. Finance Co.*, 146 S.W.2d 977, 980 (Tex. 1941). Further, a contract is not ambiguous simply because the parties advance different interpretations. *American Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). It is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). Here, none of the parties allege that the provisions of the Order are ambiguous and the Court agrees. Therefore, the Court's analysis is limited to looking at the plain language within the "four corners" of the Order to determine the proper interpretation. *Luckel v. White*, 819 S.W.2d 459, 461-63 (Tex. 1991).

To determine the proper interpretation of the Order, the Court is guided by well-established rules of interpretation. First, the Court's primary goal is to give effect to the parties' intent. *Id.* "Effectuating the parties' expressed intent," is the primary focus. *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008). The applicable standard is the "objective intent" as evidenced by the language used, rather than the "subjective intent" of the parties. *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981). Additionally, the Court should interpret the Order as a whole and harmonize all the provisions so that none is rendered meaningless. *Coker*, 650 S.W.2d at 393. Further, "[n]o single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Id.*

"The language in an agreement is to be given its plain grammatical meaning unless to do so would defeat the parties' intent." *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 101 (Tex. 1999). "When parties disagree over the meaning of an unambiguous contract, '[t]he intent of the parties must be taken from the agreement itself, not from the parties' present interpretation, and the agreement must be enforced as it is written.'" *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 407 (5th Cir. 2006) (modification in original) (quoting *Purvis Oil Corp. v. Hillin*, 890 S.W.2d 931, 935 (Tex. App.—El Paso 1994, no writ)). Finally, the Court should not construe a contract provision in a manner that is unreasonable or absurd. *See Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987) (stating courts should avoid, when possible, construction which is unreasonable, inequitable, and oppressive); *Pavecon, Inc. v. R-Com, Inc.*, 159 S.W.3d 219, 222 (Tex. App.—Fort Worth 2005, no pet.) (stating that when interpreting a contract, a court should avoid, if possible, construction that is unreasonable, oppressive,

inequitable, or absurd). With these rules of interpretation as its guide, the Court turns to review the provisions of the Order.

Discussion

As stated above, Sunnyvale argues that it complied with the terms of the Order when, within the specified time, it identified over three hundred properties that might be eligible for Target Units. Sunnyvale also argues it identified a separate low income development project that satisfied its obligations under the Order.[4] The Court will address these two arguments.

1. Defendant's List of Three Hundred Potential Low Income Housing Units (Def. Ex. 6).

On March 12, 2008, Sunnyvale sent ICP a letter informing it that the town has "several single family low income housing units" that, according to a Dallas Housing Authority, would provide as many as 389 units available for low income housing at Target Rates. Def. Ex. 6. Sunnyvale contends this notice satisfied its obligation to identify seventy Target Units under the Order. *See* Trans., p. 192 ("And as I explained earlier, I believe that the order that was signed and agreed to by the parties differentiates between is the identification of the units as a starting point as opposed to completely having an agreement with the property owner and zoning the property which is part of the process that ensues."). ICP argues this does not satisfy Sunnyvale's obligation because there was no indication the owners were willing to sell or lease the properties for low income housing as required by paragraph II. A. 4 of the Order.

Sunnyvale argues that it is not obligated to obtain the written statement of willingness of the owner because paragraph four does not expressly state that it is required to do so. Sunnyvale

[4] Two other low income projects, the Evergreen and ICP projects, are discussed by the parties. Both were submitted beyond the Order's deadline and therefore cannot serve as a defense to the breach.

argues paragraph four was written in a way that required the parties to work together to obtain the owner's willingness to sell or lease the property. Therefore, its listing of the three hundred houses fulfilled its obligation to identify Target Units.

The Court does not agree. Interpreting the Order as a whole, Sunnyvale agreed that it would not only identify the Target Units but also have an agreement from the owner that he/she would agree to sell or lease them at the Target Rates. Sunnyvale's position would not yield a reasonable alternative interpretation because it would allow Sunnyvale to fulfill its obligation by simply surveying properties throughout the town and pontificating that certain ones would be satisfactory as low income housing units and others would not. This would defeat the intent of the parties. ICP does not need a settlement agreement with Sunnyvale in order to force Sunnyvale to offer ICP suggestions concerning the suitability of existing residential property that may sell or lease at a rate within that set out by the Order. ICP could do that on its own. Rather, the settlement agreement was drafted to compel Sunnyvale to actively engage in attempting to bring about actual low income housing opportunities in the agreed on quantities in exchange for eliminating the possibility that Judge Buchmeyer may impose a more onerous obligation. While the Order does not obligate Sunnyvale to produce a particular result, it was required to perform those obligations it was capable of achieving as agreed to in the Order. Sunnyvale's argument that it did not breach the Order because it listed these three hundred houses is rejected.

The text of the Order unambiguously supports this interpretation. Paragraph one and four read:

> 1. Identification of Sites. The Town shall identify sites for seventy (70) dwelling units ("Target Units") that will allow the rental or sale of the Target Units at an estimated monthly cost ("Target Rate") to the purchaser or tenant of the housing that is no more than the greater of: (1) $713.00/month for a one-bedroom dwelling unit; $868.00/month for a two-bedroom dwelling

unit; $1,147.00/month for a three-bedroom dwelling unit; $1,412.00/month for a four-bedroom dwelling unit; $1,623.00/month for a five-bedroom dwelling unit; and $1,813.00/month for a six-bedroom dwelling unit or (2) the maximum monthly fair market payment/subsidy standards for dwelling units in Dallas, Texas as established by the Dallas Housing Authority or the United States Department of Housing and Urban Development for the Section 8 Voucher Program.

4. Willingness of Owner. The owners of any Target Unit or Target Unit site shall express a willingness, in writing, to sell or lease Target Units at the Target Rates or to sell such property to someone who is willing to develop the Target Units for sale or lease at the Target Rates.

Paragraph four uses the term "Target Units." Sunnyvale and ICP specifically defined the term "Target Units" to mean the seventy units they bargained for in paragraph one. That means wherever "Target Units" is used in the Order, it refers to the definition provided in paragraph one. Sunnyvale is the only party obligated to act in connection with the Target Units in paragraph one. Therefore, reading these paragraphs together it is clear the parties intended that Sunnyvale could not fulfill its obligation to identify the Target Units unless it also obtained the written consent of the owners of the property. Any other interpretation of the Order would fail to harmonize all the provisions such that none would be rendered meaningless (*see Coker*, 650 S.W.2d at 393), and ignore the intent of the parties as "taken from the agreement itself [and] not from the parties' present interpretation[.]" *Am. Tobacco*, 463 F.3d at 407 (citation omitted).

2. The CIS Project

Next, Sunnyvale argues it did not breach the Order because it fulfilled its obligations to identify Target Units by identifying a low income housing project focused on the elderly to be built at 3217 Beltline Road in Sunnyvale. This project contemplated a two hundred unit project to be developed by CIS known as the Meadows. *See* Def. Ex. 6 and 55; *see also* trans., p. 97. CIS submitted an application to Sunnyvale requesting a zoning amendment to permit it to construct this low income housing facility. Def. Ex. 2; Trans., p. 98. CIS also informed Sunnyvale that it intended to seek tax credits to help it obtain the necessary financial assistance

to construct this project. Trans., p. 99. According to Sunnyvale, this project never proceeded because CIS did not obtain tax credits. Trans., p.102.

ICP argues this notice does not satisfy Sunnyvale's obligations under the Order because Sunnyvale delayed re-zoning the property which impeded CIS' ability to obtain tax credits and Sunnyvale's then mayor testified in opposition to CIS' application for tax credits. Trans., p. 55, 104. ICP argues Sunnyvale sabotaged the CIS application, therefore Sunnyvale cannot use this project to satisfy its obligation under the Order.

It is undisputed the CIS project was planned for property that was zoned local retail and would need to be re-zoned for the project to move forward. CIS submitted a completed application to Sunnyvale in order to get the property re-zoned. Trans., p. 129. Although Sunnyvale had no obligation to guarantee this low income housing project would be built (Order at III. D. 1), it was obligated to comply with the dictates of the Order which were under its control to facilitate creation of the project. To comply with its obligation with respect to the CIS project, paragraph five required Sunnyvale to re-zone this property. Sunnyvale failed to amend its zoning ordinance to permit this project as requested by CIS, even though it had a completed application before it. That CIS later abandoned the project because it did not obtain tax credits did not relieve Sunnyvale of its obligation to re-zone the property when requested if it intended this project to serve as compliance with its obligations under the Order. Re-zoning the property was within its power and could have served as compliance with the Order.[5] However, it failed to

[5]ICP also argues Sunnyvale's failure to re-zone the property caused CIS to fail to obtain the tax credits which caused CIS to abandon the property. *See* Trans., p. 144. Because Sunnyvale's failure to re-zone the property prevents it from using this project to show it complied with the Order, there is no need to address this issue.

act, and as such, it cannot serve as a basis to argue compliance with the Order.

Finally, as stated as stated above, the Evergreen and ICP projects cannot fulfill Sunnyvale's obligations because these projects did not come about until February 2009 and March 2009, respectively, nearly ten and eleven months following the April 15, 2008 deadline set by the Order. *See* Trans., p. 109, 114; Def. Ex 12, 15. Sunnyvale's argument that the parties intended compliance to take longer than three years contradicts the express terms of the Order, which required notice within three years.

Conclusion

As Sunnyvale offers no evidence of compliance with the Order, the Court concludes an Order was in place requiring Sunnyvale to take specific action and it failed to comply. Therefore, Sunnyvale is in contempt. Consistent with this decision, the Court directs both parties to submit additional briefing no later than **Tuesday, April 13, 2010**, on the following issues.

First, the Court directs the parties to address whether the ICP property is currently zoned in a way that would allow the construction of more than seventy Target Units, as contemplated by the Order (*see generally* Trans., p. 126-136).[6] Otherwise stated, the parties are to brief whether, and if so, to what extent, Sunnyvale's current zoning ordinance covering the ICP property is sufficient to demonstrate compliance with the requirements of the Order, albeit two

[6]While the Court does not have adequate information at this juncture and awaits further briefing to determine if this is the case, the Court notes that, if indeed the ICP property is currently zoned in a way that would allow the construction of more than seventy Target Units, and if indeed the current owner appears willing to allow the construction of Target Units at Target Rates and of appropriate quality, had this zoning been done in advance of the deadline set by the Order, Sunnyvale might not be facing an order of contempt.

years too late.

In addition, the parties shall also brief what other appropriate remedy is necessary to address Sunnyvale's conduct.

Signed this 22nd day of March, 2010.

Reed O'Connor
UNITED STATES DISTRICT JUDGE