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JURISDICTIONAL STATEMENT

This case involves review of an order to dismiss a petition for declaratory judgment by the Eastern District Court of Appeals concerning school district participation in a Tax Increment Financing Project. The Eastern District denied Appellant's application for transfer, but this Court granted transfer pursuant to Rule 83.04. Jurisdiction is vested in the Supreme Court under Article V, §10, Constitution of Missouri.

STATEMENT OF FACTS

Amici Curiae, the Missouri School Boards' Association ("MSBA") and the Missouri Association of School Administrators ("MASA") adopt and incorporate by reference the statement of facts of the Appellants Ste. Genevieve School District R-II and Mikel Stewart ("School District").

POINT RELIED ON

The trial court erred in dismissing the Petition for a Declaratory Judgment for failure to state a claim because the Petition pleaded facts establishing that the Plaintiffs were entitled to the relief requested in that the City adopted Ordinance 3057, an amendment pursuant to the TIF Act, that changed the nature of the redevelopment project from improvement of infrastructure to rehabilitation of a shopping center without complying with the required statutory procedures for adoption of such an amendment.

AUTHORITIES

Community Federal Savings and Loan Association v. Director of Revenue, 752 S.W. 2d 794 (Mo. banc 1988).

Gould v. Missouri State Board of Registration for the Healing Arts, 841 S.W. 2d 288, (Mo. App. 1992).

Nazeri v. Missouri Valley College, 860 S.W. 2d 303 (Mo. banc 1993).

Sullivan v. Carlisle, 851 S.W. 2d 510 (Mo. banc 1993).

Real Property Tax Increment Allocation Redevelopment Act, 99.800 – 99.865 RSMo (2000)

Rule 55.12

ARGUMENT

The trial court erred in dismissing the Petition for a Declaratory Judgment for failure to state a claim because the Petition pleaded facts establishing that the Plaintiffs were entitled to the relief requested in that the City adopted Ordinance 3057, an amendment pursuant to the TIF Act, that changed the nature of the redevelopment project from improvement of infrastructure to rehabilitation of a shopping center without complying with the required statutory procedures for adoption of such an amendment.

A. Standard of Review

The trial court incorrectly applied the standard of review in this case. Before dismissing a claim, the court must assume that all of the plaintiffs' averments are true and liberally grant all reasonable inferences to the plaintiffs. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). If the plaintiffs state any claim that might, if proved, entitle the plaintiffs to relief, the petition cannot be dismissed. *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. banc 1993). Because the plaintiffs have not been able to conduct discovery, the court cannot expect the plaintiffs to prove their case at this stage. Therefore, the court must "consider the facts set out in the petition together with the exhibits attached thereto" and decide, if all things

pled are ultimately proven, whether there is a cause of action. *Gould v. Missouri State Board of Registration for the Healing Arts*, 841 S.W.2d 288, 290 (Mo. App. 1992); Rule 55.12.

The plaintiffs' petition sets out facts demonstrating that the defendants adopted Ordinance 3057, which amended the Pointe Basse Plaza ("Shopping Center") redevelopment project ("project" or "redevelopment project") within redevelopment area 3 ("RPA 3") of the Valle Springs Tax Increment Financing Plan ("TIF plan"), without reconvening the Tax Increment Financing Commission ("TIF Commission"). (Petition, ¶ 15, L.F. 5). Further, the plaintiffs' petition pleads facts which demonstrate that the amendment changed the nature of the project, and therefore required the defendants to reconvene the TIF Commission prior to adopting Ordinance 3057 pursuant to §99.825.1, RSMo. 2000. (Petition ¶¶ 17-23, L.F. 4-5). The plaintiffs' petition sets out facts that demonstrate that Ordinance 3057 was adopted in violation of state statute, and therefore state a claim for which relief must be granted.

This petition attached and incorporated by reference Exhibit 1, which includes Ordinance 3057, the resolution adopting Ordinance 3057, a letter from the City to the School District, and copies of the plan with changes marked by the City's attorney. In particular, the letter from the City to the

School District describes the changes as “a complete face lift” and “adding new buildings.” (Petition, Ex. 1, L.F. 20). The letter also acknowledged that an attorney had been consulted and the attorney advised the City that “a number of administrative changes” must be made to the plan to accommodate the amendment. The revised plan includes Property Acquisition, Site Preparation, Relocation of Utilities, Road/signalization Improvements, Relocation of Tenant, and Parking Lot Improvements as entirely new budget items for Area 3. (Petition, Ex. 1, L.F. 22). This same document demonstrates reallocation of literally hundreds of thousands of dollars from engineering and stormwater costs. (Petition, Ex. 1, L.F. 23). The Ordinance amended the plan to add the language “and other Redevelopment Activities” because, without it, the improvements to the Shopping Center did not fit within the originally described plan. (Petition, Ex. 1, L.F. 24). The Ordinance explained that the Shopping Center was “critical to the community” although the “critical” Shopping Center was omitted from the original plan. (Petition, Ex. 1, L.F. 27).

These facts and arguments, taken liberally and granting Plaintiffs all of the reasonable inferences therefrom, demonstrate that the nature of the project changed when the Ordinance was adopted and support the adequacy of the plaintiffs’ petition. The petition should not have been dismissed for

failure to state a claim because it asserted a set of facts entitling the plaintiffs to relief.

B. “Changing the Nature”

The legislature anticipated that a TIF project might change over the course of adoption and set strict guidelines governing how a redevelopment plan, project, or area may be changed, depending on when the changes are made. These guidelines articulated in §99.825.1 and are divided into four stages:

Prior to the adoption of an ordinance proposing the designation of a redevelopment area, or approving a redevelopment plan or redevelopment project; the TIF Commission, which includes school district representation, must hold public hearings and notify each taxing district located wholly or partially within the boundaries of the proposed redevelopment area, plan or project.

Prior to the conclusion of the hearing; changes can be made provided that each affected taxing district, including school districts, is given written notice of the change at least seven days prior to the conclusion of the hearing.

After the public hearing but prior to the adoption of an ordinance; changes can be made without a further hearing, “if such changes do not

enlarge the exterior boundaries of the redevelopment area or areas, and do not substantially affect the general land uses established in the redevelopment plan or *substantially change the nature* of the redevelopment projects, provided that notice of such changes shall be given by mail to each affected taxing district and by publication in a newspaper of general circulation in the area of the proposed redevelopment not less than ten days prior to the adoption of the changes by ordinance.” (emphasis added) 99.825.1.

After the adoption of an ordinance approving a plan or project, or designating a redevelopment area; “no ordinance shall be adopted altering the exterior boundaries, affecting the general land uses established pursuant to the redevelopment plan or *changing the nature* of the redevelopment project without complying with the procedures provided in this section pertaining to the initial approval of a redevelopment plan or redevelopment project and designation of a redevelopment area.”

99.825.1. The procedures for initial adoption are outlined in another portion of the statute and include appointment of a TIF Commission, public hearings, and a TIF Commission recommendation. §99.820 RSMo. 2000.

Because Ordinance 3057 was adopted to amend a previous ordinance, the last standard applies. Therefore, if Ordinance 3057 changed the nature of the redevelopment project it could not be legally adopted absent a hearing before the TIF Commission.

In determining whether the petition pled facts sufficient to determine whether the amendments to the redevelopment project “changed the nature” of the project, the Court should note the absence of the word “substantially” in the relevant portion of the statute. Unlike changes made after the public hearing but prior to the adoption of an ordinance, which do not require a TIF Commission hearing unless they “substantially” change the nature of the project, new ordinances cannot be adopted amending redevelopment plans if they change the nature of the project in any way.

This deviation in the statute makes sense. The statutes mandate an increasing adherence to the original project as the stages of adoption progress. Before the hearings are concluded, change is relatively easy, arguably because the commission is still gathering information and public input. After the hearings are concluded but prior to adoption only substantial changes in the nature of the project are prohibited, presumably because no final action has been taken and public input is still possible.

However, after adoption of the ordinance, when the time for comment has passed, any change, not just substantial changes, are prohibited without following the procedures for initial adoption.

The Ordinance changed the nature of the project in three ways. First, the actual construction to be done within RPA 3 changed. Originally, the project consisted of only public infrastructure improvements. After the adoption of Ordinance 3057, the project included specific commercial development, including construction. The City's own attorney described the project as follows: "A portion of the center will be taken down and the center will be given a complete facelift and new buildings added." (Petition, Ex. 1, L.F. 20). The nature of the ordinance changed from one that supported commercial expansion to one that financed a particular commercial venture.

Second, the potential impact on school districts, and other taxing entities, changed. (Petition, ¶ 16, L.F. 6). Although the amendment to the project may not have increased the total redevelopment dollars involved in the redevelopment area, the shift in redevelopment dollars from intangible costs such as "engineering" to tangible changes in taxable property such as parking lot improvements or "a complete face lift" of a shopping center certainly changes the ultimate assessed valuation of the

property involved in the redevelopment project. (Petition, Ex. 1, L.F. 20, 22).

When a school district evaluates a TIF proposal as a member of the commission, it weighs what is certainly a loss of present property tax revenue against the potential for a permanent increase. The payments in lieu of taxes (PILOTS) made by the developer under a TIF plan are measured by the difference between the value of the property before improvements and the value after improvements. In the original plan, much of the land targeted for improvement was vacant. It is likely the school district saw the potential for almost certain increases in revenue from that development. By shifting the improvements to land already developed, the ultimate increase in assessed valuation may change. Schools are uniquely dependent on and sensitive to changes in property tax revenues. At the very least, the district, as a member of the commission, should have been able to study and comment on the proposed change in the nature of the project, given its presumed effect on the property value.

Finally, the nature of the budget changed. (Petition, ¶¶ 17-22, L.F. 4-5). The City claims the nature of the project was not changed because the overall cost remained the same. But the cost of the *project* did change,

it was the cost of the overall *plan* that did not. Notably, §99.825.1 focuses narrowly on the change in nature of the “redevelopment project,” not the redevelopment plan or area. The Act defines “redevelopment project” as a mere subset of the redevelopment plan, within a redevelopment area. §99.805(13). The statutory language therefore requires the Court to determine whether the amendments changed the Shopping Center in RPA 3, and not the entire redevelopment area.

The budgets of two projects were drastically affected. Originally, RPA 4 of the plan was budgeted for \$2,000,000 in stormwater improvements, \$350,000 in engineering costs, and another \$350,000 in contingency fees. (Pet, L.F. 22). After the Shopping Center improvements were added, the budget in RPA 4 was cut by \$1,260,000, which was then moved to the RPA 3 project. (Petition, L.F. 22-23). Not only were the intended improvements to RPA 4 diminished, the City redirected spending from planning and engineering to site development.

The City defines nature as the “essential characteristics and qualities of a person or thing” and argues that the nature of its project was to “ameliorate blight,” a purpose which they claim has not changed with the new ordinance. (L.F. 43-44). But ameliorating blight is an essential characteristic of *any* TIF project and the statutes require that the nature of

a particular project not change once a plan has been approved. If the City's broad definition of "nature" were to be adopted, any project in a commercial area could be amended to include any type of commercial venture from opening a dry cleaning store to operating a truck stop – and as long as the exterior boundaries and general land uses were not changed, the "nature" of the project would not have changed. This interpretation is ridiculous.

The City argues that the School District is asking this Court to create an unwieldy and rigid process. (L.F. 44). This is untrue. The City had plenty of time and leeway under the statute to amend the project prior to the adoption of the original ordinance. Once the ordinance was adopted, however, the statute clearly limits the City's ability to amend the project without additional input from the public entities affected by the amendments – and rightfully so. Tax abatement schemes can benefit private and public entities. However, they can also ultimately harm public entities highly dependent upon property tax revenues like school districts.

The Plaintiffs do not argue that the City cannot ever adopt new ordinances amending or changing a redevelopment plan. The Plaintiffs simply want to ensure that the City takes the time to receive the necessary input from the school districts affected before making any decisions. The

intent to include school district input in amendments to redevelopment plans is clearly expressed in the TIF Act. §99.820.2(7) (. . . members representing school boards and other taxing entities shall be appointed [to the TIF Commission] . . . prior to any amendments to any redevelopment plans, redevelopment projects or designation of a redevelopment area.)

Based on the facts pled in the Plaintiffs' petition, Ordinance 3057 changed the nature of the redevelopment project and the Ste. Genevieve School District was prevented from giving input into the decision to amend the redevelopment plan, in clear violation of §99.825.1, RSMo. Because the Petition stated a claim, the Plaintiffs' petition was improperly dismissed.

CONCLUSION

As a representative of a majority of public school boards and superintendents in the state of Missouri, MSBA and MASA are concerned by the Court's interpretation of the TIF statutes. If this interpretation is allowed to stand, school districts will lose legislatively mandated influence over the types of projects financed by TIF funds. Under this interpretation, municipalities need only get input while a project is in the planning stages but not on any changes after adoption as long as the physical boundaries and total cost do not change. The legislature intended school district participation when the nature of the project changed as

well. Because the City's action was contrary to that intent, MSBA and MASA support the petition of the Ste. Genevieve School District and Mikel Stewart seeking a Declaratory Judgment that the City lacked authority to adopt Ordinance 3057.

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Pursuant to Rule 84.06; I certify that this brief is Times New Roman Font, 14 point type. Microsoft Word 2000 was used to prepare the brief and to count the number of words, which is 2596. The brief is double-spaced and printed on one side of paper weighing not less than nine pounds per ream. The brief is signed pursuant to Rule 55.03.

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