

approximately 145.6 acres owned by the defendants Dale Helms and Jane Helms (the 145-acre tract); and parcel number 14-19.0-200-002, which consisted of 29.28 acres owned by the defendant Dale Helms (the 29-acre tract). In 2002, the 9-acre tract was annexed into the Village. On April 5, 2004, the parties entered into an annexation agreement, which annexed the 145-acre tract into the Village in exchange for the Village installing a sewer to the 9-acre tract. The specific language concerning the sewer extension was as follows:

"The Village of Freeburg agrees to install a sewer main with sufficient capacity to service 450 homes to parcel 14-06.0-300-022 (Jane and Matt Helms 9.2 acres) and to the east boundary of parcel 14-06.0-300-006 when said street is constructed by owners. If necessary, the Village shall install a lift station on said main to service the annexed property. Construction of the sewer line shall take place in conjunction with the widening of Illinois Highway 15 as proposed by the Illinois Department of Transportation and will be completed no later than 12 months after the completion of the Highway 15 widening project (official opening of all lanes to traffic), subject to the IEPA approval of the facilities planning area ***. If the Village fails to install the sewer line within the twelve (12) month completion deadline, except for delays beyond its control, it agrees to pay a late fee in the amount of \$300.00 per day. *** In addition, the Village shall install a lift station complete and operational at a location with grade level to allow gravity fed sewer from said annexed tracts, subject to final engineering design by the Village's engineers."

That same day, an ordinance approving the annexation of the 145-acre tract was executed by the Village's council members. Additionally, the defendant Dale Helms executed a permanent utility easement on parcel 14-19.0-200-002, which consisted of 29.28 acres located near the 9-acre and 145-acre tracts. The permanent utility easement contained the same language set forth in the annexation agreement concerning the extension of the sewer

to the 9-acre tract. On March 15, 2004, the utility easement was accepted by the Village president, Allen L. Watters, and recorded on March 17, 2004.

¶ 4 On March 23, 2011, the Village filed a complaint for declaratory judgment, seeking a determination of its obligations under the annexation agreement and the permanent utility easement entered into between the parties. In the complaint, the Village alleged that the Highway 15 road-widening project had been completed and was officially opened to all lanes of traffic as of August 14, 2009, and that the Helms family had sent the Village multiple letters requesting payment of the \$300-per-day penalty fee established in the annexation agreement and utility easement because construction on the sewer had not been completed within the time limit established. The Village requested the trial court enter a declaratory judgment finding that the Village did not owe the \$300-per-day penalty and that the Village had no obligation to construct the sewer until certain conditions had been met.

¶ 5 On November 3, 2011, the Helms family filed a counterclaim based on breach of contract, alleging that the Village had failed to comply with the terms of the annexation agreement and the permanent utility easement. Specifically, they alleged that the road-widening project on Highway 15 was completed on July 18, 2009, and that the sewer line was not constructed within 12 months of the completion of the road-widening project. Therefore, they requested that the Village be ordered to pay the \$300-per-day penalty fee established in the annexation agreement and the permanent utility easement.

¶ 6 Thereafter, the Village filed a motion to voluntarily dismiss its complaint for declaratory judgment, which was granted by the trial court on November 16, 2011. On February 14, 2012, the Village filed a motion to dismiss the Helms family counterclaim pursuant to section 2-619(a)(9) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (a)(9) (West 2010)). The Village argued, in pertinent part, that the annexation agreement and the permanent utility easement were void contracts because no prior appropriation was

made for the expense of the sewer line, lift station, or the \$300-per-day penalty fee as required under section 8-1-7 of the Illinois Municipal Code (the Municipal Code) (65 ILCS 5/8-1-7 (West 2010)). Therefore, the Village argued that the contracts were unenforceable.

¶ 7 The Helms family filed a response to the Village's motion to dismiss, arguing, in pertinent part, that the Village had the authority to enter into the annexation agreement and to provide for terms that it deemed just and reasonable to accomplish its purpose; that it would not be reasonable for the Village to approve the appropriation of funds for the sewer extension project without plans and prior approval by the Illinois Environmental Protection Agency; and that an appropriation for the sewer extension project had been made as indicated by the Village's 2003 and 2004 budget.

¶ 8 On May 3, 2012, the Village filed a reply to the Helms family's response to the motion to dismiss the counterclaim, reiterating that the contracts were void and therefore unenforceable. In response to the argument that an appropriation had been made, the Village noted that the Helms family had referenced the total appropriations for the sewer department and that the amount of the expenditures for the sewer extension project was "nearly double the amount of total annual appropriation for the sewer department." The Village also noted that the appropriations for the sewer department were properly itemized and argued that none of the itemizations in the sewer department budget indicated that the sewer extension project was occurring.

¶ 9 On May 30, 2012, the trial court granted the Village's motion to dismiss the counterclaim because the Village had not complied with the prior appropriation requirement as it pertained to the annexation agreement and the permanent utility easement. The Helms family appeals.

¶ 10 On appeal, the Helms family argues that the trial court erred in dismissing their counterclaim on the basis that the Village had not complied with the prior appropriation

requirement set forth in section 8-1-7 of the Municipal Code and in failing to rule on their request for leave to amend their counterclaim to allege promissory estoppel.

¶ 11 The circuit court's decision to grant a motion to dismiss pursuant to section 2-619 (a)(9) of the Code is subject to *de novo* review. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997). When ruling on a motion to dismiss, the trial court must construe all pleadings and supporting documents in a light most favorable to the nonmoving party. *Id.*

¶ 12 A municipality organized under the Municipal Code is limited to those powers which are delegated to it by constitution and statute. *McMahon v. City of Chicago*, 339 Ill. App. 3d 41, 45 (2003). A municipality's power to contract is limited by statute, and therefore the municipality cannot be bound unless the statutory requirements are followed. *Id.*

¶ 13 Pursuant to section 8-2-9 of the Municipal Code (65 ILCS 5/8-2-9 (West 2010)), a village is required to pass an annual appropriation ordinance within the first quarter of each fiscal year. Section 8-2-9 gives the following instructions with regard to the village's annual appropriations:

"the corporate authorities (i) may appropriate sums of money deemed necessary to defray all necessary expenses and liabilities of the municipalities *** and (ii) shall specify the objects and purposes for which these appropriations are made and the amount appropriated for each object or purpose. *** *Except as otherwise provided, no further appropriations shall be made at any other time within the same fiscal year, unless a proposition to make each additional appropriation has been first sanctioned by a petition signed by electors of the municipality numbering more than 50% of the number of votes cast for the candidates for mayor or president at the last preceding general municipal election at which a mayor or president was elected, by a petition signed by them, or by a majority of those voting on the question at a regular election or at an emergency referendum authorized in accordance with the general election*

law." (Emphasis added.) 65 ILCS 5/8-2-9 (West 2010).

¶ 14 Section 8-1-7(a) of the Municipal Code (65 ILCS 5/8-1-7(a) (West 2010)), which is the subject of this case, places certain limitations on the corporate authorities' ability to enter into contracts or incur expenses on behalf of the municipality. Specifically, section 8-1-7(a) provides, in relevant part, as follows:

"Except as provided otherwise in this Section, no contract shall be made by the corporate authorities, or by any committee or member thereof, and no expense shall be incurred by any of the officers or departments of any municipality, whether the object of the expenditure has been ordered by the corporate authorities or not, unless an appropriation has been previously made concerning that contract or expense. Any contract made, or any expense otherwise incurred, in violation of the provisions of this section shall be null and void as to the municipality, and no money belonging thereto shall be paid on account thereof." 65 ILCS 5/8-1-7(a) (West 2010).

The purpose of section 8-1-7 is to protect the municipal treasury against incurring liabilities which exceed an appropriation or for which none has been made. *Beling v. City of East Moline*, 14 Ill. App. 2d 263, 272 (1957). The prior-appropriation requirement "is mandatory and was enacted for the protection of the taxpayer." *Id.* A party contracting with a municipality is presumed to know whether the municipality is prohibited from making a contract. *Nielsen-Massey Vanillas, Inc. v. City of Waukegan*, 276 Ill. App. 3d 146, 153 (1995). A contract made in violation of section 8-1-7 is void *ab initio*. *Id.*

¶ 15 In the present case, the annexation agreement and the permanent utility easement provided for the annexation of the 145-acre tract of land in exchange for the Village constructing sewer lines and a lift station on the 9-acre tract of land owned by Jane and Matthew Helms. The annexation agreement and utility easement also provided for a \$300-per-day fee if the construction was not completed within a certain time frame. The Village

argues that this contract was void because it had not made a prior appropriation of funds for this project, as required under section 8-1-7 of the Municipal Code. The Helms family argues that the Village passed the proper appropriations bills and point to the affidavit of Dennis Herzing, the Village administrator of the Village of Freeburg, and the affidavit's attached exhibits, which contain the 2003 and 2004 budgets for the Village of Freeburg, as support for their position (the affidavit was attached to the Village's motion to dismiss). Further, the Helms family points to the following facts to argue that the sewer-extension and late-fee provisions should be enforced: the Village agreed to the expenditures for the sewer extension project and the \$300-per-day late fee/the agreement was made in good faith, the ordinances passed by the Village reflected that the agreement was presented to and approved by the corporate authorities, the Village had the authority to enter into an annexation agreement, and the agreement was properly recorded.

¶ 16 Herzing's affidavit revealed that the estimated construction cost for the extension of the sewer line was \$453,500 and the estimated cost for the lift station was \$180,000, which did not include engineering and planning costs. The entire annual appropriations for the waste water (sewer) department of the Village for 2003 totaled \$434,555 and for 2004 totaled \$485,330. A review of the itemized appropriations on the 2003 and 2004 budgets for the waste water department does not reveal any reference to this sewer extension project or the construction of a lift station. We note that the 2004 budget contains an appropriation for \$39,000 for an extension project, but the project is identified as the Cherry Tree extension project. We do not see a similar appropriation for the sewer extension project at issue in this case in either the 2003 or the 2004 budget. The Helms family refers to a 2003 appropriation of \$3,900,000 identified as "Infr. US Expansion/North" and a 2004 appropriation of \$4,550,000 identified as "Infr. US Expansion/North Eng./Bldg" when it argues that the Village made the proper appropriations. However, we note that the two appropriations are

contained in the electric department budgets for 2003 and 2004 and not the waste water department budgets. Further, the Helms family points to the total amount of appropriations for the sewer department from 2003 and 2004 to argue that the sufficient funds were appropriated for the sewer extension project at issue in this case. However, we note that the sewer department appropriations are itemized and there is no indication that a prior appropriation of funds had been made for this project. Although the record does indicate that the agreements were approved by the corporate authorities and were properly recorded, any contract made in violation of section 8-1-7 of the Municipal Code is null and void. As stated above, the requirements of section 8-1-7 are mandatory. Therefore, the annexation agreement and the permanent utility easement are unenforceable against the Village.

¶ 17 The Helms family further argues that the annexation agreement and the permanent utility easement are enforceable against the Village because this case involves an irregular exercise of municipal authority as described in *Avery v. City of Chicago*, 345 Ill. 640, 650 (1931).

¶ 18 In *Avery*, 345 Ill. at 647-50, the city of Chicago exceeded its authority by making a contract for the disposal of dead animals and condemned meats beyond one year. The city had paid for these services for a period of nine months at a rate fixed by the contract and had made a prior appropriation for the executed portion of the contract. *Id.* at 650. Although the Illinois Supreme Court concluded that the city had exceeded its authority by entering into a contract for longer than one year, the court concluded that the executed portion of the contract was not invalid. *Id.* at 650-51. The court reasoned that this case involved an irregular exercise of power by the corporate authorities with respect to the term of the contract and not the subject matter of the contract. *Id.* at 650. The court further concluded that in the case of irregularly exercised power, "the contract would not be *ultra vires* in the true sense of that phrase; and in an action by a *bona fide* contractor who had expended money

or parted with value for the benefit of the municipality, the latter would be estopped to set up as a defense its own irregularities in the exercise of a power clearly granted to it." *Id.*

¶ 19 The Second District in *Diversified Computer Services, Inc. v. Town of York*, 104 Ill. App. 3d 852, 858 (1982), also discussed the distinction between the lack of power in a municipality to act and the improper or irregular exercise of authority. The court explained the distinction as follows:

" 'Contracts entered into by a municipality which are expressly prohibited by law, and which under no circumstances can be entered into, are void and ultra vires. They may not be rendered valid thereafter by estoppel or ratification on the part of the municipality. However, there is another class of municipal contracts, distinct from the void type heretofore referred to, wherein the municipality has the power to enter into the contract, but where a portion thereof may be beyond its power, or its power may have been irregularly exercised. As to this class of contracts, a municipality may not assert its want of authority or power, or the irregular exercise thereof, where to do so would give it an unconscionable advantage over the other party.' " *Diversified Computer Services, Inc.*, 104 Ill. App. 3d at 858 (quoting *Stahelin v. Board of Education, School District No. 4, Du Page County*, 87 Ill. App. 2d 28, 41-42 (1967)).

In *Diversified Computer Services, Inc.*, 104 Ill. App. 3d at 853, a township entered into a five-year contract for the purchase of a computer system, and no full, prior appropriation had been made for the purpose of acquiring the computer system. For several months, the agreement went forward without incident, and funds for the monthly payments were included in the annual budget and appropriation ordinances. *Id.* at 853-54. Thereafter, the town board expressed dissatisfaction with the computer system and declined to approve future monthly payments. *Id.* at 854. The Second District concluded that the contract was unenforceable against the town because the town board lacked authority to approve the contract in the

absence of a full, prior appropriation of funds. *Id.* at 857-58. The court reasoned that the requirement of a prior appropriation was "a condition precedent to the expenditure of town funds and therefore to the validity of the contract in issue." *Id.* at 858.

¶ 20 In the present case, the Helms family argues that to "permit the Village *** to unilaterally declare an agreement void that it entered into knowingly and with the advice of counsel is 'unconscionable.'" However, we conclude that this case does not fall within the class of cases involving an irregular exercise of municipal authority discussed in *Avery* and *Diversified Computer Services, Inc.* Instead, like *Diversified Computer Services, Inc.*, the municipality entered into the annexation agreement and permanent utility easement without making a full, prior appropriation, which made the contract unenforceable against the Village.

¶ 21 Last, the Helms family argues that the trial court erred in failing to rule on their request for leave to amend their counterclaim to seek recovery based on promissory estoppel. In response, the Village argues that the trial court did not abuse its discretion because any promise made by the Village in this case was *ultra vires* and expressly forbidden by Illinois statute.

¶ 22 The decision of whether to grant or deny leave to amend a complaint is within the sound discretion of the trial court, and that decision will not be reversed absent an abuse of that discretion. *Weidner v. Midcon Corp.*, 328 Ill. App. 3d 1056, 1059 (2002). A contract made in violation of section 8-1-7 of the Municipal Code is void *ab initio* and cannot be enforced by estoppel or ratification. *Ligenza v. Village of Round Lake Beach*, 133 Ill. App. 3d 286, 291 (1985). A municipality cannot be estopped to dispute the validity of a contract which it had no authority to make for the reason that it has received the consideration. *DeKam v. City of Streator*, 316 Ill. 123, 136-37 (1925). In the present case, the contract was void *ab initio* because it violated section 8-1-7, and therefore, any promises made by the

Village to construct a sewer line and lift station are unenforceable. Consequently, the trial court did not abuse its discretion by failing to grant the Helms family's request for leave to file an amended counterclaim alleging promissory estoppel.

¶ 23 For the foregoing reasons the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 24 Affirmed.

¶ 25 JUSTICE GOLDENHERSH, dissenting:

¶ 26 I respectfully dissent. I have no objection to the majority's recitation of what are generally agreed-upon facts in this appeal. I do, however, object to the majority's disposition and its reasoning.

¶ 27 In my view, the trial court erred in granting the Village's motion to dismiss and in failing to grant the Helms family leave to amend their counterclaim to allege promissory estoppel. In *Avery v. City of Chicago*, 345 Ill. 640, 650, 178 N.E. 351, 355 (1931), cited by the majority, our supreme court, as quoted by the majority, stated that "in an action by a *bona fide* contractor who had expended money or parted with value for the benefit of the municipality, the latter would be estopped to set up as a defense its own irregularities in the exercise of a power clearly granted to it." Such is clearly what happened in this particular case. Similarly cited by the majority is *Diversified Computer Services, Inc. v. Town of York*, 104 Ill. App. 3d 852, 858, 433 N.E.2d 726, 731 (1982), a portion of which is quoted in the majority's disposition. The majority, however, fails to give weight to a portion of this decision which it quoted at length:

" However, there is another class of municipal contracts, distinct from the void type heretofore referred to, wherein the municipality has the power to enter into the

contract, but where a portion thereof may be beyond its power, or its power may have been irregularly exercised. As to this class of contracts, a municipality may not assert its want of authority or power, or the irregular exercise thereof, where to do so would give it an unconscionable advantage over the other party.' " *Diversified Computer Services, Inc.*, 104 Ill. App. 3d at 858, 433 N.E.2d at 731 (quoting *Stahelin v. Board of Education, School District No. 4, Du Page County*, 87 Ill. App. 2d 28, 41-42, 230 N.E.2d 465, 472 (1967)).

Both *Avery* and *Diversified Computer Services, Inc.* should lead us to the conclusion that the Village is estopped from asserting the defense of a void contract because no prior appropriation was made.

¶ 28 I also note a prior decision of this court, *Vogt v. Bartelsmeyer*, 264 Ill. App. 3d 165, 636 N.E.2d 1185 (1994), *appeal denied*, 157 Ill. 2d 524 (1994), a suit against the State for its failure to provide an overpass over a newly constructed highway so that the plaintiffs could reach the two separated parts of their land. The majority gave an admonition which is clearly applicable to the instant case:

"Petitioners reached a good-faith settlement with our State to resolve the underlying eminent domain proceeding. Petitioners fulfilled their obligations and trusted the State to fulfill its obligations. After refusing to do so, the State aggressively attempted to evade compliance with its obligations both in the circuit court and this court. The citizens of our State deserve better treatment from our government." *Vogt*, 264 Ill. App. 3d at 174, 636 N.E.2d at 1191.

In a special concurrence, Presiding Justice Lewis stated:

"[W]e should not, as a matter of public policy, allow the State to renege on its promises." *Vogt*, 264 Ill. App. 3d at 175, 636 N.E.2d at 1192.

These statements as to basic justice and fair play are certainly applicable to the instant

situation. To rule otherwise provides governmental entities a means by which they can avoid fulfilling obligations in contracts entered into in good faith by citizens of our State. We should reverse the instant judgment of the circuit court of St. Clair County and remand for further proceedings.