2014 IL App (2d) 130486-U
Nos. 2-13-0486 & 2-13-0836 cons.
Order filed August 5, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE VILLAGE OF JOHNSBURG,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-CH-1800
	)	
BCP REALTY, LLC,	)	Honorable
	)	Thomas A. Meyer,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: BCP forfeited its argument that the trial court erred in denying its motion for judgment in its favor at the close of the Village's case, because BCP presented evidence in its defense. The trial court did not abuse its discretion in granting specific performance, and its finding that the Village did not effectively exercise its option in 2008 was not against the manifest weight of the evidence. The trial court did not improperly rely on BCP's failure to submit evidence that was barred by a motion *in limine*, nor did it improperly conclude that the Village had standing to pursue its claims. The trial court did not err in ruling that the annexation agreement was unambiguous or in admitting the agreement into evidence. The trial court acted within its discretion in awarding the Village attorney fees**,** and the Village was entitled to attorney fees for defending the appeal. Therefore, we affirmed and remanded.

¶ 2 Defendant, BCP Realty, LLC (BCP), appeals from the trial court's judgment granting specific performance in favor of plaintiff, the Village of Johnsburg (Village), and ordering BCP to convey a parcel of land to the Village's designee pursuant to the parties' annexation agreement. BCP also appeals from the trial court's grant of the Village's petition for attorney fees. On appeal, BCP argues that the trial court erred in: (1) denying BCP's motion for a "directed verdict"; (2) granting the Village specific performance when there was an adequate remedy at law; (3) relying on factually incorrect evidence which was contradicted by evidence at trial; (4) basing its ruling in part on BCP's failure to submit evidence, when such evidence was barred by a motion *in limine*; (5) failing to hold that the Village lacked standing under language in the agreement; (6) finding the annexation agreement to be unambiguous and barring the introduction of parol evidence; (7) admitting the annexation agreement into evidence even though it was not properly authorized or executed and violated the best evidence rule; and (8) granting the Village's petition for attorney fees where the Village did not incur or pay any legal fees. We affirm **and remand the cause for the assessment of additional attorney fees**.

¶ 3 I. BACKGROUND

¶ 4 A. Bench Trial

¶ 5 We begin by summarizing the evidence presented at the bench trial, which took place on various days in September and December 2012. We refer to relevant pre-trial proceedings in conjunction with the analysis portion of this order.

¶ 6 In April 2004, the Village received a development application for a 171-acre parcel of land. The application listed Bill Anest as the owner and Mark Janeck as the petitioner. The application requested that the Village annex the land and zone it as a mixed use development. The land was located in unincorporated McHenry County, and McHenry County did not offer

public sewer or water treatment capacity in unincorporated areas. The land was also zoned E-1, which required a minimum of one-acre lots for residential development, whereas Anest wished to have small lots and multi-family housing as well as commercial development.

¶ 7 Section 17.7(A) of the Village's planned development ordinance required that a development have 20% of the land set aside for open space. It was customary for the Village to require that such open space be conveyed to it to ensure maintenance and make potential improvements. The open space requirement was not in lieu of any park land requirements. Rather, article 10 of the Village's subdivision control ordinance, which related to the dedication of park land, streets, and school sites, required a minimum of 10% dedication of land or a cash contribution to allow the Village to purchase other land. The cash contribution was set at $25,000 per acre, which would have amounted to about $850,000 for the 171 acre parcel.[1] Shortly after submitting the application, Janeck represented that 29 acres would be dedicated to fulfill the open space requirements.[2]

¶ 8 The Village had a board meeting scheduled for September 7, 2004, at which it planned to vote on the annexation agreement. About one week before the meeting, Janeck informed Claudette Peters, who was the Village's administrator, clerk, and comptroller, that there may be an environmental condition on the 29 acres. Peters was concerned about potential Village

[1] It appears that the open space and park land requirements could potentially be satisfied by the same parcel of land. Twenty percent of 171 acres would be 34.2 acres, which multiplied by $25,000 is $855,000.

[2] As stated, 20% of 171 acres would be 34.2 acres, so it is unclear from the record how the 29 acres satisfied the open lands/park land requirements. However, this point is not disputed on appeal.

liability and asked if Anest would like to make a cash payment in lieu of the land donation, but Janeck declined. Peters asked if Janeck would agree to delay a vote on the annexation agreement. Janeck said that he needed the meeting to go ahead because it could otherwise delay negotiations with Remington Homes on a portion of the development. Janeck agreed to get Peters documentation about the environmental condition of the 29 acres, and he suggested that the Village receive an option for the property. Janeck explained that this would provide the Village some time to look at the documentation and determine whether it still wanted to receive a dedication of the property. According to Peters, the Village never received any report from Janeck about the land's environmental condition. Still, even before this time, the Village was aware that there was ground water contamination on land adjacent to the 29 acres.

¶ 9 The Village unanimously approved the annexation agreement at the September 7, 2004, meeting. The meeting minutes reflected that Janeck stated that previous testing of the land showed minimal contamination. He said that there were currently two test wells on the property and that tests were expected to show either no or minimal traces of contamination.

¶ 10 A couple of months later, at a November 16, 2004, Village meeting, Janeck requested that the Village release its interest in the 29 acres. Janeck stated that Rohm and Haas, a chemical company that owned the land adjacent to the 29 acres, had expressed a desire to acquire the property due to liability concerns related to ground water contamination on the property. Janeck stated that it was not surface contamination, and only a small portion of the property was impacted.

¶ 11 At a December 7, 2004, Village meeting, Rohm and Haas representatives stated that the company was interested in acquiring the 29 acres. They stated that there was currently a groundwater contamination cleanup taking place, and Rohm and Haas wanted the full 29 acres

so it could have a buffer zone around the contamination.

¶ 12 In January 2005, Peters obtained a tax bill for the property which identified BCP as the owner of record rather than Anest. A deed reflected that Anest had conveyed title to the property to BCP in 2000. Peters spoke to Janeck about this concern, and Janeck said that Anest and BCP "were basically the same," and that he did not wish to make any changes to the agreement. The law firm representing BCP sent the Village a letter stating that Anest was BCP's manager and had authority to act on BCP's behalf. Anest testified at trial that he operated and controlled BCP, which was owned by a family trust consisting of himself, his wife, and his son.

¶ 13 Peters expressed concern to Janeck that the ownership misrepresentation could invalidate the option in the annexation agreement, and she encouraged him to re-publish for a hearing on the annexation agreement. According to Peters, Janeck said that it was simply a mistake and that re-publishing would interfere with a closing with Remington Homes. Peters herself did not think the Village was legally required to hold a new hearing because the zoning and planning was all based on the land, not the owner of record. Janeck testified that he did not recall the subject of a potential second hearing and would not have been against delaying the closing with Remington Homes for a couple of months.

¶ 14 At Janeck's request, the annexation agreement was changed to reflect BCP as the owner of record, and in March 2005, the Village received an executed copy of the revised agreement. The annexation agreement did not have any changes to the language giving the Village an option to the 29 acres.

¶ 15 The agreement stated that the owner "desires that the Subject Property be annexed to the Village under the terms and conditions and in the manner hereafter specified and the Village hereby agrees to enter this Agreement based on the conditions undertaken and the promises made

by [BCP] to the Village herein."[3] The Village agreed to change the zoning to a residential district and allow BCP to develop up to 147 single family homes and 83 townhomes. It also agreed to provide water and sewer services to the homes upon receipt of "tap-on" fees.

¶ 16 Particularly relevant to his appeal is subsection 5(A) of the agreement, entitled "Conveyance of 29 acres to the Village," which provides:

> "*[BCP] hereby conveys an option to the Village for the Village or its designee to acquire fee simple title from [BCP] for the approximately 29 acre parcel* in the northwestern portion of the Subject Property which may be *exercised by the Village by its sending written notice to [BCP] of the Village's election to exercise such option any time within 10 years from the date of this Agreement. The final plat for any portion of the Subject Property shall reflect the Village's option.* *** If the Village exercises such option, [BCP] shall convey fee simple title to said parcel through a warranty deed not subject to any conditions or restrictions of record except real estate taxes due and payable arising after the date of transfer. ***
>
> In addition, [BCP] shall deliver a survey of such parcel prepared by a registered surveyor certified to the Village and stating the acreage of such portion of the Subject Property as well as a title insurance policy with coverage in the amount of $500,000.00 naming the Village as the owner of record, all at [BCP's] cost. ***
>
> *Prior to the conveyance of any land to the Village from [BCP] at [BCP's] cost, the Village shall be furnished with an environmental risk audit certified to the Village* and prepared by an environmental professional meeting the minimum requirements of 415

[3] A provision of the agreement states that the representations and recitals are material to the agreement, and it incorporates them into the agreement.

ILCS 5/22.2(j)(6)(E)(iii), *certified to and acceptable to the Village, assuring the Village* that there are no hazardous substance(s) (as defined hereinafter) on, under, to or from the land. Said environmental audit shall be what is commonly referred to as a Phase I Environmental Audit, which shall meet the minimum requirements for a pre-acquisition audit as set for [*sic*] in 415 ILCS 5/22.2(j)(6)(E)(iii)(v).

In the event the Phase I Environmental Audit concludes there is a presence or likely presence of a release or substantial threat of a release of hazardous substance(s) or pesticide on, under, to or from the land, [BCP] at [BCP's] cost shall furnish a Phase II Environmental Audit ***.

In the event said Phase II Environmental Audit and/or soil toxicity analysis discloses the presence or likely presence of a release or a substantial threat of a release of any hazardous substance(s) at, on, under, to or from the land to the [*sic*] conveyed, [BCP] shall first cause all such hazardous substance(s) to be removed at its sole cost and expense ***.

Prior to the conveyance of the land, [BCP] shall execute and deliver to the Village an Environmental Indemnification Agreement ***.

Hazardous substances includes without limitation: ***.

Alternatively, in the event the Village elects not to exercise its option to acquire the 29 acre parcel, such parcel shall be conveyed in fee simple title to the Village's designee, including but not limited to the McHenry County Conservation District, the McHenry County Land Foundation, or the Nature Conservancy as determined by the Village, in its sole discretion, with covenants approved by the Village providing that it shall remain permanent, open space and a conservation easement shall be placed against

> such parcel in connection with any transfer to another entity in a form approved by the Village, however, the pedestrian and bike path trails shall be transferred to the Village in fee simple title not subject to any restrictions except ad valorem taxes arising after the date of transfer. *** At the Village's election, [BCP] shall also construct a 4,287 square foot parking lot at or proximate to the entrance of the 29 acre parcel at [BCP's] expense and convey the underlying real property to the Village in fee simple title ***." (Emphases added.)

¶ 17 At trial, Anest denied that his signature was on the annexation agreement; the signature page was dated February 28, 2005. He believed that at one time he had signed an annexation agreement for the property with the Village. Anest later testified that it could be his signature, and he believed that he authorized the agreement for BCP in February 2005. Still, according to Anest, he had never seen any portion of the annexation agreement before trial. Anest testified that BCP needed the land to be rezoned in order to sell it to Remington Homes, and Janeck was authorized to negotiate on his and BCP's behalf. Anest knew that the 29 acres were polluted in 2001 and as early as 1999. Before negotiating with the Village to annex the property, Anest was already trying to sell the 29 acres to Rohm and Hass because that company or its predecessor had polluted the groundwater there.

¶ 18 Around April 2005, Janeck asked Peters to record the annexation agreement, and the Village rezoned the property as provided for in the annexation agreement. The final plat of the subdivision contained an "outlot A," which was the 29 acres referred to in paragraph 5(A) of the annexation agreement. The agreement required that the lot be platted to ensure that third parties would know that the Village had an option on the property. The surveyor's notes stated that the subdivision was subject to the terms and conditions in the annexation agreement recorded on

April 29, 2005, and that the Village had an option of acquiring fee simple title to outlot A. Another surveyor's note stated that "outlot A1" was dedicated to the Village. The Village had accepted title to outlot A1, which contained a parking lot.

¶ 19 The Village passed an order approving the plat which stated that it was subject to and contingent upon certain conditions, including compliance with the relevant annexation agreement. The Village provided potable water and sanitary sewer treatment for the Remington Grove of Johnsburg Subdivision, which it did not do in unincorporated areas or for all of its residents, and it issued building and occupancy certificates.

¶ 20 Also in April 2005, Remington Homes (officially Remington Grove, LLC) purchased 123[4] acres from BCP for about $7 million. A Remington Homes representative testified at trial that it would not have purchased the land without an annexation agreement with the Village. Janeck received between $200,000 and $300,000 for his role in the sale of the property to Remington Homes.

¶ 21 In August 2007, Peters received a letter from Janeck asking that the Village release its option to the 29 acres, with the understanding that it would still remain open space accessible to the public.

¶ 22 In October 2007, Janeck said that he was pursuing a sale of property to Rohm and Haas and needed the Village to release its option for the sale to move forward. Peters said that if Janeck wanted to make a change to the annexation agreement, there would need to be a hearing, but at that time Janeck did not indicate that BCP wished to have a hearing.

¶ 23 A Village document from November 2007 indicated that in August 2007, the Village authorized an appraisal for the 29 acres, which came back with a value of $48,000. The Village

[4] This property included the 117 acres that was rezoned, minus the 29 acres at issue here.

sought the appraisal because Rohm and Haas had asked the Village to sell it the property. Rohm and Haas conducted an independent appraisal and offered the Village $100,000 for 22 of the 29 acres it wished to acquire.

¶ 24 On March 11, 2008, the Village sent a letter to Anest stating that it was exercising its option on the 29 acres. It asked Anest to send a warranty deed with Rohm and Haas as the grantee.

¶ 25 In March 2010, the Village adopted a resolution to authorize the sale of the 29 acres. Rohm and Haas bid $100,000. In a June 2010 letter, Rohm and Haas made an offer to the Village to buy the full 29 acres for $175,000 and pay any legal fees the Village incurred in pursuit of the Village's rights to the land. On June 15, 2010, the Village passed an ordinance accepting Rohm and Haas's offer. The following day, the Village sent a letter to BCP stating that the Village was exercising its option to the 29 acres and that it was naming Rohm and Haas as its designee. On June 23, 2010, the Village sent a letter stating that if its demand for performance was not met within five days, it would bring suit. BCP never conveyed the property, and the Village filed suit on June 29, 2010. The Village had never been provided with a written environmental assessment of the 29 acres, but it was not requesting a phase I environmental audit at the time of trial.

¶ 26 At the close of the Village's case, BCP moved for a directed finding. The trial court requested that the Village file a written response to the motion. The trial court denied BCP's motion on September 27, 2012, stating, "after considering the evidence, argument of counsel, I believe that the [Village] has sufficiently met [its] burden of proof for this case to proceed."

¶ 27 During BCP's case-in-chief, Janeck testified that the entire time he was working on the project, BCP's assumption was that it would sell the 29 acres to Rohm and Haas. The Village

never indicated that it did not know this fact. Rohm and Haas assured BCP that it would keep the land as open space, as required by the annexation agreement. At the conclusion of the November 2004 Village meeting, Janeck's understanding was that the board had largely approved the 29 acres being transferred to Rohm and Haas and just wanted Rohm and Haas to appear and assure the board that the land would remain open space in perpetuity. Janeck agreed that at the meeting, he asked the Village to release its option to the 29 acres. Janeck understood that for a village board to officially take action, it typically needs to pass a motion. Janeck believed that the Village wanted to hear from Rohm and Haas before finalizing the release of the option.

¶ 28 Thomas Bielas of Rohm and Haas was called as a witness in support of BCP's affirmative defenses and testified as follows. Rohm and Haas was a wholly-owned subsidiary of Dow Chemical and manufactured adhesives and coating products at the Ringwald facility, which was adjacent to the land in question here. On January 26, 2005, Bielas sent a letter to the Village stating that Rohm and Haas had been working to acquire the 29 acres for the previous four years. Bielas stated that Rohm and Haas would be willing to leave the land as open space, conditioned on Rohm and Haas entering into a signed contract with Anest for purchasing the property. Shortly afterwards, Rohm and Haas offered Anest, who indicated that he owned the property, $930,000 for the 29 acres.

¶ 29 B. Trial Court's Decisions

¶ 30 1. Ruling

¶ 31 The trial court issued its ruling on February 8, 2013, stating as follows. BCP and the Village entered into an annexation agreement executed by BCP on February 28, 2005, as demonstrated by the Village's copy of the agreement and BCP's answer to the verified

complaint. There was consideration for the agreement identified in the agreement itself, in that the Village provided zoning, water, sewer, and building permits, all to BCP's benefit. The Village complied with the agreement's terms. The agreement provided the Village with the option to acquire the 29 acres, and under the plain meaning of "acquire," the Village was given the option to take possession of the property or direct it to a designee. BCP's argument that the Village obtained an option to purchase was not supported by testimony or the contract's language. The language in paragraph 5(A) gave the Village the right to direct that the property be conveyed to its designee, Rohm and Haas.

¶ 32 BCP argued that the agreement contained a condition precedent to the execution of any conveyance, in that an environmental risk audit needed to be performed. However, section 5(A) required the audit only if the property was conveyed to the Village, which did not happen here. There was also no evidence to support the contention that the environmental audit's original purpose was to benefit BCP. This argument lacked credibility because the contract required BCP to pay for the audit. The fact that BCP never availed itself of the audit that it was now claiming was for its protection also indicated to the court that BCP did not view the audit as for its benefit.

¶ 33 The trial court rejected the argument that the Village waived its right to the 29 acres. A waiver requires an intentional relinquishment of a known right by an unequivocal act, and there was no evidence to support the argument that the Village behaved this way at the November 16, 2004, meeting. A tentative agreement to an idea is consistent with the acceptance of an idea, without a final decision being made, as opposed to an unequivocal act.

¶ 34 BCP argued that the Village should be barred from pursuing specific performance on the 2010 exercise of the option because the Village exercised its option in 2008 before seeking to

exercise it again in 2010. Clearly, the Village wrote to Anest in 2008 and gave notice of the exercise of the option, but there was no compliance. Later in 2010, the Village formally requested that BCP, the appropriate party, convey the property pursuant to the agreement, which then led to this suit. BCP argued in its motion for a directed finding that Anest and BCP were not the same entities, and now it seemed to be arguing the reverse. Regardless, the only formal notice to the correctly-named party of the exercise of the option that the trial court was aware of was in 2010, and this suit was properly brought to enforce the exercise of the 2010 option.

¶ 35 The trial court agreed with the Village that the case was appropriate for specific performance because there was no adequate remedy at law. The property's condition concerned Village residents' health, safety, and welfare, and this was supported by the Village ordinance accepting Rohm and Haas's offer for the 29 acres.[5]

¶ 36 The Village complied with the agreement's terms by providing the necessary zoning, etc., and exercised its option, and BCP failed to comply as it did not convey the property. There was no evidence that the Village acted in bad faith. Therefore, the trial court found in favor of the Village and against BCP, and it directed that BCP convey the 29 acres.

¶ 37 2. Motion to Reconsider

¶ 38 BCP filed a motion to reconsider, which the trial court denied on May 3, 2013. The trial court stated the following. BCP argued that the trial court's rationale for finding that the notice

[5] The ordinance stated, in relevant part, that the Village believed that it was the best course of action to have Rohm and Haas hold title to the property "in order for it to undertake environmental monitoring of the subject property and an appropriate remediation program, if necessary, and which is in the interests of the health, safety and welfare of the Village and residents."

sent to Anest in 2008 was inadequate was that the letter was not specifically addressed to BCP. However, the trial court's finding was not based on the proper naming of the party. The trial court found that Anest was not a "particularly credible witness" based on his manner of testifying and because his testimony seemed contrived and convenient. Therefore, it put little weight on his testimony. Nevertheless, in the course of Anest's testimony, as well as his counsel in opening statement, there were carefully drawn distinctions between Anest and BCP. Anest emphasized that BCP was owned by a family trust and that he was only a manager, not the owner. He denied that his signature was on the 2005 agreement even though it was notarized by his own office manager. He eventually admitted that the signature was his but then denied knowledge of his negotiations with the Village.

¶ 39 In 2008, the Village directed a letter to exercise the option, and BCP argued that this should be binding on the Village. The trial court's ruling was ultimately consistent with BCP's reaction to the letter. After taking into consideration BCP's careful distinctions and Anest's credibility problem, the trial court considered BCP's reaction to the letter, in that BCP ignored the letter rather than acting in any way consistent with the Village's attempt to exercise the option. "Ultimately, the Court viewed the actions of BCP in 2008 as a manifestation of its own belief that it did not accept or recognize that the Village had properly exercised its option."

¶ 40 Next, BCP argued that the trial court's ruling on the environmental audit was based on a lack of evidence presented by BCP. While the trial court commented on BCP's failure to get an audit for its own protection, the trial court's ruling that the audit was not a condition precedent was based entirely upon the contract's language.

¶ 41 BCP timely appealed the trial court's ruling.

¶ 42 C. Attorney Fees

¶ 43 Meanwhile, on February 15, 2013, the Village filed a petition for attorney fees. It cited a clause in the annexation agreement that stated: "In the event the Village chooses to sue in order to enforce or interpret the obligations hereunder, [BCP] shall pay all costs and expenses incurred by the Village, including, but not limited to, attorneys' fees and court costs, provided the Village prevails." The Village was later given leave to file copies of checks or invoices with affidavits to demonstrate that such fees were incurred by the Village, as well as an amended petition for attorney fees.

¶ 44 At a hearing on July 8, 2013, BCP argued that the Village was not entitled to attorney fees because Rohm and Haas was reimbursing the Village for the fees pursuant to its contract to purchase the 29 acres; BCP argued that attorney fees were meant to make a party whole, but the Village had lost no money in pursuing the litigation. BCP argued that essentially Rohm and Haas was incurring the attorney fees, not the Village. BCP argued that the Village was not even taking any risks because it had set up an account from which to pay the fees, and Rohm and Haas always maintained a balance in the account.

¶ 45 The trial court stated that the situation seemed similar to one involving the "collateral source" rule. The trial court stated, "The fact that they're being reimbursed doesn't mean, as a matter of law, it still isn't their expense." The trial court additionally stated that it was aware of Rohm and Haas's role behind the scenes, from what was disclosed in court, but its decision boiled down to the language in the annexation agreement between BCP and the Village. The trial court questioned why the provision would be unenforceable.

¶ 46 BCP replied that the annexation agreement gave the Village the right to attorney fees if it chose to file an action, but the Village did not choose to file this action, because it was obligated to file the action by virtue of its contract with Rohm and Haas. BCP argued that the Village had

no need or desire to hold the land, but rather Rohm and Haas did.

¶ 47 The Village responded that it chose to enter the contract with Rohm and Haas, and it chose to file the action to enforce its contract with BCP. The Village stated that it would not be recovering attorney fees twice, because any amount it received for attorney fees would be assigned back to Rohm and Haas.

¶ 48 The trial court stated that the fact that the Village chose to negotiate with Rohm and Haas was not ultimately relevant, and there was no indication that the Village was the alter ego of Rohm and Haas or under its direct control. The trial court stated that the existence of the contract with Rohm and Haas did not make the Village's filing of the complaint an involuntary act, and the Village was entitled to fees under the terms of its contract with BCP.

¶ 49 At a hearing on August 1, 2013, the trial court stated:

> "There's been argument regarding whether the Village actually incurred these because the bills were completely reimbursed by Rohm and Haas. And even if that hasn't been stipulated to, it's been implicitly agreed to that that is the fact of the matter. But I don't think that that affected this provision because the fact that the Village may have entered into an agreement with a third party to pay these bills does not in any way mean that BCP should realize the benefit of the Village's bargain, nor should it relieve BCP of the obligation to comply with this provision.
>
> And that's why I likened it to the Collateral Source Rule earlier. BCP seems to be wishing to claim the benefit of a separate agreement that the Village negotiated for itself. And I *** don't think that they were an intended third-party beneficiary of that set in the agreement.
>
> So even though Rohm and Haas reimbursed the Village, I still think that the legal

> fees at issue *** were still incurred by the Village such that they are covered by this provision."

The trial court awarded the Village $227,005.49 in attorney fees.

¶ 50 BCP timely appealed from the attorney fee award. This court subsequently granted the Village's motion to consolidate the two appeals.

¶ 51 II. ANALYSIS

¶ 52 A. Directed Finding

¶ 53 On appeal, BCP first argues that the trial court erred in denying its motion for judgment in its favor at the close of the Village's case. BCP argues that: (1) the Village does not have a valid option to the 29 acres because the 2005 annexation agreement is itself invalid due to the Village's failure to hold a public hearing or pass an ordinance authorizing an annexation agreement between it and BCP, as opposed to Anest; (2) the option is unenforceable because the contract does not set a price for acquiring the parcel; (3) the Village has no standing to sue pursuant to its purported exercise of the option in 2010 because it previously exercised the option in 2008 and must pursue relief under that exercise of the option; (4) an environmental risk audit was a condition precedent that has not been met; and (5) the Village did not prove that it lacks an adequate remedy at law.

¶ 54 Section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2012)) governs motions for directed findings in bench trials. *Dwyer v. Love*, 346 Ill. App. 3d 734, 737 (2004). In ruling on such a motion, the trial court should first determine as a matter of law whether the plaintiff has established a *prima facie* case by providing evidence on every element essential to the plaintiff's underlying cause of action. *In re Foxfield Subdivision*, 396 Ill. App. 3d 989, 992 (2009). If the plaintiff fails to meet this burden, the trial court should grant judgment in the

defendant's favor. *Id.* Our standard of review in such a situation is *de novo*. *Minch v. George*, 395 Ill. App. 3d 390, 398 (2009). On the other hand, if, as here, the trial court determines that the plaintiff has presented a *prima facie* case, the trial court must consider and weigh all of the evidence presented to determine if the *prima facie* case survives. *Id.* We review the trial court's ruling at this stage under the manifest-weight-of-the-evidence standard. *Greater Pleasant Valley Church in Christ v. Pappas*, 2012 IL App (1st) 111853, ¶ 23.

¶ 55 BCP argues that the standard of review is *de novo*, but it cites cases dealing with the denial of a directed verdict. A motion for a directed verdict applies in jury trials (see 735 ILCS 5/2-1202 (West 2012)), whereas a party moves for a directed finding in a bench trial (see 735 ILCS 5/2-1110 (West 2012)), like in this case.

¶ 56 This distinction is particularly significant here because under section 2-1110, "If the ruling on the motion is adverse to the defendant, the defendant may proceed to adduce evidence in support of his or her defense, in which event the motion is waived." 735 ILCS 5/2-1110 (West 2012). In other words, if the trial court denies a section 2-1110 motion and the defendant then presents evidence in its defense, the defendant " 'waives any complaint that the denial of the motion was in error.' " *Pancoe v. Singh*, 376 Ill. App. 3d 900, 909 (2007) (quoting *Evans & Associates, Inc. v. Dyer*, 246 Ill. App. 3d 231, 239 (1993)). After the trial court denied BCP's motion for a directed finding, BCP called Janeck as a witness in its defense, thereby waiving its argument that the trial court erred in denying the motion.[6] *Id.*; *Dwyer*, 346 Ill. App. 3d at 737.

¶ 57 B. Specific Performance

[6] Notwithstanding our finding of waiver, we note that in other portions of its brief, BCP reasserts many of the same arguments underlying its contention that the trial court should have granted its motion for a directed finding, and we address the issues in those contexts.

¶ 58 BCP next argues, outside the framework of its motion for a directed verdict, that the trial court erred in granting the Village specific performance, because there was an adequate remedy at law. In order to be entitled to specific performance, a plaintiff must prove: (1) the existence of a valid, enforceable contract; (2) the plaintiff's compliance with the contract or willingness and ability to perform; and (3) the defendant's refusal to perform his part of the contract. *Happy R. Securities, LLC v. Agri-Sources, LLC*, 2013 IL App (3d) 120509, ¶ 42. As relevant for the issue at hand, specific performance will be granted only where there is no adequate remedy at law, such as money damages. *John O. Schofield, Inc. v. Nikkel*, 314 Ill. App. 3d 771, 785 (2000). It is within the trial court's discretion whether to grant specific performance. *WestPoint Marine, Inc. v. Prange*, 349 Ill. App. 3d 1010, 1013 (2004).

¶ 59 BCP argues that the Village has demonstrated that the land at issue is not a unique piece of property that it wishes to keep for itself, because the Village plans to immediately sell the land to Rohm and Haas. BCP argues that the Village also did not prove irreparable harm, because the annexation agreement provides that the 29 acres must always remain open space, regardless of owner. BCP maintains that its position is further supported by Peters's testimony that the Village "attempted to sell the land at public auction," without any restrictions. BCP argues that because the Village is selling the land to Rohm and Haas for a sum certain, there is ample evidence of the land's monetary value to the Village constituting an identifiable, adequate remedy at law. BCP further argues that Rohm and Haas agreed to comply with the Illinois Environmental Protection Agency's (IEPA) requests for remediation, not the Village's requests for remediation, and the IEPA would enforce remediation requirements regardless of any agreement between Rohm and Haas and the Village.

¶ 60 We conclude that the trial court did not abuse its discretion in granting the Village specific performance. Where a contract concerns land, the inadequacy of monetary damages is well-settled. *Happy R. Securities, LLC*, 2013 IL App (3d) 120509, ¶ 36. This proposition is particularly applicable to this case. As the Village points out, the 29 acres is next to outlot A1, which was dedicated to the Village in part for access to the property. The 29 acres is also part of a planned subdivision containing Village residents, and it is undisputed that at least a portion of the land is contaminated. BCP's argument that the Village tried to sell the land at public auction misconstrues the evidence, which showed that in 2010 the Village actually solicited bids for the land pursuant to statutory requirements, with the right to reject any and all bids, and with the knowledge that Rohm and Haas was interested in purchasing the property from the Village. The Village's sale of the land to Rohm and Haas was not just for $175,000 but also the condition that Rohm and Haas conduct any necessary groundwater remediation. While BCP argues that the IEPA would force Rohm and Haas to do so anyway, it appears that such cleanup has not taken place while the land has been under BCP's ownership. More significantly, Rohm and Haas agreed in writing to "continue" its remediation of groundwater contamination in accordance with IEPA requests and "approvals," which indicates a proactive approach, and having a contract also provides the Village with a cause of action should Rohm and Haas fail to comply. Therefore, the trial court acted within its discretion in granting the Village specific performance.

¶ 61 C. Prior Exercise of Option

¶ 62 BCP next argues that the evidence shows that the Village exercised its option in March 2008, thereby changing the option to a bilateral contract (see *Stull v. Hicks*, 59 Ill. App. 3d 665, 666 (1998)), and the Village could therefore not exercise the option again in 2010. As

mentioned, the Village's complaint requested specific performance on its 2010 exercise of the option.

¶ 63 BCP argues as follows. The trial court opined that the suit was properly brought to enforce the 2010 exercise of the option because that was the only formal notice to the correctly named party (BCP), whereas the March 2008 exercise of the option was addressed to Anest. This was a novel theory not raised by the Village, and the finding was also factually incorrect based on the evidence presented. In the first place, Anest signed both annexation agreements, and per the 2005 agreement all notices were to go to him at a Libertyville address where the 2008 letter was also sent. Relatedly, Anest was the contact person for BCP and the manager authorized to do business on its behalf. The March 2008 letter itself stated that it was in reference to the annexation agreement between the Village and BCP, not the agreement between the Village and Anest.

¶ 64 BCP further argues that because the issue of proper notice was never raised by the Village, BCP was unfairly prejudiced in that it could not present additional evidence showing that the Village addressed another 2008 option letter to BCP specifically. BCP maintains that it could have provided over 10 letters sent certified mail to BCP purporting to exercise the same 2008 option.

¶ 65 The Village responds that BCP's argument is without merit because the March 2008 letter asks Anest himself to convey the warranty deed, whereas even BCP has taken great pains to argue that it, not Anest, owned the 29 acres, and that Anest as an individual is distinguishable from BCP. The Village also argues that there is no evidence in the record that Anest received the letter in 2008, much less BCP. The Village maintains that BCP fails to explain why the Village would be precluded from requesting in 2010 that BCP convey the property.

¶ 66 Regarding the additional letters BCP alleges that the Village sent to BCP to exercise the option, the Village argues that such letters are not part of the record, and BCP never asked for them to be admitted into evidence. The Village argues that even if the letters were in evidence, BCP's refusal to convey title to the 29 acres shows that the letters did not result in a meeting of the minds which extinguished the option.

¶ 67 The appellate court has defined an option contract as:

> "an agreement in which one party (the optionor), based upon consideration given to him by the optionee, binds himself to perform a certain act, at the sole power and discretion of the optionee to accept upon terms specified, at which time it is converted from a bilateral to a unilateral contract and cannot be withdrawn by the optionor during the option period." *Terraces of Sunset Park, LLC v. Chamberlin*, 399 Ill. App. 3d 1090, 1093-94 (2010).

In this situation, whether the Village fully exercised its option in March 2008 is a question of fact given that, among other things, the letter was addressed to Anest. See *Wolfram Partnership, Ltd. v. LaSalle National Bank*, 328 Ill. App. 3d 207, 218 (2001) (finding a question of fact as to whether the plaintiff exercised its option in accordance with the parties' understanding). We will defer to the trial court's factual findings after a bench trial unless the findings are against the manifest weight of the evidence. *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35. A ruling is against the manifest weight of the evidence if the opposite conclusion is clearly apparent or the ruling is unreasonable, arbitrary, or not based on the evidence. *Id.* We give great deference to the trial court's determinations because, as the fact finder, it was in the best position to evaluate the witnesses' conduct and demeanor. *Id.*

¶ 68 We conclude that the trial court's finding that the Village did not effectively exercise its option in the March 2008 letter was not against the manifest weight of the evidence. The letter was addressed to Anest and listed "STATE OIL COMPANY" underneath his name. It asked Anest to submit the deed and the phase I environmental audit. As the trial court discussed, BCP repeatedly emphasized in the context of other arguments that it was not the same party as Anest. While the March 2008 letter also included a reference to the BCP annexation agreement in the subject line, this fact was a conflict for the trial court to resolve. See *Kovac v. Barron*, 2014 IL App (2d) 121100, ¶ 59 (it is the trial court's role to resolve conflicts in the evidence). Moreover, as the Village points out, BCP never presented any evidence that it actually received the letter in 2008. In denying BCP's motion to reconsider, the trial court stated that its primary basis for finding that the Village did not exercise its option in March 2008 was that BCP ignored the letter, which indicated that BCP did not accept or recognize that the Village had properly exercised its option. The trial court did not err in considering BCP's lack of reaction to the letter in determining whether the Village effectively exercised its option. *Cf. Wentcher v. Busby*, 98 Ill. App. 3d 775, 783 (1981) (stating that conclusion that the plaintiff effectively exercised his option was strengthened by the fact that the parties regarded his letter as a valid exercise of the option, in that the defendant's counsel sent a letter recognizing the validity of the exercise).

¶ 69 Regarding alleged unfair prejudice to BCP from the trial court's ruling on the notice, the record reveals that BCP contended in its written closing argument that if any option existed between the parties, the evidence showed that the Village exercised the option in March 2008. The Village's reply to the closing argument maintained that the 2008 correspondence to Anest individually did not preclude the Village from exercising its option in 2010 through correspondence with BCP, the owner of record. Therefore, this issue is hardly one that the trial

court raised *sua sponte*. The record also does not indicate that BCP sought to introduce any additional letters from the Village at trial. Therefore, we find no unfair prejudice to BCP.

¶ 70 In sum, the trial court did not err in finding that the Village exercised its option in 2010.

¶ 71 D. Evidence Barred by Motion *in Limine*

¶ 72 BCP's fourth argument on appeal is that the trial court erred in basing its ruling in part upon BCP's failure to submit evidence that was barred by a motion *in limine*. BCP notes that the trial court ruled before trial that the annexation agreement was unambiguous, and therefore the trial court would not allow extrinsic evidence in order to interpret the agreement. BCP argues that contrary to this ruling, the trial court specifically addressed BCP's lack of proofs at trial to support BCP's argument that the phase I environmental audit could not be waived by the Village because it also benefitted BCP. BCP points to the trial court's statement: "Furthermore, the Court rejects the argument that the audit was for the benefit of [BCP] ***. While it is possible for [BCP] to construct an argument that BCP would potentially benefit from the audit, there is no evidence to support the contention that this was its original purpose."

¶ 73 It is within the trial court's discretion to determine whether evidence is relevant and admissible, and we will not disturb its determination absent a clear abuse of discretion. *In re Marriage of Bates*, 212 Ill. 2d 489, 522 (2004). In contrast, where the relevant facts are undisputed and the trial court excluded the proposed evidence based on its interpretation of the law, our review is *de novo*. *Petre v. Kucick*, 331 Ill. App. 3d 935, 941 (2002). Here, the issue implicates the trial court's legal reasoning, so we review the issue *de novo*.

¶ 74 We conclude that BCP's argument, that the trial court improperly relied on BCP's failure to submit extrinsic evidence, is without merit. Immediately following the quote about the environmental audit cited by BCP, the trial court stated, "[BCP's] argument lacks credibility

simply because [it was] required to arrange to pay for the audit." Therefore, it is clear that the trial court found that the audit was not for BCP's benefit because the agreement's language required BCP to pay for the audit, not based on a lack of extrinsic evidence from BCP. Additionally, the trial court clarified during its ruling on BCP's motion to reconsider that its findings regarding the environmental audit were based upon the contract's language.

¶ 75 E. Standing

¶ 76 BCP next argues that the trial court erred in failing to hold that the Village lacked standing to pursue its claims, an issue that BCP raised in a motion to dismiss[7] and also mentioned in its closing argument. Lack of standing is an affirmative matter that may be raised in a section 2-619(a)(9) motion to dismiss. *McCready v. Illinois Secretary of State White*, 382 Ill. App. 3d 789, 794 (2008). We review *de novo* a trial court's denial of a motion under section 2-619. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004); see also *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 14 (the assertion of an affirmative defense of lack of standing presents a question of law that we review *de novo*). BCP's argument also requires us to construe the annexation agreement. The interpretation of a contract is a question of law that we likewise review *de novo*. *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20 (2011).

¶ 77 BCP argues that the Village lacks standing because it failed to tender proper consideration to BCP for the 29 acres, so no option contract exists between the parties. We

[7] On September 3, 2010, BCP moved to dismiss the case under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)) on the basis that the Village lacked standing. The trial court denied the motion on October 6, 2010.

disagree. As mentioned, the annexation agreement stated that the owner "desires that the Subject Property be annexed to the Village under the terms and conditions and in the manner hereafter specified and the Village hereby agrees to enter this Agreement based on the conditions undertaken and the promises made by [BCP] to the Village herein." Within the agreement, the Village agreed to, among other things, annex and rezone the property and provide water and sewer services. Paragraph 5(A) gives the Village an option to acquire title to the 29 acres, and nowhere in the approximately three pages devoted to provisions regarding the conveyance of the property is the subject of additional consideration mentioned. Therefore, we conclude that the Village was not required to pay BCP any sum of money in order to exercise the option.

¶ 78 BCP also argues that the Village lacks standing to sue under its purported exercise of the option in 2010 because any option that it had was exercised through its 2008 letter. In its 2-619 motion to dismiss, BCP argued that the Village exercised its option in March 2008, but BCP attached as an exhibit a letter from May 2008 and did not include any affidavits. *Cf.* 735 ILCS 5/2-619 (West 2010) ("If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit[.]"). On this basis alone it was not error for the trial court to deny the section 2-619 motion to dismiss. Moreover, as discussed, the question of whether the Village effectively exercised its option in 2008 was a factual dispute, which would also provide a basis to deny the section 2-619 motion. See *Collins v. Bartlett Park District*, 2013 IL App (2d) 130006, ¶ 55 (existence of a genuine issue of material fact precludes dismissal under section 2-619(a)(9)).[8] As for the question of standing raised in BCP's closing argument, we have already

[8] There is also case law stating that where a defendant brings a section 2-619 motion in a bench trial and there are disputed questions of fact, the trial court may deny the motion without prejudice with the right to raise the issue through the answer, or it may decide the merits of the

determined that the trial court's finding that the Village did not effectively exercise its option in the 2008 letter was not against the manifest weight of the evidence.

¶ 79 F. Contract Ambiguity

¶ 80 BCP's sixth argument on appeal is that the trial court erred in finding that the annexation agreement was unambiguous and barring the introduction of parol evidence.

¶ 81 On May 7, 2012, the Village filed a motion *in limine* seeking, among other things, to exclude any evidence as to BCP's interpretation or understanding of the annexation agreement. The Village cited *Air Safety, Inc. v. Teacher's Realty Corp.*, 185 Ill. 2d 457 (1999), for the proposition that where a contract contains an integration clause, extrinsic evidence may not be used to create ambiguity in an otherwise unambiguous contract. The trial court granted the motion on August 16, 2012, stating, "I believe that the language of the contract is sufficiently clear that there are no ambiguities and parol evidence is inappropriate."

¶ 82 A decision of whether to grant a motion *in limine* is within the trial court's sound discretion, and the trial court's ruling will not be disturbed on appeal unless it abused its discretion. *Taylor v. Board of Education of the City of Chicago*, 2014 IL App (1st) 123744, ¶ 45. However, here the trial court excluded extrinsic evidence solely based on its interpretation of the contract, a question of law (see *Carr*, 241 Ill. 2d at 20), so we review this issue *de novo*. See *People v. Olson*, 2013 IL App (2d) 121308, ¶ 11 (reviewing ruling on motion *in limine de novo*

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dispute based on the pleadings and affidavits offered by the parties. *Hart v. Loan Kieu Le*, 2013 IL App (2d) 121380, ¶ 4. In such a situation, we apply the manifest-weight-of-the evidence standard of review. *Id.* Applying this framework, we still find no error in the trial court's dismissal because, as stated, in conjunction with its 2-619 motion, BCP did not provide affidavits or evidence relevant to its assertion that the Village exercised the option in March 2008.

because the trial court excluded the evidence based on its interpretation of case law); *People v. Hall*, 2011 IL App (2d) 100262, ¶ 10 (where the trial court's ruling on a motion *in limine* presented a question of law, the appellate court reviewed the issue *de novo*).

¶ 83 In construing a contract, the primary objective is to give effect to the parties' intent, and we will first look to the contract's language to determine that intent. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). We construe a contract as a whole, viewing each provision in light of other provisions. *Id.* If the contract's words are clear and unambiguous, they will be given their plain, ordinary, and popular meaning. *Id.* In contrast, if the contract's language is susceptible to more than one meaning, it is ambiguous, and the court can look to extrinsic evidence to determine the parties' intent. *Id.* However, a contract is not rendered ambiguous simply because the parties disagree on its meaning. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 372 (2007). As stated, we review a contract's interpretation *de novo*. *Carr*, 241 Ill. 2d at 20.

¶ 84 BCP first argues that an integration clause does not prevent extrinsic evidence if the contract's terms are ambiguous. The annexation agreement's integration clause states:

> "This Agreement sets forth all agreements, understandings and covenants between and among the parties. This Agreement supersedes all prior agreements, negotiations and understandings, written and oral, and is a full integration of the entire agreement of these parties. All rights granted to [BCP] or the Village hereunder shall be deemed vested up [*sic*] execution hereof."

¶ 85 An integration clause is a clear indication that the parties desired that the contract be interpreted solely according to the agreement's language. *Air Safety, Inc.*, 185 Ill. 2d 457, 465 (1999). Therefore, extrinsic evidence may not be considered where the contract contains an integration clause and is facially unambiguous. *Id.* at 466. Still, if the contract is ambiguous, an

integration clause will not preclude the court's consideration of extrinsic evidence. *Gomez v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 130568, ¶ 26. Accordingly, we agree with BCP that the fact that the annexation agreement contained an integration clause would not, on its own, prohibit the introduction of extrinsic evidence. However, we also note that the trial court based its grant of the Village's motion *in limine* on its determination that the contract's language was unambiguous, and it did not rely on the presence of the integration clause.

¶ 86 BCP next argues that the annexation agreement is patently ambiguous. BCP maintains that section 5(A) is susceptible to at least two reasonable but conflicting interpretations. BCP argues that the first alternative language (beginning, "[BCP] hereby conveys an option to the Village for the Village or its designee to acquire fee simple title from [BCP]") clearly imposes environmental conditions, whereas the second alternative language (beginning, "Alternatively, in the event the Village elects not to exercise its option to acquire the 29 acre parcel") is silent on this issue. BCP contends that although it takes the position that the contract language imposes the environmental requirements for both alternatives, one could argue that the second alternative language could be read as not requiring the environmental conditions. BCP argues that it is confusing why the alternative language was drafted at all, because if the first alternative allows the Village or its designee to acquire the land in fee simple title, there should not be a need for the second alternative language which also allows the land to be conveyed to the Village's designee in fee simple title. BCP maintains that the two clauses cannot be read with clarity unless and until there is an explanation as to why the environmental conditions precedent were drafted into the agreement. BCP argues that it is also unclear whether the ten-year option expiration date applies to the second alternative language, which further demonstrates the

contract's ambiguity. Therefore, BCP argues, the trial court should have allowed extrinsic evidence as to the intent and meaning of the contract.

¶ 87 The Village argues that the language of section 5(A) clearly shows that the Village had the option for it or its designee to acquire title to the 29 acres, or alternatively, to simply direct the conveyance of the 29 acres to a designee. The Village maintains that while BCP complains that such language is duplicative or repetitive, there is no text in the agreement that *conflicts* with other text in the agreement.

¶ 88 Regarding the environmental audit, the Village notes that the third subparagraph of section 5(A) provides in part: "Prior to the conveyance of any land *to the Village* from [BCP] at [BCP's] cost, the Village shall be furnished with an environmental risk audit certified to the Village." (Emphasis added.) The Village also cites the first sentence in the last subparagraph of section 5(A), which states, "Alternatively, in the event the Village elects not to exercise its option to acquire the 29 acre parcel, such parcel shall be conveyed in fee simple title to the Village's designee ***." The Village argues that there is no language in section 5(A) providing for an environmental audit if the 29 acres is conveyed to a party other than the Village, and here the Village sought to have the property conveyed to Rohm and Haas.

¶ 89 We agree with the Village that the above-cited text, considered in conjunction with the entirety of section 5(A) and the contract as a whole, shows that the contract unambiguously requires an environmental audit only if the property is conveyed to the Village. That is, the text states before the land is conveyed "to the Village," the Village is to be provided with an environmental audit. In contrast, if the Village chooses not to acquire the 29 acres for itself, the land "shall be conveyed in fee simple title to the Village's designee," and there is no mention of an environmental audit.

¶ 90 While BCP also argues that the contract is unclear as to whether the ten-year option expiration date applies to the second alternative language, here it is undisputed that the Village acted within the ten-year period, so this point alone will not serve to allow extrinsic evidence as to the entire agreement. See *Vole, Inc. v. Georgacopoulos*, 181 Ill. App. 3d 1012, 1021 (1989) (court may consider extrinsic evidence if a contract is ambiguous or silent "on a disputed issue").

¶ 91 BCP also argues that the Village has taken the position that it is "waiving" the environmental requirements, but the Village may not unilaterally do so because the requirements benefit and protect BCP as well. BCP cites *Perry v. Estate of Carpenter*, 396 Ill. App. 3d 77, 82 (2009), where the court stated that a party to a contract may waive a condition precedent where that condition is intended for that party's benefit. BCP argues that if it transfers the land to the Village knowing that the land is contaminated without first requiring Rohm and Haas to clean up the land to residential standards, BCP can be held liable for injuries resulting from the contaminated land. BCP argues that it should not be forced to turn over the land to the Village without receiving indemnification from Rohm and Haas. BCP also makes the somewhat conflicting argument that the ability to waive the environmental requirements is unclear, requiring the use of extrinsic evidence to determine whether the requirements were written for the Village, BCP, or both parties.

¶ 92 Given our conclusion that the environmental requirements are not triggered when the Village elects to have the property conveyed to its designee, this issue is moot. Even otherwise, the annexation agreement states that the "Village shall be furnished with an environmental risk audit certified to the Village" at BCP's cost, "assuring the Village that there are no hazardous substance(s)," and that before conveying the land, BCP "shall execute and deliver to the Village an Environmental Indemnification Agreement." This language makes clear that the

environmental audit is for the Village's benefit, and thus the Village could waive the condition precedent.

¶ 93 BCP additionally argues that extrinsic evidence on contract negotiations was admissible for proving its affirmative defenses of unclean hands, waiver, impossibility of performance, fraud, and misrepresentation. BCP argues that the Village falsely and fraudulently represented to BCP that BCP could sell the land to Rohm and Haas, so negotiations between the parties were relevant and admissible for purposes of resolving whether the Village acted in bad faith.

¶ 94 We agree with an argument made by the Village that while the trial court's ruling on the motion *in limine* precluded extrinsic evidence on the construction or interpretation of the annexation agreement, its ruling did not preclude BCP from furnishing evidence on any of its affirmative defenses. In fact, after the trial court made its ruling on the motion *in limine*, BCP's counsel stated, "This leaves open whether or not parol or extrinsic evidence is admissible with respect to *** [BCP's] affirmative defenses, if we get there." The trial court replied, "Yeah, I haven't gotten to that yet."

¶ 95 Furthermore, to preserve an error in the exclusion of evidence, the proponent of the evidence must make an adequate offer of proof in the trial court. *Northern Trust Co. v. Burandt & Armbrust, LLP*, 403 Ill. App. 3d 260, 280 (2010). To be adequate, an offer of proof must apprise the trial court of what the offered evidence is or expected testimony will be, its purpose, and by whom it will be presented. *Id.* "Failure to make an adequate offer of proof results in forfeiture of the issue on appeal." *Id.* Here, BCP cites to no offer of proof in the record, thereby forfeiting the issue on appeal.

¶ 96 Finally, BCP argues that oral and written modifications of the annexation agreement after September 7, 2004, are admissible regardless of the court's determination regarding ambiguity,

because the evidence showed that BCP and the Village entered into the annexation agreement on August 17, 2004, as reflected by Ordinance No. 2004-05-28, dated September 7, 2004. BCP notes that the minutes from the November 16, 2004, Village board meeting stated that "the Board provided tentative agreement to the idea of releasing our option on the property so that Rohm and Haas could purchase it." BCP argues that the parties did not seek to revise the annexation agreement at that time because the agreement was already approved.

¶ 97 It is unclear what evidence BCP is contending was wrongly excluded, as the trial included testimony about the November 2004 Village meeting and the minutes from that meeting. The mere fact that an agreement has been amended does not require the trial court to allow evidence as to the negotiations leading to the amendment. See *First Bank & Trust Co. of Illinois v. Village of Orland Hills*, 338 Ill. App. 3d 35, 40 (2003) (finding language of agreement and amendment clear and unambiguous); *cf. A. Epstein & Sons International, Inc. v. Eppstein Uhen Architects, Inc.*, 408 Ill. App. 3d 714, 720 (2011) (where there was an ambiguity whether a document was a proper modification of initial contract, parol evidence had to be considered in determining parties' intent). To the extent that BCP did not provide an offer of proof on the allegedly wrongfully-excluded evidence, it has forfeited the issue on appeal.

¶ 98 G. Admission of the Annexation Agreement

¶ 99 BCP's seventh argument on appeal is that the trial court erred in admitting the annexation agreement, because it was not properly authorized or executed and violated the best evidence rule. As stated, we will not disturb a trial court's determination on whether evidence is relevant and admissible absent a clear abuse of discretion. *In re Marriage of Bates*, 212 Ill. 2d at 522.

¶ 100 BCP cites section 11-15.1-3 of the Illinois Municipal Code (65 ILCS 5/11-15.1-3 (West 2004)) which states:

> "The corporate authorities shall fix a time for and hold a public hearing upon the proposed annexation agreement or *amendment*, and shall give notice of the proposed agreement or amendment not more than 30 nor less than 15 days before the date fixed for the hearing. *** After such hearing the agreement or amendment may be modified before execution thereof. The annexation agreement or amendment shall be executed by the mayor or president and attested by the clerk of the municipality *only after such hearing and upon the adoption of a resolution or ordinance directing such execution, which resolution or ordinance must be passed by a vote of two-thirds of the corporate authorities then holding office*." (Emphases added.)

BCP argues that the Village failed to comply with this statute in that ordinance no. 2004-05-28 authorized an annexation agreement between Anest and the Village, but there was no ordinance authorizing the execution of an agreement between BCP and the Village. Therefore, argues BCP, the Village president did not have the authority to sign an annexation agreement between the Village and BCP, and it is not a valid and enforceable contract. BCP argues that even if the trial court considered the 2005 annexation agreement to be an amendment of the 2004 Anest annexation agreement, the Village failed to provide the required notice of hearing and hearing on amendments to annexation agreements.

¶ 101 BCP points out that it objected to the authenticity and admissibility of the 2005 annexation agreement based on the best evidence rule because the agreement was attached to a resolution signed on August 7, 2004. BCP argues that at some point the Village must have switched the agreements prior to recording the document, because there was no other explanation for how a 2005 document was attached to a 2004 resolution. BCP relatedly objected to the annexation agreement on the grounds of lack of foundation and relevance, arguing that the

Village's authorizing ordinance was for an agreement between it and Anest. The trial court overruled BCP's objection to the annexation agreement on the basis that it had been "addressed via the answer."

¶ 102 The Village argues that it complied with each step of the statutory procedure in entering into the annexation agreement. The Village points out that Anest initially represented to the Village that he, rather than BCP, owned the property. The Village maintains that the ordinance directed the execution of the annexation agreement by the Village president and that the agreement ultimately executed by the parties was identical to the one approved by the board except that the reference to "William Anest" as being the owner of record was modified to "BCP Realty, LLC" prior to the agreement's execution. The Village cites section 11-15.1-3's provision, "After such hearing the agreement or amendment may be modified before execution thereof," as support for the position that the agreement could be modified before it was executed. The Village contends that there is no evidence in the record that the modification to reflect the correct property owner was made outside the interval between the public hearing and the execution of the annexation agreement in 2005.

¶ 103 The Village argues that in addition to the statute expressly permitting such a modification, case law shows that if there is an error in a municipality's records, a municipality may amend them. The Village cites *City of Chicago v. City of Waukegan*, 116 Ill. App. 3d 88, 94 (1983), where the court stated:

> "[A] public body may amend the records of its actions to conform to the facts in order to prevent public injustice. A public body establishes its acts by its records and, in cases of error or omission, may amend them."

The Village argues that here, the error regarding the owner of record was corrected. The Village maintains that the authorizing ordinance itself continues to refer to the "William Anest" agreement and the "Creekside Planned Development" for identification purposes. The Village points to evidence in the record that even after the 2005 agreement was executed by BCP, there were references to the property as the "Anest property." The Village argues that no statute or case law requires the ordinance authorizing the annexation agreement to identify the owner of record, but rather the only requirement in this regard is that the annexation agreement itself be signed by the owner of record, which occurred here.

¶ 104 The Village further argues that BCP may not challenge the Village's authority to enter into the annexation agreement based on BCP's verified pleadings. The Village points out that BCP's verified answer to the complaint stated, "Defendant admits the Village and BCP entered into an annexation agreement on September 7, 2004," and that its verified counterclaim stated "On or about September 7, 2004, the Village and BCP entered into an Annexation Agreement ***." The Village also cites BCP's verified amended affirmative defenses filed on March 1, 2012, which stated:

> "5. On or about September 7, 2004, the Village and BCP entered into an Annexation Agreement ***, which was approved, *authorized* and published by the Village on September 7, 2004.
>
> * * *
>
> a. The Village *** and BCP entered into an Annexation Agreement, which was approved by the Village Board on September 7, 2004 *and authorized by Ordinance No. 2004-05-28*." (Emphases added.)

The Village additionally notes that the agreement itself contains a factual recital that "the Village has conducted the public hearing on the proposed Agreement ***."

¶ 105 The trial court allowed the annexation agreement into evidence based on BCP's admissions in its verified pleadings, and we conclude that the trial court did not abuse its discretion in doing so. A fact admitted in a verified pleading is a conclusive judicial admission which is binding on the pleader and wholly dispenses with the necessity of proof of that fact. *People ex rel. Department of Public Health v. Wiley*, 348 Ill. App. 3d 809, 819 (2004). Here, BCP stated that it (as opposed to Anest) and the Village entered into an annexation agreement on September 7, 2004, and that the agreement was authorized by ordinance no. 2004-05-28. Accordingly, BCP may not now challenge the Village's authority to enter into the annexation agreement with it.

¶ 106 To the extent that the Village's authority to enter into the document could arguably be a conclusion of law to which a party is not bound by admission (see *id.*) we likewise find no error. As the Village points out, section 11-15.1-3 states, "After such hearing the agreement or amendment may be modified before execution thereof" (65 ILCS 5/11-15.1-3 (West 2004)). In construing a statute, our primary goal is to ascertain and give effect to the legislature's intent, which is best indicated by the plain and ordinary meaning of the statute's language. *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶ 12. A plain reading of section 11-15.1-3 allows for modification of an annexation agreement before its execution. Here, the landowner's name was changed to correct a mistake by the parties, and there is no evidence that this did not occur before the annexation agreement was first executed in 2005 (*i.e.* there is no evidence that a prior version of the annexation agreement was actually signed). Accordingly, the trial court did not err in allowing into evidence the annexation agreement signed by BCP in 2005.

¶ 107 H. Attorney Fees

¶ 108 Next, BCP argues that the trial court erred in granting the Village's petition for attorney fees, because the Village did not incur or pay any legal fees. A trial court has broad discretion in awarding attorney fees. *Wendy & William Spatz Charitable Foundation v. 2263 North Lincoln Corp.*, 2013 IL App (1st) 122076, ¶ 40. We review *de novo* the trial court's interpretation of attorney fee provisions, but our review of the trial court's judgment in applying the provision to the facts of the case is based on an abuse of discretion standard. *Id.*

¶ 109 BCP reasserts the same arguments against the award of attorney fees that it made in the trial court. Specifically, BCP notes that the Village sought attorney fees under the annexation agreement provision stating, "In the event the Village chooses to sue in order to enforce or interpret the obligations hereunder, [BCP] shall pay all costs and expenses incurred by the Village, including, but not limited to, attorneys' fees and court costs, provided the Village prevails." BCP argues that the Village is not entitled to attorney fees under this language because it did not choose to sue in order to enforce the agreement's terms, but rather it was required to file suit under the terms of its contract with Rohm and Haas because it was unsuccessful in its demand that BCP turn over title to the land to Rohm and Haas. BCP points to language in the contract between the Village and Rohm and Haas stating that Rohm and Hass would reimburse the Village for attorney fees in prosecuting a specific performance action against BCP, in return for the Village: naming Rohm and Haas as its designee; demanding that BCP convey the property to Rohm and Haas; bringing an action for specific performance if BCP failed to comply with the demand; and reimbursing Rohm and Haas for any attorney fees the Village recovered from BCP.

¶ 110 BCP maintains that once the Village entered into the contract with Rohm and Haas, it became a Rohm and Haas proxy, forced to do as directed by Rohm and Haas. BCP contends that this is made clear by additional contract language which required Village attorneys to "take reasonable steps to keep [Rohm and Haas] apprised of material developments in this matter" and "provide to [Rohm and Haas] copies of pleadings and copies of any correspondence with BCP."

¶ 111 BCP further argues that the trial court improperly likened the situation to one involving the collateral source rule. BCP cites *Jiles v. Spratt*, 195 Ill. App. 3d 354, 358 (1990), where the court stated that in contract law, the collateral source rule applies only where there has been an element of fraud, tort, or willfulness in breaching a contract. BCP argues that here, in contrast, there was no finding that BCP's alleged breach of the contract was willful, but rather the trial court acknowledged that the issue was complicated.

¶ 112 BCP analogizes this case to *Sterling Radio Stations, Inc. v. Weinstine*, 328 Ill. App. 3d 58 (2002). There, the plaintiff brought a legal malpractice claim alleging that the defendants' malpractice had led to a judgment against him, as a guarantor. *Id.* at 61. The trial court granted the defendant summary judgment, ruling that the plaintiff had not suffered any damages because a third party (a corporation in which the plaintiff was a shareholder) paid a settlement in satisfaction of the judgment. *Id.* at 61-62. The appellate court held that the $100,000 the plaintiff paid in attorney fees for his unsuccessful appeal (through a different firm), to avoid the consequences of the defendants' action, should be considered damages. *Id.* at 63. However, it agreed with the trial court's reasoning as to the monies paid in satisfaction of the underlying judgment, rejecting the plaintiff's argument that the collateral source rule should apply. *Id.* at 65. The appellate court stated that because the plaintiff paid nothing towards the settlement, "his measure of damages is zero." *Id.* The court stated that to allow the plaintiff to recover the

amount of the judgment in his malpractice claim would unjustly enrich him and permit a double recovery. *Id.* BCP argues that in the instant case, the Village similarly has incurred no attorney fees, and to order BCP to pay such fees permits the Village to obtain a double recovery and force BCP to pay Rohm and Haas for the litigation it forced the Village to pursue.

¶ 113 We conclude that the trial court acted within its discretion in ordering BCP to pay the attorney fees. Addressing BCP's last point first, we note that the Village is not obtaining a "double recovery" because its contract with Rohm and Haas requires it to reimburse Rohm and Haas with any attorney fees recovered. In any event, the trial court did not award the Village the fees based on the collateral rule, but rather based on the contractual provision in the annexation agreement between Village and BCP; such a provision was not present in any of the cases cited by BCP.

¶ 114 Regarding BCP's argument that the Village did not choose to sue BCP, as required to recover attorney fees under the agreement, because it was required to do so under its contract with Rohm and Haas, we agree with the trial court that the Village's voluntary decision to enter into the contract with Rohm and Haas did not render the Village's filing of the complaint against BCP an involuntary act. Moreover, the Village's attorneys represented the Village, not Rohm and Haas, and that the Village was supposed to keep Rohm and Haas informed on what was occurring in the suit in no way means that Rohm and Haas was controlling the litigation. That Rohm and Haas was funding an account for the Village also does not mean that the Village was not incurring the attorney fees,[9] as the Village was legally responsible for the charges, and it

[9] Black's Law Dictionary defines "incur" as "[t]o suffer or bring on oneself (a liability or expense)." Black's Law Dictionary 771 (7th ed.1999).

submitted copies of checks it paid its attorneys. Accordingly, the trial court did not abuse its discretion in awarding the Village attorney fees.

¶ 115 In its brief, the Village has requested that BCP be required to pay the attorney fees the Village incurred in responding to BCP's appellate brief. As we ultimately affirm the trial court's judgment in full, we agree that under the language of annexation agreement, the Village is entitled to attorney fees. Therefore, we remand the cause for the trial court to determine the appropriate amount of fees.

¶ 116 I. Reply Brief

¶ 117 Last, we note that in its reply brief, BCP argues that the Village exercised its option under the first section of 5(A) and therefore only has rights thereunder. BCP argues that: the Village exercised this option in 2008, and the first alternative requires an environmental audit; the Village cannot obtain relief under the second alternative language because its complaint cites only to the first alternative language; and the second alternative language does not contemplate that the designee be anything other than a government agency or environmental not-for-profit organization.

¶ 118 We have already addressed BCP's argument that the Village exercised the option in 2008. As for the remaining arguments, they were not directly raised in BCP's initial brief and are therefore forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued [in the opening brief] are waived and shall not be raised in the reply brief ***."); *Ryan v. Glen Ellyn Raintree Condominium Ass'n*, 2014 IL App (2d) 130682, ¶ 20.

¶ 119 III. CONCLUSION

¶ 120 For the reasons stated, we affirm the judgment of the McHenry County circuit court and remand the cause for the trial court to assess attorney fees against BCP.

¶ 121 Affirmed; cause remanded.