IN THE MISSOURI SUPREME COURT

SUPREME COURT NO.: SC92646
EASTERN DISTRICT NO.: ED95733
22nd CIRCUIT NO: 0922-CC9379

BONZELLA SMITH, *et al.*,
RESPONDENTS – CROSS APPELLANTS

and

CHERYL NELSON AND ELKE MCINTOSH
RESPONDENTS – CROSS APPELLANTS

v.

TIF COMMISSIONERS, *et al.*
APPELLANTS –CROSS RESPONDENTS

Appeal from the Circuit Court of the City of St. Louis
22nd Circuit, Division 18
Circuit Judge The Honorable Robert H. Dierker, Jr.

SUBSTITUTE BRIEF OF CHERYL NELSON AND ELKE MCINTOSH

Respectfully Submitted,
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*Pursuant to **Rule 84.04(j)** the parties have agreed that Defendants in the Circuit Court shall in this Court be deemed Appellants, and vice versa.*

Plaintiffs/Petitioners/ Intervenors below, Respondents - Cross Appellants here, (hereafter "Intervenors") are property owners in the portion of North St. Louis which is subject to the Tax Increment Financing (TIF) ordinances at issue in this case. Defendants/Respondents below, Appellants –Cross Respondents here, are (1) the TIF applicant, Northside Regeneration, LLC, (2) a City bureaucratic entity called the Tax Increment Financing Commission which responded to Northside's TIF proposal's by making a favorable recommendation to the City's Board of Alderman, (3) the Board of Alderman which passed Ordinances, (4) the Mayor who signed the Ordinances, and (5) the City of St. Louis which may or may not implement TIF ordinances depending on the outcome of this case.

Bonzella Smith, Isaiah Hair, and Cheryl Nelson, represented by Dorian Amon, were the original challengers to the TIF. Elke McIntosh and the same Cheryl Nelson, represented by undersigned Eric E. Vickers, W. Bevis Schock and James W. Schottel, entered the fray later as Intervenors.

This Substitute Brief is filed on behalf of Nelson and McIntosh. For the convenience of their identification, in this Substitute Brief counsel will refer to them they

way they were referred to in the trial court and at the Court of Appeals, that is, as "Intervenors".

Paul McKee, the "driving force" behind the enterprise, Judgment, L.F. 315, is not a party to the suit personally, and "the Court did not have the pleasure of meeting [him] at trial," Trial Court's Judgment in this matter, titled, "Memorandum, Order and Judgment", July 2, 2010, (hereafter "Judgment"), Legal File Tab 24, 315. (He did attend oral argument at the Court of Appeals).

Appellants' brief does not challenge Respondents' standing. Intervenors suggest that because all Respondents are property owners who are subject both to a blight designation and the threat of eminent domain this court need have no concern about the challenger's standing. Nevertheless, because the court may at any time consider the issue of standing *sua sponte*, ***State ex rel. St. Louis Retail Group v. Kraiberg*, 343 S.W.3d 712, 716 (Mo.App. 2011)**, Intervenors will address it briefly. In support of the view that standing is not an issue see (a) Judgment, L.F. 21, (b) Intervenor McIntosh's Stipulation at L.F. 158, signed by all counsel, stating that she believes her property value was decreased by the blight designation and the threat of eminent domain, and (c) Intervenor Nelson testimony to the same points, Tr., Tab 3, p. 141.

(Intervenors note that the pages of the transcript are numbered in sections and that Appellants kindly inserted tabs to keep track of the separate sections, although Tab 4 material seems to follow the Tab 2 material, and so Tabs 3 and 4 are apparently out of order).

Procedural History, Introduction to Claims, Judgment in the Trial Court, Appeal, Outcome at Court of Appeals, Transfer to This Court

Plaintiffs and Intervenors below, Respondents and Cross-Appellants here, filed separate Petitions to challenge the ordinances, each seeking declaratory and injunctive relief, and also attorney's fees, L.F. 12, 23. The Petitions asserted, in general, that the ordinances were unlawful due to lack of compliance with the TIF Statute, and that the conduct of Defendants has been so bad that Plaintiffs should receive attorney's fees under the admittedly high bar regarding such fees in declaratory judgment actions.

The trial court adjudged and decreed that the ordinances did not comply with the TIF statute, and (a) declared the ordinances void, and (b) enjoined their implementation, Judgment, L.F. 360. The court focused on the fact that the ordinances lacked a precise "project" and merely approved a plan or a "concept".

Additionally, the trial court stated that (a) the Judgment "shall not be construed to forbid Defendant City of St. Louis to amend or supplement said ordinances in accord with law", Judgment, L.F. 361, and (b) "certainly Defendant Northside could now seek to procure an executed project agreement from the City and so cure the defect in the ordinance at issue," Post-Trial Memorandum and Order, October 22, 2010, L.F. 494.

Northside filed a Motion for New Trial, L.F. 361, and indicated that if it had only known it needed evidence of a project it would have provided all kinds of detail about infrastructure improvements that had been presented to the Board of Alderman in connection with the TIF application. See also, Appellants' Amended Initial Brief in the

Court of Appeals, p. 22. The trial court rejected this approach because regardless of the talk, there was no "project agreement executed and approved by the City", L.F. 493.

Various parties appealed, and the Court of Appeals consolidated the appeals, Docket Orders of November 10 and 19, 2010.

At the Court of Appeals on July 28, 2011 the City of St. Louis (and presumably related parties the Mayor, the Board of Alderman, and the TIF Commission), filed notice that "The City of St. Louis adopts Brief of Northside".

Later Appellants sought to provide additional information to both the Court of Appeals and the trial court about a Recycling Center Northside was building within the Plan area. Appellants said the Recycling Center was a project, and its construction cured the fatal flaw. The trial court lacked jurisdiction (because the case was already at the Court of Appeals) and so did nothing. Northside moved to dismiss in the Court of Appeals and the Court of Appeals court took the issue with the case, Docket Order, June 15, 2011. Intervenors' opposition was in their Jurisdictional Section to their Court of Appeals Brief as directed by that Docket Order.

On June 19, 2012 the Court of Appeals issued its opinion indicating it would affirm. In footnote 3 it summarily denied Northside's Motion to Dismiss. Then the Court of Appeals, pursuant to Rule 83.02, transferred the case to this Court.

Northside filed a Motion to Dismiss in this court which was essentially the same Motion as it had filed in the Court of Appeals. Intervenors filed a Memorandum in

Opposition. The court overruled the Motion to Dismiss by docket entry on August 14, 2012.

In this Court Northside has filed its substitute brief. The City of St. Louis and its related parties, the Mayor, the Board of Alderman and the TIF Commission, have also filed a Substitute Brief. That Brief focuses on Point II of Northside Briefs' in the Court of Appeals and in this Court.

Intervenors acknowledge that that the Briefs of Northside and the City of St. Louis and related parties comply with Rule 83.08(b), in that neither alters the basis of any claims that were raised in the Court of Appeals briefs.

Scheme of a TIF- Scope of This TIF

Depending on whom one asks TIF's either are a clever and honest way of creating incentives for developers to engage in economic activity which would not otherwise occur, or are shady schemes in which politicians and developers engage in crony capitalism to shift the risks of development to taxpayers, in which there are market distortions of the sort which recently brought America to her knees, in which homeowners and business people are expelled from their real property by eminent domain so that their property can be used by other private persons and not for public use, and in which government entities are starved of the new revenue that they would receive through organic economic growth. As Intervenors' expert put it:

> If things fly, the private investor will capture all the upward gains, and if things don't fly the public purse will remain with the stick. Tr., Tab 1, 43.

Luckily for the judicial branch, however, it falls only to the legislative branch, subject to the people's right to throw the bums out, to determine the wisdom of the TIF statute. The courts thus only call the balls and strikes to make sure that TIF ordinances comply with the TIF statute's terms, and the courts leave theory to the legislature and to the lobbyists.

The formal economic idea behind a TIF is that a proposed development falls short of what the free market would organically produce on its own, or as Intervenors' expert stated in formal economic terms, the social value is greater than the private value, Tr., Tab 1, 22. And, therefore, the municipal government's legislative branch, subject to signature of the mayor, has under the TIF Statute the option of providing an economic incentive to make a project happen. And since by the definition of the concept of TIF no development would occur without the incentive, Tr., Tab 1, 26[1], it purportedly makes sense to give the extra real estate tax revenue which will come from the development, (known as the "increment"), to the developer instead of to the patchwork of government

[1] While one may state that "by definition no development would occur without the incentive", that is a conclusion hard to prove. It is certainly true that many developments occurred before the invention of TIF, and once a government incentive is offered, business people quite rapidly seek to gain its benefits for themselves. The developers always argue, of course, that the entire thing would be impossible without the benefit, but it is also true that once one developer gets the benefit, he has an unfair advantage over all his competitors unless the competitors get the benefit too. The competitors then demand the benefit.

entities which would normally receive additional revenue from the additional real estate taxes which would come from normal organic growth.

The Missouri legislature has put this concept into effect in "the TIF Statute", **RSMo. 99.800-865.**

Due to the obvious dangers of (a) interference with the allocation of capital by the ordinary process of free markets and organic growth, (b) private persons being disposed of their property in favor of other private persons, (c) reduction in property values due to a blight designation and the threat of eminent domain even if not carried out, and (d) government entities being starved of revenue, the legislature has enacted precise requirements for the application process for TIF's. Those requirements, and Appellants' compliance or non-compliance with them, are the core of this appeal.

In this case Northside followed the prescribed procedural path in that it made application to the TIF Commission, Pl. Ex. 10, Intervenors' Appendix Tab 1, A-1, and the TIF Commission duly recommended the plan and sent it on to the Board of Alderman. The Board of Alderman then approved ordinances which teed up the plan.

An unusual aspect of this matter is the unprecedented vast scope of the proposed plan. The "Redevelopment Plan" is for a geographic area whose size is on par with Forest Park's 1371 acres, and involves over 4000 parcels of land, Judgment, L.F. 323. Whereas the usual TIF is for, e.g., a Wal-Mart with a few outbuildings, or at most a giant mall, as in the West County Mall case, ***JG St. Louis West Ltd. Liability Co. v. City of Des Peres*, 41 S.W.3d 513 (Mo.App. 2001)**, the idea here is to redevelop an entire region

of the city. (*See* Intervenors' expert Professor Boldrin's testimony above and below regarding the size of the TIF).

An important aspect of a TIF is that it authorizes the use of eminent domain, which for all intents and purposes allows the TIF developer, a private property owner, to use government power to take another private property owner's land, **RSMo. 99.820.1(3)**. The proponents of TIF's shake their heads and claim that in order to put their plans into effect they will, of course, never take any one's home, see Northside's opening statement at trial, Tr., Tab 1, 8, but, of course, the developer still has the power to do so. And after all, "what is a fellow's castle when progress is at stake?" "It takes a few lemons to make lemonade, right?" etc., etc., etc.

(The political and public relations side of this case have seen substantial rhetoric on this subject. For example newly energized litigants the City of St. Louis, the Board of Alderman and TIF Commission, ["the City of St. Louis Appellants" or "the City of St. Louis and related Defendants"], have submitted to this court a Substitute Appendix which contains a several page excerpt from **James Neal Primm's *Lion of the Valley***, which provides an up and down history of the City of St. Louis and also includes both a re-enactment photo of Auguste Chouteau and his gang chopping down trees, and James S. McDonnell sitting at his desk with a globe.) But just as with the wisdom or lack thereof of having the TIF statute at all, the wisdom of granting a particular TIF developer the power of eminent domain is not now before this court. Intervenors only mention the rhetorical aspects of the situation in order to draw the court's attention to the seriousness

of the matter. Even setting aside undersigned counsel's rhetoric, it is a true fact that Respondents' houses—that is, where they live, raise their children, and form a neighborhood community—are at stake in the matter before this court.

Another important aspect of TIF's is that they are to be used in "blighted" areas, and so in all TIF cases there is a "Blight Report" that suggests the area is blighted, and the Board of Alderman then finds the entire area to be blighted, see the Blight Report in this case, Intervenors' Trial Exhibit 6 (Intervenors' Appendix Tab 2, A-15), and blight finding in Ordinance 68484, § A, A30.

In its substitute appendix the City litigants offer photos of abandoned properties and abandoned buildings. These photos are countered by the testimony at trial of Dave Roland, Tr., Tab 1, 132&c. As described in his testimony, Mr. Roland stood at the location where various photos from the Blight Report had been taken. He took a continuous video starting at the angle from whence the photo of decrepitness had been taken and slowly twirled in a circle. The resulting video showed many areas teaming with private investment.

A Complex Statute Indeed

Appellants have kindly set out the TIF Statute at the front of the Appendix, Appellants' Appendix A2-26. Intervenors will not attempt to summarize the statute, and will instead in this brief cite to the sections of the statute as needed for the exposition of these Facts and the later presentation of the Argument. It is important for the court to realize, however, that the TIF Statute is no simple law. For example, if the Court

examines **RSMo. 99.845**, pp. A18-26, the Court will see that many portions of the TIF Statute are somewhat opaque.[2]

Requirements of a TIF Application

Under the section of the TIF Statute which states the requirements for a TIF application, **RSMo. 99.810.1**, the proponent of a TIF must present in the application a Redevelopment Plan and other supporting documents which include but are not limited to the following:

- A general description of the program,
- The estimated redevelopment project costs [and] the anticipated sources of funds to pay the costs,
- Evidence of commitments to finance the project costs,
- The anticipated type and term of the sources of funds to pay costs,

AND, findings from the municipality's legislative branch:

- That the redevelopment area on a whole is blighted, subsection (1),
- That the redevelopment plan conforms to the comprehensive plan for the development of the city as a whole, subsection (2), and
- Regarding a cost benefit analysis the economic impact of the plan on each taxing district within the redevelopment area, including the impact on the economy if the project is not built and is built, subsection (3).

[2] Of course, opaque statutes allow certain constituencies to effect regulatory capture for their benefit because no one else can figure out what is going on.

Issues Raised in the Pleadings and Events at Trial

Intervenors Petition is set out at Tab 3 of the Legal File, p. 23. The claims are as follows:

- Count I: The City's blight conclusion was flawed.
- Count II Northside engaged in bad faith in order to mislead the city in order to reach its blight conclusion.
- Count III The City failed to make a proper finding that development would not occur without the TIF.
- Count IV The City failed to make a proper finding that Northside's Redevelopment Plan conformed to the "Comprehensive Plan" for the City.

At para. 13 Intervenors stated that they were incurring reasonable fees and costs, and in their prayer they sought attorney's fees, L.F. 28.

The original Plaintiff's Second Amended Petition is set out at Tab 2 of the Legal File, p. 12. Paragraphs asserting issues on which Intervenors will focus this appeal include:

- Para. 21.a "The plan and ordinance do not conform to State legislative requirements",
- Para. 21.b "That said Plan and ordinance insufficiently satisfy the minimum statutory requirements.

- Para. 22 "That pursuant to 99.800.(13) "*Each redevelopment plan shall conform to the requirements of section 99.810.* (Emphasis in original).
- Para. 24 "That said Plan fails to include evidence of commitments to finance the project costs.
- Para. 32 "Said Plan contains no other 'evidence' of financing except the singular letter [of September 8, 2009 from Louis B. Eckelkamp, III of the Bank of Washington]".
- Para. 33 …[Northside] has no equity in owned property within the plan area.
- Para. 41 "Additionally **§ 99.810.1RSMo** requires '*Each redevelopment plan shall include the anticipated type and term of the sources of funds to pay costs, the anticipated and terms of the obligation to be issued.'"* (Emphasis in original).

As the trial began Dorian Amon, counsel for the original Plaintiffs, filed a Motion in Limine, A345. (That document was a late addition to the record because of clerical error. See footnote 4 of the Court of Appeals opinion). The Motion in Limine asked the court to prohibit evidence related to a "specific project" - because the TIF application contained no specific project.

The court and the attorneys discussed this Motion right at the start of trial, as the transcript reflects at p. 3:

Mr. Amon: We filed a Motion in Limine and I understand the Court's going to take that with the case, but I wanted to make a continuing objection with respect to the question of whether or not a redevelopment project actually exists or not. There's no foundation laid for the existence of a redevelopment project and any mention that it is in existence or that there is a redevelopment project, I wanted to make a continuing objection with respect to that.

The Court: All right. Well, I understand your views and I will bear that in mind as we adduce the evidence.

Mr. Amon: And I take my motion to that objection.

The Court: Your motion will be taken as a continuing objection.

The trial was a wide open affair over several days, with testimony from experts, aldermen, and consultants, and, of course, objections, squabbling over trivialities, etc. The court did not limit the presentations of the original Plaintiffs and the Intervenors to matters specifically raised in their respective pleadings.

Of great significance to Appellants' concern that they have been blind-sided by the lack of a specific project, however, neither during the interchange the first morning as quoted above, nor at any later time during the trial itself, did counsel for Northside assert he had been blind-sided by the issue raised in Mr. Amon's Motion in Limine, that is, that there was no project.

In truth, counsel for Northside's complaint about being blind-sided is something Northside invented after it lost on the issue of "no project".

Further, at trial, Respondents questioned two witnesses regarding whether the Redevelopment Plan included a "redevelopment project" as defined by **RSMo. 99.805(14)** and whether Appellants had entered into individual redevelopment agreements for RPA A and RPA B that described a "redevelopment project."

One witness, Alderwoman Kacie Starr Triplett, testified that "no hard, concrete plan for what the developers sought to do" had been presented and incorporated into the Redevelopment Plan. Tr. Tab 2, p. 16. The Alderwoman further testified that the Redevelopment Agreement was only a general redevelopment agreement that "had some set, concrete deadlines for the developer to come back to the Board of Aldermen to activate" individual redevelopment agreements for RPA A and RPA B and to determine "what type of projects would go in the set RPA's." Tr. Tab 2, p. 17-18.

The other witness, the executive director of development the City Appellant, Barbara Geisman, testified that the City and Northside were proceeding with a general redevelopment agreement and that RPA A and RPA B would have their own individual redevelopment agreements that would be discussed and reviewed by the Appellants at a later date. Tr. Tab 4, p. 218-19.

Appellants did not object to the introduction of testimony from either witness (*see* Tr. Tab 2, p. 6 and Tr. Tab 4, p. 212-13) and further did not object specifically to the above line of questioning.

Four Development Sections – Intervenors Do Not Challenge

Just to clarify a much discussed aspect of the case, Intervenors note that the Redevelopment Plan calls for division of the geographic areas of the TIF into four "Redevelopment Areas": A, B, C and D. There were some timing issues in the case related to when certain sections would be worked on and when Northside would receive subsidies for each such section. The trial court found that aspect of the story to be irrelevant to the legality of the TIF, and so essentially ruled for Appellants on this issue.

Intervenors do not formally concede the point but also do not challenge that conclusion on appeal.

Blight Designation - Intervenors Also Do Not Challenge

Intervenors fought hard at trial to show that the blight designation was improper. The trial court ruled against Intervenors on this issue, however, and again although they do not formally concede the point, Intervenors here again elect not to challenge the Judgment on this issue.

Intervenors' Expert- Dr. Michele Boldrin

Intervenors called as their expert Professor Michele Boldrin, the then Chairman of the Economics Department at Washington University, to opine regarding various aspects of the TIF application. Dr. Boldrin was raised near Venice and his credentials are unimpeachable, *see* Dr. Boldrin's Curriculum Vitae, Intervenors' Trial Ex. 33, Intervenors' Appendix Tab 4, A-223, and his testimony regarding familiarity with matters of this nature:

> In the United States I've consulted mostly for the World Bank in Washington, International Monetary Fund and Inter-American Development Bank, also in Washington.
>
> Abroad I have advised Italian, Spanish, Columbian government on a number of development issues…
>
> As you may expect [most of the work of] of the World Bank and so on, concerned the involvement of government in subsidizing or financing one project or another.
>
> I'm a research adviser of the Federal Reserve Bank of St. Louis. When you study developments, sir, as I do, you look at cases like this. I have looked at issues related to TIF and similar financing plans very, very often. Tr. Tab 1, p. 12-14.

The trial court found "Dr. Boldrin's opinions to be both credible and persuasive" Judgment, L.F. 326.

Because Dr. Boldrin's opinions were accepted by the trial court as both credible and persuasive Intervenors will therefore hereafter state Dr. Boldrin's opinions as facts. As "arbiter of credibility", the trial court was free to believe Dr. Boldrin, ***Kinsey-Geujen v. Geujen*, 984 S.W.2d 577, 582 (Mo.App. 1999)**.

———

Intervenors will now address the particular items needed for a TIF application to be lawful, and the evidence regarding each in this case.

Estimated Costs and Revenue: The Numbers

Dr. Boldrin's testimony regarding the estimated costs and revenue, as summarized in the Redevelopment Plan in a table at A286, is as follows:

> This is something that if an MBA student, when I used to teach MBA, came up with a term paper, I would throw him out of the office.
>
> The numbers are clearly out of thin air. There is no social economic study, background, statistics, development plan, anything behind it. They are stuck into an Excel sheet, and then there is a percentage, sometimes 1.5, sometimes two, sometimes 2.5, nice round numbers, applied to these initial numbers to construct what will happen in the far future for a couple of decades.
>
> That is, you take those initial numbers, you just multiply them times 1.015 of the power one, two, three, four, five, six, seven, and you understand, with a computer and An Excel software, you can produce things like that by the hundreds, but the point is that I could not find any even common sense justification for this.
>
> Let me elaborate. There are numbers there, and this goes to the heart of the matter of the but-for thing. That's why I insisted that there has to be social value, which is, in fact, as I verified and as I knew, what every TIF provision requires. The thing must have positive social value, must add something to the community.

My back of the envelope estimate is that in order for those projected tax incremental revenues to make sense, that is, to actually take place, to be realized, to be received by the City of St. Louis over a twenty-year period probably, this project should be able to generate, give and take, something in the order of eighty to a hundred thousand new jobs or residents that may be earning those salaries outside the City strictly but are living in the area.

Consider the social economic condition of the metropolitan area of St. Louis, considering what has happened here for the last twenty years, considering –

Q Slow down.

A -- the current state of the local economy and of the national economy, I find those assumptions, that are not even spelled out, by the way, but they are necessary by backward induction to justify the projected tax increment, I find those numbers plainly unbelievable. As I said, they're out of thin air. Tr., Tab 1, 38-40.

Professor Boldrin further stated:

The developer is saying that, "By this intervention, we will be able to multiply the actual value of those buildings". That's the value of the building and the land… You'll be able to multiply by roughly a factor of fifty.… Miracles are not to be ruled out, but before I believe in miracles I need to see some evidence that this has been done at least once, this

extension in this form in some other City of the United States in circumstances similar to that…. If would be nice if this were possible, but before dreaming I'd like to have evidence that the dream has some chances of turning into reality. Tr., Tab 1, 44-46.

These houses have to be bought by somebody. Somebody has to go there and say, "I'll buy that apartment, I'll buy that house," so again, in order for all this to make sense, somehow the developer in the City must be expected that by this action, and purely this action, roughly a hundred thousand additional high paid professionals will move into the City of St. Louis. I would love it, but I don't notice it. Tr., Tab 1, 49-50.

There's a lot of empty – how we call that – lofts. There's a lot of stuff that is sitting on the verge of folding, I mean, of failing as a business enterprise because there's not enough demand. The City of St. Louis does not seem to, for a variety of reasons, attract a large enough inflow in high tech businesses and good companies, and so my real puzzle is, where do they think this extra hundred thousand will come? That's the point. Tr., Tab 1, 50.

The documents presented by the developer [are] out of thin air. Tr., Tab 1, 55.

Additionally:

A. …When something seems to have essentially a zero chance, then you say zero chance.

Q. (By Mr. Schock) Is that where you put this project?

A. That's my view, yes. Tr., Tab 1, 55.

Additionally:

> If I come and tell you that I want to redo Brasilia in the middle of the Nevada desert, you'll probably say you're nuts, right, and so you need the public purse to do such a suicidal operation and money wasted.

Additionally, in two grand displays of chutzpah, in its Redevelopment Plan, Intervenors' Trial Exhibit 8, Intervenors' Appendix Tab 3, A-171, Northside calculated profit by a new and exciting accounting concept called "return on costs". Particularly, at the first table in appendix B of the cost benefit analysis, the title of the bottom line is: "Return on project costs after TIF".[3] Regarding that novel accounting term "return on costs", Professor Boldrin stated:

Q. (from Mr. Amon) Is return on project[] costs a valid measure of profitability?

A. Obviously not. Tr., Tab 1, 86.

A. It's not the proper way to measure. In other words, nobody would do that. Tr., Tab 1, 88.

[3] The table indicates that the alleged net return on costs after TIF is 11.30%.

A. These tables are very poorly done, they're not professionally done. Tr., Tab 1, 89.

On the above line Northside added the TIF in as *profit*. About that Professor Boldrin said:

Q. It adds the 390,700,000 – dollar TIF into this – into this page. It identifies it as profit, is that correct?

A. No, that's what doesn't make sense.

This table – I can say that this table was not done by a professional or the professional should go back to school. No, I'm honest. This is not the way you do it. This is a table that I'm confused. It particularly mixes things that have to do with balance sheet, with things that have to do with the assets actually of the company. I'm sure that the person that did this cannot possibly not know the difference between the two, but the reason they're mixed in here beats me. Tr., Tab 1, 90-91.

In sum, the numbers presented by Northside are out of thin air, are not even close to based in reality, and as the final two examples show, are actually deceptive. Northside was either being run by inexperienced fools (doubtful), or was playing city officials for stooges (likely).

Financing Commitment

As stated above, **RSMo. 99.810.1** requires the Redevelopment Plan to include:

- The estimated redevelopment project costs [and] the anticipated sources of funds to pay the costs,
- Evidence of commitments to finance the project costs.

The precise language in the statute reads:

> The Redevelopment Plan… shall include, but need not be limited to, the estimated redevelopment project costs, the anticipated sources of funds to pay the costs, evidence of the commitments to finance the project costs, the anticipated type and term of the sources of funds to pay costs.

The Redevelopment Plan's appendix B is titled "Evidence of Commitment to Finance Project Costs", Appellants' Appendix, A323.

Entire Appendix B consists of a one page September 8, 2009 letter on Bank of Washington stationery, over the signature of Louis B. Eckelkamp, III, (whose title is not stated on the letter). The letter is directed to Mr. McKee at Northside. The subject line reads:

> Re: Financing for NorthSide Regeneration Tax Increment Financing Redevelopment Plan

The letter reads, in its entirety:

> The purpose of this letter is to reiterate the commitment of Bank of Washington to provide financing for the proposed redevelopment projects for the designated Redevelopment Project of the City of St. Louis under the terms and provisions of the NorthSide Regeneration Tax Increment

> Financing Redevelopment Plan, subject to final review and approval of the Loan Committee of Bank of Washington.
>
> As we have discussed, financing of these redevelopment projects would not be feasible without the assistance of tax increment financing. Therefore, please be advised that we are excited to provide financing for the redevelopment projects should the City of St. Louis adopt the necessary tax increment financing for the redevelopment project areas.
>
> If you have any questions or if I can be of further assistance, please contact me at (636) 239-7831.

The trial court's Judgment described this as "little more than a general expression of willingness to consider additional financing to Northside and its affiliates," L.F. 334.

Dr. Boldrin's statements regarding the bank's ability to provide the financing are:

> I find it most unlikely – it violates the Geneva in every dimension, to start with -- that a bank of that size would be-- ever able to raise 3.5 billion, which is literally five times their current portfolio and, you know, fifty times their –no, more – 500 times their equities. It is just out of the question. Tr., Tab 1, 74.

Further:

> Q. (by Mr. Schock) Would you describe the financing promise from the Bank of Washington as an empty promise?
>
> A. Yes. Tr., Tab 1, 75.

Comprehensive Plan

The story of the "Comprehensive Plan" cannot but bring forth a chuckle. It turns out that the City's last Comprehensive Plan was enacted in 1947, Tr., Tab 4, p. 254, and Judgment, L.F. 32. That was when the population was three times what it is today, and before the building of either the interstate highways or the Gateway Arch.

Nevertheless Ordinance 68484, one of the ordinances in this case, states at Section One, B:

> The Redevelopment Plan conforms to the comprehensive plan for the development of the city as a whole.

Freeman Bosley, Sr., a long standing member of the City's Board of Alderman, Ward 3, said regarding a Comprehensive Plan:

> Q. (by Mr. Schottel) But you don't know what the comprehensive plan for the development of the city as a whole is?
>
> A. No, they never explained it to me. Tr., Tab 3, 128.

Antonio French, then a freshman member of the City's Board of Alderman, Ward 21, said regarding a Comprehensive Plan:

> Q. (by Mr. Schottel) Are you aware of whether or not there exists a Comprehensive Plan?
>
> A. I have heard of it. I have not seen it or read it in my ten months.
>
> Q. Okay. How did you hear of it?

A. It's referred to in basically most of these redevelopment agreements. It's kind of boilerplate language.

Q. So you don't know whether it's a multi-page document or what it consists of?

A. I've never seen it.

In 2005-2006 the City created a "strategic land use plan" which is essentially a zoning map, Defendant's Exhibit K at trial, referenced by the trial court at Judgment, L.F. 344, testimony of Barbara Geisman, Executive Director for Development in Mayor Slay's office, Tr., Tab 4, 254. (Ex. K is Intervenors' Appendix Item 5).

The trial court found the cases about requiring a Comprehensive Plan to be loose, and so allowed the Zoning Map to serve as a Comprehensive Plan, L.F. 341&c.

Cost Benefit Analysis

Intervenors offered Appellants' Cost Benefit Analysis as their Exhibit 8. This exhibit is not in Appellants' Appendix, and Intervenors thus included it in their Appendix at Tab 3, A-171.

Professor Boldrin described the cost benefit analysis as forecasts and stated:

> Forecasts are either justified, grounded, verifiable, credible or arbitrary, and these are arbitrary" Tr., Tab 1, 65.

Further:

> Some of the growth rate they imply is really pie in the sky that has now filled Nevada and Arizona and south of Florida with Cathedrals in the

> Desert or on the shore, for that matter, and we are paying them with our taxes. Tr., Tab 1, 67-68.

Further:

> Twenty percent growth rate of market value, I don't know where people come up with that. Tr., Tab 1, 68.

Thus the numbers in the cost benefit analysis are not grounded in reality.

No Project

As discussed above, and as discussed in great detail by the Trial Court in the Judgment, the trial court rejected the ordinances because of a lack of a specific project:

> Northside's Redevelopment Plan sets forth estimated dates of completion of objectives, but without reference to any specific projects as that term must be understood… The Redevelopment Plan's blanket statements of completion dates without reference to specific *projects* renders the finding of compliance with §99.810.1(3) arbitrary." Judgment, L.F., 348, (emphasis in original).

Attorney's Fees

As stated above in reference to Intervenors' pleading, Intervenors stated in their Petition that they were incurring attorney's fees, and then in their prayer sought attorney's fees.

In all their pleadings, however, Intervenors have also sought an initial order that fees should be granted, and have then made a request that after that initial determination,

Intervenors should be allowed to submit a fee application outlining their hours, etc. to be followed by the expected squealing from Appellants.

It will not surprise this court to learn that Intervenors have incurred substantial attorney's fees.

As Intervenors will outline in the cross appeal portion of this brief, Intervenors assert that the presentation of material in this TIF application was so far outside the bounds of reality, as Professor Boldrin laid out in detail, that Intervenors meet the high bar of "special circumstances" to receive attorney's fees in this court.

SUMMARY OF ARGUMENT

Although Intervenors have no choice but to address (a) all the issues raised by Appellants, and (b) all issues on which the trial court found against Intervenors but on which this court could affirm, ***Maryland Plaza Redevelopment Corp. v. Greenberg*, 594 S.W.2d 284, 286 (Mo.App. 1979)**, this case is likely to turn on Appellants hope that this Court will overturn ***City of Shelbina v. Shelby County*, 245 S.W.3d 249, 252 (Mo.App. 2008)**.

That decision requires a TIF application to define specific projects, and there are no specific projects here.

———

Paul McKee and his Northside Regeneration, LLC seek over $600 million in government financing incentives in support of a proposed $8.3 billion dollar redevelopment project in the northern portion of the City of St. Louis. The incentives break out into (a) $250 million in state tax credits, and (b) the balance from a TIF. The City of St. Louis Board of Alderman granted the TIF, and Intervenors homes and businesses were thereby declared blighted and subject to eminent domain. Mr. Amon's original Plaintiffs and the Intervenors sued to challenge the ordinances granting the TIF. They asserted that Mr. Mckee and Northside had not complied with the TIF enabling statute.

The challengers prevailed in the trial court, and Mr. McKee and Northside have appealed. Plaintiff and Intervenors have cross appealed for attorney's fees. The Court of

Appeals issued its opinion which would have affirmed, but transferred the case to this Court.

The trial court ruled in favor of the challengers based on a "Fatal Flaw", Judgment, L.F., 353. That Fatal Flaw is that the entire proposal is essentially only a plan or a concept, and nowhere contains in the proposal a specific project.

In Point I Appellants assert they were blind-sided and had no idea that the issue of whether the TIF statute required a project was in the case. Intervenors counter by stating that the pleadings precisely allege non-compliance with the TIF statute, and in a project of this scope Appellants should have been well aware they had to comply with every part of the statute. Alternatively and further, Mr. Amon's Motion in Limine on behalf of Plaintiffs put Appellants on notice this issue was in the case.

In Point II Appellants assert, seemingly in the alternative, that the TIF Statute does not require a specific project and even if it does require a specific project their proposal includes specific projects. Intervenors counter that the statute does indeed require a project, that, no, the proposal does not contain a project, and if this court disagrees with those propositions, Appellants' TIF materials fail to comply with the TIF statute in several other ways, and so this court may affirm on other grounds.

In Point III Appellants assert that the Cost Benefit Analysis does not require a specific project. This point apparently relates to the trial court's rejection of Appellants' post trial offer to put on additional evidence that after the trial court had rejected the TIF ordinances the City's Board of Alderman had passed a new ordinance for a specific

project, a building materials recycling center, and so had cured the "Fatal Flaw." In rejecting this evidence the trial court found, among other problems, that a single project could not cure the defect because the original cost benefit analysis did not include that project. In effect, the trial court said the only cure was to start over. Intervenors agree with the trial court that the language of the cost benefit analysis requirement in the TIF Statute at 99.810.1(5) does indeed require a specific project in the cost benefit analysis, and so the new ordinance approving the recycling center did not cure the defect, and so the trial court was correct to reject the new evidence.

Point IV asserts the trial court erred in denying Appellants Motion for New Trial. The arguments are brief and generally rehash the prior Point. Intervenors briefly counter with the similar arguments, while discussing the tough Standard of Review for Appellants on this issue.

In their cross appeal Intervenors assert that the trial court erred in failing to award Plaintiffs and Intervenors attorney's fees. Rule 87.09 states that "The court may make such award of costs as may be equitable and just". The case law allows attorney's fees, at the trial court's discretion, in narrow circumstances. Particularly, In ***Goralnik v. United Fire and Cas. Co.*, 240 S.W.3d 203, 211 (Mo.App. 2007)** the court listed cases in which attorney's fees were upheld and found a common thread to be "intentional misconduct directly damaged the party seeking attorneys' fees and resulted in litigation expenses". Intervenors assert that the complete hash that Appellants made of the TIF application documents, resulting in widespread and arbitrary blighting of citizens' homes,

demonstrates precisely the intentional misconduct which makes the denial of attorney's fees an abuse of discretion. The Intervenors and other Plaintiffs suffered the precise effect that one would expect from such misconduct: the designation of blight and the threat of eminent domain damaged the value of their real estate. The effect on lives and the amount of money at stake is relevant to the inquiry. Intervenors ask this court to therefore remand to the trial court with an instruction to determine the Respondents' reasonable attorney's fees, and to award those fees to Respondents' respective counsel.

ARGUMENT IN RESPONSE TO SUBSTITUTE BRIEFS OF APPELLANTS

APPELLANT NORTHSIDE'S POINT I –

NOTICE TO APPELLANTS THAT LACK OF A PROJECT WAS AT ISSUE

Standard of Review

Appellants assert that the Standard of Review is *de novo* because the issue in Appellants' Point I is whether the lack of notice in the pleadings makes the judgment void, and whether a judgment is void is subject to de novo review.

Intervenors believe Appellants' argument effectively breaks the point into two parts, first, whether the pleadings are so removed from the judgment as to make the matter void, and second, if not, whether the pleadings were sufficient to put Appellants on notice that the lack of a project would be an issue in the case, and then whether the case should be remanded for further proceedings instead of affirmed. *See* a somewhat related situation in ***Katz v. Slade*, 460 S.W.2d 608, 614 (Mo. 1970)** where the Court of Appeals remanded to allow the Plaintiff to proceed to the jury on an issue on which he had made out a submissible case but had fouled up the jury instructions.

The Standard of Review for the first question is *de novo*, and Intervenors suggest if this court finds that the judgment is not void, then the Standard of Review for the second question is that of ***Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976)**:

> [T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is "against the weight of the evidence" with caution and with a firm belief that the decree or judgment is wrong.

Under ***Murphy*** the burden is on the appealing party to demonstrate error. ***State ex rel. Ashcroft, ex rel. Plaza Properties, Inc. v. City of Kansas City*, 687 S.W.2d 875, 876 (Mo. 1985)**.

The Missouri Supreme Court has stated that the Standard of Review in a judge tried declaratory judgment case is no different than the Standard of Review in any other judge tried case. ***Levinson v. State,* 104 S.W.3d 409, 411 (Mo. banc 2003).**

(See Intervenors' Argument in Point II regarding the standard of review when a trial court judges a legislative finding).

Discussion

Appellants assert that trial court judgment is void because of a disconnect between the pleadings and the judgment. Particularly, they state that because the lack of a project was not precisely mentioned in the pleadings, all that came after is for naught.

As a preliminary statement of the law on this point Intervenors note ***Roe v. Ross*, 701 S.W.2d 799, 802 (Mo.App. W.D. 1985)** for the proposition that "the trial judge has the discretion to control the conduct of the trial and…the court must be permitted to define the issues and the law of the case within the pleadings and exclude evidence inconsistent with or irrelevant to the pleadings."

In Appellants' case ***In re Marriage of Hendrix*, 183 S.W.3d 582, 588-89 (Mo. 2006)** the Court quoted ***Charles v. White,* 112 S.W. 545, 549 (Mo 1908)** regarding when a judgment is void because it goes beyond the issues defined by the pleadings. The example in ***Charles*** tells the tale. The example is that if a court hearing a case in which the pleadings relate only to foreclosure and in the course of the case the court issues a decree of dissolution for the soon to be dispossessed homeowners, the decree of dissolution is void.

Charles thus sets a high bar for a judgment to be void because of a lack of congruity between the pleadings and the judgment—it has to be as unrelated as foreclosure and dissolution. There is an argument, hopefully eviscerated below, that the court's judgment in this matter went beyond the scope of the pleadings, but the pleadings

and the judgment are hardly as different as foreclosure is from dissolution of marriage. Intervenors therefore conclude that under *de novo* review the judgment is not void.

A recent case to examine the issue is ***Echols v. City of Riverside*, 332 S.W.3d 207, 211 (Mo.App. 2010)**. There a Missouri Human Rights Act Plaintiff received a modest jury verdict against his City employer and post trial the City sought to offset the verdict against other money the Plaintiff had received. The trial court granted the offset and the Court of Appeals reversed. The first reason cited for the reversal was that the City's pleadings did not raise the issue of offset at all. The case at bar differs. Here the initial pleading directly asserted non-compliance with the TIF Statute, and that was what the trial court found. In ***Echols*** the issue was not raised at all. The Judgment here, therefore, does not meet the standard of ***Echols*** and so is not void.

Let us now turn to whether there was insufficient notice of the issue under a ***Murphy*** Standard of Review.

Appellants assert that the trial court overreached in concluding that that it could rule in Respondents' favor on an issue not specifically laid out in the pleadings. The trial court was very cautious on this issue, L.F.357, noting Mr. Amon's pleading and additionally finding that the Motion in Limine provided sufficient notice, but Intervenors believe the trial court was perhaps overly cautious and could have simply concluded that pleadings were sufficient.

As quoted in the Jurisdictional section, Mr. Amon's Second Amended Petition included the following paragraphs:

- Para. 21.a "The plan and ordinance do not conform to State legislative requirements",
- Para. 21.b "That said Plan and ordinance insufficiently satisfy the minimum statutory requirements."
- Para. 22 "That pursuant to **99.805.(13)** "*Each redevelopment plan shall conform to the requirements of section **99.810***." (Emphasis in original).

Is this Court to take seriously Northside's argument that those paragraphs did not inform it that compliance with **ALL** the requirements of the TIF statute would be at issue? Compliance with the statute is the precise issue put forward by the paragraphs.

Appellants cite ***Henkel v. Pevely*, 488 S.W.2d 949, 951 (Mo. App. 1972)** for the proposition that "general allegations of illegality, voidness, impropriety and unconstitutionality are mere conclusions and must be disregarded." The case indeed said that but in that case the Plaintiff's Petition included no specifics at all. Here the pleader stated that the plan did not conform to the statute.

Mr. Amon's quoted paragraphs in the Second Amended Petition apprised Northside that full compliance with the TIF Statute was in play. Could it have been more clear by stating additional details? Yes. Was it sufficient? Also yes.

Mr. Amon's Motion in Limine and oral statements at the beginning of the trial may be seen as surplus notice, that is, merely an addition to the previous notice in the pleadings.

Intervenors assert, of course, that if the court finds the pleadings themselves insufficient, the court should find that the trial court is right and the Motion in Limine and supporting oral statements did the job.

Also, the issue is waived, because when Mr. Amon made his oral statements Northside's counsel did not leap to his feet and say that the lack of a project was beyond the scope of the pleadings. Weirdly, Appellants complain at Appellants' Amended Initial Brief p. 33 that they were "not heard on the issue." What stopped them from responding? Even if Northside had a legitimate quarrel with the pleadings, the lack of a response to Amon's Motion in Limine does not mean they were not heard. It means they waived the issue.

Intervenors note that the Court of Appeals found this point dispositive, Opinion, p. 10, and focused on the lack of objection to questions to two witnesses on the subject.

Particularly, Alderwoman Kacie Starr Triplett, testified that "no hard, concrete plan for what the developers sought to do" had been presented and incorporated into the Redevelopment Plan. Tr. Tab 2, p. 16. The Alderwoman further testified that the Redevelopment Agreement was only a general redevelopment agreement that "had some set, concrete deadlines for the developer to come back to the Board of Aldermen to activate" individual redevelopment agreements for RPA A and RPA B and to determine "what type of projects would go in the set RPA's." Tr. Tab 2, p. 17-18.

The other witness, the executive director of development the City Appellant, testified that the City and Northside were proceeding with a general redevelopment

agreement and that RPA A and RPA B would have their own individual redevelopment agreements that would be discussed and reviewed by the Appellants at a later date. Tr. Tab 4, p. 218-19.

Appellants did not object to the introduction of testimony from either witness (*see* Tr. Tab 2, p. 6, 17-18 and Tr. Tab 4, p. 212-13) and further did not object specifically to the above line of questioning.

Intervenors have no response to Appellants' argument at Appellants' Substituted Brief at 33, that somehow the introduction of the Redevelopment Ordinances is relevant to notice of the lack of a project as an issue in the case. The reason Intervenors have no response is that those ordinances were the very subject of the case. Did anyone think those ordinances were not coming into evidence? It is a "stretcher" to assert that the introduction or non-introduction of the very ordinances at issue in the case bears on issues of notice.

The Court of Appeals "must affirm the trial court's judgment if it is sustainable for any reason supported by the record." ***Gaydos v. Imhoff*, 245 S.W.3d 303, 306 (Mo.App.2008)**. Intervenors' position is thus that if either the trial court was right that the pleadings, and particularly the Motion in Limine, were sufficient to provide Appellants notice of the issue of a lack of a project, or if Intervenors are right that Mr. Amon's client's pleadings alone contained sufficient notice that compliance with the entire TIF statute would be in play, notice was still sufficient.

Appellants' cite to ***Hancock v. Shook*, 100 S.W.2d 786, 802 (Mo. 2003)** is unavailing because that case involved a failure to object to evidence after a Motion in Limine had been overruled. As stated in the quoted transcript section from the beginning of trial, the court took the Motion in Limine with the case.

Intervenors acknowledge that a Motion in Limine is a tool not normally used in a bench trial, but assert that the Motion in Limine provided notice that Respondents were onto the lack of statutory compliance with the requirement of a project, and so Northside and the other Appellants knew they should provide whatever evidence they had to meet the concern. As stated above, of course the Court of Appeals just found the objection waived because Northside did not object to the questions to Alderwoman Kacie Starr Triplett or to Barbara Geisman.

———

Northside plans an $8.3 billion dollar redevelopment and seeks over half a billion dollars in government subsidies, and asserts that it should not have to meet arguments regarding each individual requirement of the statute creating the legal superstructure to support the subsidy. That position is arrogant, and it is ridiculous.

Northside knew this case was going to be all out war – there were shouting matches at public hearings, squabbles over inadequate room size, anti-McKee graffiti all over the neighborhood, a request for a TRO, contentious depositions, the arrival of Intervenors, several attorneys lined up on both sides, etc., etc., etc.

The number of requirements in the TIF statute is finite. Surely Northside knew that once the challengers raised serious questions about compliance with the TIF Statute, the pressure was on to prove that it was in compliance with each and every element of this statute. This case does not exist in a vacuum. Real lives and huge sums of money are at stake.

In Intervenors' view this court need not reach the issue of whether the Motion in Limine was sufficient to put Northside on notice that it should have shown there was a project. Mr. Amon's pleading did so at the very beginning. If the court doesn't like that theory, the pleading and the Motion in Limine together did the job. If the court doesn't like that theory, this court should agree with the trial court and conclude that the Motion in Limine was enough by itself regardless of the pleading. If the court does not like that theory it should follow the lead of the Court of Appeals and focus on the failure to object.

To think otherwise is to insult the citizenry, and imply that by sleight of hand a company can mulct the taxpayers out of unfathomably large sums of money. If they want to (a) get subsidies with the really big boys- i.e. at the $600 million dollar plus level, (b) declare great swaths of city ground blighted and claim the power of eminent domain and thereby reduce home values, and (c) have the power to throw people out of their homes and businesses for their own private benefit, they should know they have be prepared to defend compliance with all aspects of the statute.

APPELLANT NORTHSIDE'S POINT II –

AND THE CITY OF ST. LOUIS APPELLANTS' ONLY POINT

———

APPELLANTS SAY: "WE DID NOT NEED TO HAVE A 'PROJECT',

BUT IF WE DID NEED TO HAVE A PROJECT WE HAD ONE"

The gist of Appellants' Point II comes down to two concepts: first, that the TIF statute does not require a specific project, and second, that if the TIF statute does require a project, Appellants' TIF documents included a project.

Standard of Review

In this Court when the court reviews a trial court's determination of a legislative finding the Standard of Review is "whether there is substantial evidence to support the legislative decision." ***Great Rivers Habitat Alliance v. City of St. Peters*, 246 S.W.3d 556, 562-63 (Mo.App. 2008)** citing ***Centene Plaza Redevelopment Corp. v. Mint Props.*, 225 S.W.3d 431, 433 (Mo. banc 2007)**.

Nevertheless, this court reviews issues of law *de novo*, ***Major Saver Holdings, Inc. v. Education Funding Group, LLC*, 2011 WL 4948216 (Mo.App. October 18, 2011)**, and statutory interpretation is purely a question of law, ***City of Shelbina v. Shelby County*, 245 S.W.3d 249, 252 (Mo.App. 2008)**.

Additionally, Intervenors note that by the letter of the cases the trial court's job in reviewing a TIF is quite involved. At the risk of a long quotation, Intervenors quote the description of the trial court's job as stated in ***Great Rivers at 562***:

> It has long been the rule in Missouri that disputes over the propriety of a municipality's legislative findings are to be resolved by application of the "fairly debatable" test. *See* ***City of St. Joseph v. Hankinson,*** **312 S.W.2d 4, 8 (Mo.1958)**. Under that test, we will not substitute our discretion for that of a legislative body, and review of the reasonableness of legislative action "is confined to a determination of whether there exists a sufficient showing of reasonableness to make that question, at the least, a fairly debatable one; if there is such, then the discretion of the legislative body is conclusive." *Id.* Our Supreme Court has explained the policy underlying this rule:
>
> Out of proper respect for the role of co-equal branches of government, this Court has consistently refused to second-guess local government legislative factual determinations that a statutory condition is met unless there is a claim that the city's decision is the product of fraud, coercion, or bad faith, or is arbitrary and without support in reason or law.
>
> ***Spradlin v. City of Fulton,*** **924 S.W.2d 259, 263 (Mo. banc 1996)**.

The "fairly debatable" test may also be justified as flowing naturally from a well-recognized presumption: because the validity of legislative enactments

is presumed, uncertainties about their reasonableness "must be resolved in the government's favor." ***Heidrich v. City of Lee's Summit,* 26 S.W.3d 179, 184 (Mo.App. W.D.2000)**; *See* ***Hoffman v. City of Town & Country,* 831 S.W.2d 223, 225 (Mo.App. 1992)** (noting that the "fairly debatable" test operates "[i]n conjunction with and, perhaps, in amplification of" the presumption of legislative validity). In order to overcome this presumption, it must be shown that no such uncertainty exists—that the challenged action is not "reasonably doubtful or even fairly debatable." ***City of St. Charles v. DeVault Mgmt.,* 959 S.W.2d 815, 821 (Mo.App. 1997)**.

Regardless of the underlying rationale, application of the "fairly debatable" test is rather straight-forward in practice: in order to prevail on any claim that legislative action is unreasonable, arbitrary, or capricious, it must be shown that the reasonableness of that action is not even fairly debatable. ***Hankinson,* 312 S.W.2d at 8**. The assertion of such a claim ultimately leads to one of two factual findings: either the complained of action is *unreasonable* or the reasonableness thereof is *fairly debatable*. *See, e.g.,* ***Heidrich,* 26 S.W.3d at 184** (noting that "this court may reverse a legislative action only if arbitrary and unreasonable, meaning that the decision is not fairly debatable").

> When assessing municipal legislative determinations, "[t]he issue of reasonableness or arbitrariness must turn upon the particular facts of each case…"

Intervenors suggest that when this court examines whether there is "substantial evidence to support the legislative decision" this court is essentially looking over the trial court's work, *de novo*. The Standard of Review, after all, is now whether there is substantial evidence to support the trial court's decision. Thus in reality, this court's job is really the same as, and thus as hard as, the trial court's.

Discussion – Primary Theory

Intervenors believe that the central issue in the appeal is here in Point II, that is, the trial court's conclusion that the TIF statute requires a project. After a detailed analysis, the court reached this firm conclusion at Judgment, L.F., 353. In summary, the court concluded that the TIF Statute required three things: an area, a plan and a project (or projects).

The court did not reach this conclusion in isolation. Particularly, the trial court hung its decision on ***City of Shelbina v. Shelby County*, 245 S.W.3d 249 (Mo App. 2008)**. ***Shelbina*** is a short decision. The City of Shelbina passed TIF ordinances which were aspirational but not specific. The trial court found the ordinances void *ab initio*, ***Id. at* 253.**

The ***Shelbina*** court quoted 99.845.1 "in pertinent part":

> A municipality, *either at the time a redevelopment project is approved or, in the event a municipality has undertaken acts establishing a redevelopment plan and redevelopment project and has designated a redevelopment area* after the passage and approval of Sections 99.800 to 99.865 ... which acts are in conformance with the procedures of Sections 99.800 to 99.865, may adopt tax increment allocation financing by passing an ordinance.... (Emphasis in original).

The trial court explained that under ***Shelbina*** there must be a project and here there was no project and so the TIF ordinances fail. The court found no legal distinction between Northside's plan and the ***Shelbina*** plan. Each one was a concept without a project.

Intervenors believe (not surprisingly) that the trial court got it right. Intervenors note that if the Appellants thought they really did have a project, they would not have gone to the trouble of passing a follow-up ordinance approving the recycling center.

This court should therefore affirm.

Intervenors will begin with a discussion of ***Shelbina*** and then review the various alternative theories on which this Court could affirm.

Discussion

A Project

Appellants' seem to say in their point relied on that "no project is required, but if one is required, we have one". An examination of Appellants' Substitute Brief on the point that they have one, however, comes up a touch short.

At p. 40 Northside states:

> Even assuming that the trial court was right and Northside had to present just one "shovel ready" project (7/2 Ruling at 45-46, LF 355-356), Northside did just that. The Redevelopment Agreement obligated Northside to complete specific demolition and remediation on an accelerated schedule:
>
> > On or before March 31, 2010, the Developer shall provide to the City a list of the buildings on properties within the Redevelopment Area that the Developer has identified for demolition and rehabilitation. The Developer shall (a) by December 31, 2010, demolish those buildings located on the properties identified for demolition on said list if such demolition is approved by the City; and by (b) December 31, 2011, rehabilitate those buildings located on the properties identified for rehabilitation on said list.

If it is a "project" to provide a list of buildings for future work, then we are living in the world of Alice in Wonderland. Northside has not listed anything to be built, but

says there is to be a list of future buildings to be demolished. This does not fulfill the suggestion in Northside's Point Relied On that it really did have a project.

The City of St. Louis Appellants take a slightly different tack. At p. 30 of their Substitute Brief they say the "project" which is approved consists of infrastructure work within RPA A and B by April 1, 2010. The problem is that, as the City of St. Louis Appellants admit, "the tasks" include "construction, reconstruction, renovation and/or rehabilitation of infrastructure and/or public improvements, including without limitation, sidewalks, lighting, landscaping, sewer, water, electrical and other utilities." (A164).

Those are nice words, even inspirational words, but Intervenors see nothing therein which delineates anything specific. Further, such infrastructure work is distinguishable under both the TIF statute and ordinary meaning from a development "project," which has a legal description of the selected area, and a detailed breakdown of costs. **RSMo. 99.805.(14) and (15)**.

At p. 25 City of St. Louis Appellants list several dictionary definitions of "project." This exercise is valuable insofar it demonstrates that different dictionaries define words in different ways. Nevertheless, Intervenors suggest the relevant definition is not of the word "project", it is the definition of the full phrase "redevelopment project". As discussed above the definition of that phrase is in the statute at **99.805.(14)**. The court need look no further. If the court does look further, however, Respondents suggest the correct way to read the TIF statute's definitions are for their plain and ordinary meaning, not any conceivable definition. *See generally* **Antonin Scalia & Bryan A. Garner,**

Reading Law: The Interpretation of Legal Texts (2012). Intervenors conclude that Appellants' arguments that there was a development "project" should be rejected.

Let us now turn to whether a specific project is required under the terms of the TIF statute, or whether the trial court defined the statute too narrowly. (One might note that both Northside and the City of St. Louis Appellants spend page after page trying to horse shoe the statute into not requiring a project. Their sheer volume of words raises suspicions).

Both Substitute Briefs of Appellants acknowledge that **RSMo. 99.805(14)**, which contains the TIF statute's definition of "Redevelopment Project" is a good place to start. That section reads:

> "Redevelopment project", any development project within a redevelopment area in furtherance of the objectives of the redevelopment plan; any such redevelopment project shall include a legal description of the area selected for the redevelopment project.

Intervenors simply point that under this definition the "redevelopment project" is "within" the "redevelopment area". By definition then, it is something discrete which is distinct from the entire plan. A reasonable reader will therefore conclude that this definition means that there has to be a project.

Let us now move to **RSMo. 99.810**, the TIF statute section which describes the paperwork which an applicant for a TIF must submit. The very first sentence of the very first section reads:

> Each redevelopment plan shall set forth in writing a general description of the program to be undertaken to accomplish the objectives and shall include, but need not be limited to, the estimated redevelopment project costs,

Once more we see a distinction between the plan and the project. In this case Northside submitted papers describing a plan but no project. The dispositive word in the quoted section is "shall".

Let us now turn to **RSMo. 99.810**, which described the circumstances when the TIF shall issue. It reads, in relevant part:

> A municipality… at the time a redevelopment project is approved…may adopt tax increment allocation financing

This is the third and final time the legislature has referred to a "redevelopment project" in the TIF scheme. Despite Appellants' protestations to the contrary, the language, as least to Intervenors, seems to indicate that a project is required.

Both Substitute Briefs claim that the ***Shelbina*** case is inapplicable because the process halted before a developer had been identified. While Intervenors acknowledge that factual distinction, the case still says what it says:

> It is clear from the plain language of the statute that the legislature contemplated a municipality must take the step of either: (1) approving a redevelopment project; *or* (2) undertake acts that establish a redevelopment

> plan *and* a redevelopment project prior to enacting TIF ordinances. ***City of Shelbina v. Shelby County*, 245 S.W.3d 249, 253 (Mo.App. E.D. 2008)**.

Nothing in that language has anything to do with the factual difference between when the process halted in ***Shelbina*** and here. Intervenors believe that this court can only reverse the trial court in this matter if it overrules ***Shelbina***. Naturally Intervenors suggest that ***Shelbina*** is well grounded in the statute, so there is no reason for this court to overrule it.

The Court of Appeals reviewed this issue at p. 18&c of the opinion and found the lack of a specific project to be fatal, regardless of how thinly Appellants tried to slice the issue, and regardless of vague references to infrastructure and aspirational goals.

Appellants' Substitute Briefs also discuss policy. In fact, City of St. Louis Appellants' Substitute Brief speaks eloquently about the history of St. Louis and policy reasons why TIFs are the greatest invention since sliced bread. (And Intervenors acknowledge firing back a few policy volleys herein.) But in the very recent case about medical malpractice caps, however, there is an articulation of a Court's undisputed job:

> Courts have the authority to interpret the law; but [courts] possess neither the expertise nor the prerogative to make policy judgments, ***Watts v. Lester E. Cox Medical Centers*, 2012 WL 3101657, 14 (Mo. 2012)**, (internal quotations and citations omitted).

The court may safely ignore Appellants' policy arguments, or in the alternative, if the court accepts them, the court should consider Intervenors' counter arguments.

Finally, Intervenors here respond to City of St. Louis Appellants' washing the car v. washing the windshield of the car analogy at p. 32. These Appellants seem to suggest there is no difference between washing the car and washing the windshield of the car. The court may take judicial notice that at one time or another most youngsters, whether in exchange for the opportunity to use a car – perhaps on a date – or perhaps in punishment for a transgression, were required by their parents to wash the family car. It seems to Intervenors that in all such cases if the parents said to wash the car those parents would not have been satisfied with only a clean windshield. The Appellants needed to comply with all the statute, that is, to wash the whole car, not just the windshield of the car.

Discussion

Alternative Theories

In the alternative Intervenors suggest that if this court finds either that the trial court misinterpreted ***Shelbina***, that ***Shelbina*** should be overruled, or that there was a project, then this court should still affirm on other grounds. "When the trial court fails to assign grounds for its decision…or assigns incorrect reasons, its judgment will be affirmed if supported by any reasonable theory". ***Maryland Plaza Redevelopment Corp. v. Greenberg*, 594 S.W.2d 284, 286 (Mo.App. 1979)**, *see also*, ***First Banc Real Estate, Inc. v. Johnson*, 321 S.W.3d 322, 331 (Mo.App. 2010).**

Particularly, Intervenors assert that the trial court was too deferential to the City in reference to the numbers in the plan, the financing commitment, the cost benefit analysis

and the comprehensive plan. In fact, each was not "fairly debatable", but instead was "arbitrary".

The Numbers – Out of Thin Air

As discussed in the Statement of Facts, **RSMo. 99.810** requires that:

> The Redevelopment Plan… shall include, but need not be limited to, the estimated redevelopment project costs, the anticipated sources of funds to pay the costs.

Professor Boldrin, whom the court considered credible, said about the numbers:

> The numbers are clearly out of thin air. There is no social economic study, background, statistics, development plan, anything behind it. They are stuck into an Excel sheet, and then there is a percentage, sometimes 1.5, sometimes two, sometimes 2.5, nice round numbers, applied to these initial numbers to construct what will happen in the far future for a couple of decades.
>
> That is, you take those initial numbers, you just multiply them times 1.015 of the power one, two, three, four, five, six, seven, and you understand, with a computer and an Excel software, you can produce things like that by the hundreds, but the point is that I could not find any even common sense justification for this.
>
> Let me elaborate. There are numbers there, and this goes to the heart of the matter of the but-for thing. That's why I insisted that there has to be

social value, which is, in fact, as I verified and as I knew, what every TIF provision requires. The thing must have positive social value, must add something to the community.

My back of the envelope estimate is that in order for those projected tax incremental revenues to make sense, that is, to actually take place, to be realized, to be received by the City of St. Louis over a twenty-year period probably, this project should be able to generate, give and take, something in the order of eighty to a hundred thousand new jobs or residents that may be earning those salaries outside the City strictly but are living in the area.

Consider the social economic condition of the metropolitan area of St. Louis, considering what has happened here for the last twenty years, considering… the current state of the local economy and of the national economy, I find those assumptions, that are not even spelled out, by the way, but they are necessary by backward induction to justify the projected tax increment, I find those numbers plainly unbelievable. As I said, they're out of thin air. Tr., Tab 1, 38-40.

Intervenors ask how numbers out of thin air can be anything but arbitrary?

The Financing Commitment

The financing commitment in this case is a one page letter from the Bank of Washington.

The City of St. Louis Appellants gloss over this letter in their Statement of Facts at 6: "The primary lender is the Bank of Washington, a 130 year old Missouri bank with over $700 million in assets [citation omitted]. With these preliminary finances secured, McKee…began acquiring properties…"

As quoted in the Statement of Facts, the letter from the bank reads, in relevant part:

> The purpose of this letter is to reiterate the commitment of Bank of Washington to provide financing for the proposed redevelopment projects for the designated Redevelopment Project of the City of St. Louis under the terms and provisions of the NorthSide Regeneration Tax Increment Financing Redevelopment Plan, subject to final review and approval of the Loan Committee of Bank of Washington.
>
> As we have discussed, financing of these redevelopment projects would not be feasible without the assistance of tax increment financing. Therefore, please be advised that we are excited to provide financing for the redevelopment projects should the City of St. Louis adopt the necessary tax increment financing for the redevelopment project areas.

The "commitment" is not even past the Loan Committee. It seems to Intervenors that a bank making a "commitment" should be past the loan committee. Without commitment of the loan committee, the letter's second paragraph should be deemed to be

the relevant part, that is, that the letter is an expression that the bank is "excited", not that the bank is committed.

Additionally, the most minor due diligence, as performed by Professor Boldrin, indicates that this bank has insufficient capital to finance the project anyway:

> I find it most unlikely – it violates the Geneva in every dimension, to start with -- that a bank of that size would be-- ever able to raise 3.5 billion, which is literally five times their current portfolio and, you know, fifty times their –no, more – 500 times their equities. It is just out of the question. Tr., Tab 1, 74.

It hardly seems that this letter fulfills the City of St. Louis Appellants' gloss "with these preliminary finances secured."

The trial court discussed the cases regarding the requirements of a financing commitment: The trial court cited ***Maryland Plaza Redevelopment Corp. v. Greenberg*, 594 S.W.2d 284, 290 (Mo.App. 1979)** as the only case rejecting a financing plan as insufficient. (Intervenors note that ***Maryland Plaza*** is a condemnation case and not a TIF case).

In ***Maryland Plaza*** the court rejected the financing as arbitrary with the following quote: "The plan is destitute of the requisite detailed statement of financing".

Our trial court then noted the softening of the standard in the cases including ***State ex rel. Devanssay v. McGuire*, 622 S.W.2d 323 (Mo. App. 1981)** and ***Parking Systems v. Kansas City Downtown Redev. Corp.*, 518 S.W.2d 11 (Mo. 1974)**. Intervenors

respectfully suggest that the trial court was too generous to Appellants. The latter two cases suggest that there must merely be enough information to permit the Board of Alderman to "determine the plan's feasibility". Judgment, L.F., 336. In this case, particularly in light of Professor Boldrin's testimony, found to be credible, that the Bank's letter does not contain enough information to determine the plan's feasibility. There is nothing there, and so our facts look more like ***Maryland Plaza*** than the latter two cases. Thus the court applied the facts to the law improperly, by being too generous and deferential to the Board of Alderman.

Intervenors believe that the trial court erred in finding that this financing commitment was fairly debatable. In fact, because the loan committee had not passed on the project, and because the bank has insufficient capital to finance the project anyway, there really was no financing commitment at all, and the financing commitment is therefore arbitrary.

The Cost Benefit Analysis

Northside's cost benefit analysis, Intervenors' Appendix, Tab 3, A-171, is a joke in that absent a project no analysis is possible, and any numbers are therefore arbitrary. The cost benefit analysis must provide information on the project if built or if not built. **RSMo. 99.810.1(3)** specifically requires:

> A cost benefit analysis showing the economic impact of the plan on each taxing district within the redevelopment area, including the impact on the economy if the project is not built and is built.

As stated in the Statement of Facts, Professor Boldrin opined as follows:

> Forecasts are either justified, grounded, verifiable, credible or arbitrary, and these are arbitrary" Tr., Tab 1, 65.

Further:

> Some of the growth rate they imply is really pie in the sky that has now filled Nevada and Arizona and south of Florida with Cathedral in the Desert or on the shore, for that matter, and we are paying them with our taxes. Tr., Tab 1, 67-68.

Further:

> Twenty percent growth rate of market value, I don't know where people come up with that. Tr., Tab 1, 68

Thus the numbers in the cost benefit analysis are not grounded in reality. The trial court found that the cost benefit analysis met the fairly debatable test. Given that it makes assumptions that are outrageous, however, it can only be seen as arbitrary, and so not fairly debatable. The trial court was thus once more too generous to Appellants.

While deference between branches is appropriate, the trial court must do its job in a manner consistent with its own credibility findings.

Comprehensive Plan

As stated in the Statement of Facts, the story of the Comprehensive Plan is another source of comedy. The last time the City enacted a Comprehensive Plan was 1947.

The trial court, however, cited case law indicating that compliance with this requirement may be loose, and allowed a 2005 zoning map showing existing land use to serve as a Comprehensive Plan.

The trial court stated in a footnote at Judgment, L.F., 342 that it did not see the TIF Statute as requiring as a condition precedent that the City adopt a Comprehensive Plan. The trial court nevertheless questioned the case law on which it was required to rely, Judgment, L.F., 345, citing ***State ex rel. Westside v. Weatherby Lake*, 935 S.W.2d 634 (Mo. App. 1996), *Strandberg v. Kansas City*, 415 S.W.2d (Mo. 1967), *State ex rel. Chiavola v. Village of Oakwood*, 886 S.W.2d 74 (Mo. App. 1994)**, and other cases.

Intervenors suggest the trial court's unfulfilled inclination is correct.

The Western District very recently restated the well established rules of statutory construction:

> The primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. The legislature is presumed to have intended what the statute says, and if the language used is clear, there is no room for construction beyond the plain meaning of the law… We will look beyond the plain meaning of the words of a statute "only when the language is ambiguous or would lead to an absurd or illogical result." ***State ex rel. KCP & L Greater Missouri***

***Operations Co. v. Cook*, 2011 WL 4031146 (Mo.App.), 2** (citations and internal quotation marks omitted).

RSMo. 99.810.1(2) states the requirement regarding conformance to the Comprehensive Plan:

> No Redevelopment Plan shall be adopted by a municipality without findings that:
>
> (2) The redevelopment plan conforms to the Comprehensive Plan for the development of the municipality as a whole

Intervenors suggest that the statute has no ambiguity. A plain reading requires that the city have a Comprehensive Plan. After all, how can a proposed Redevelopment Plan comply with something which does not exist? As quoted in the Statement of Facts the Aldermen testified they had never even heard of a Comprehensive Plan for the City of St. Louis, and any thought that the 1947 plan is meaningful three generations after its creation is ludicrous.

The zoning map, Ex. K, was just that, a "map" of the existing zoning. How can that be a plan when it has no information about the future?

This court should reverse the decisions which give developers and cities a bye on conformance to Comprehensive Plans. If the City wants to grant a developer a TIF, with all that entails, it ought to have to create a Comprehensive Plan. After all, as stated over and over, there are money and lives at stake, and one reason the statute exists is to protect that money and those lives. The legislature's decision to place requirements on the

players to protect those interests should be respected. (Northside's argument that the developer should have "considerable latitude" is a continuation of their extraordinary arrogance. Why should they have "considerable latitude" when they want to extract $600 plus million from the public purse? Under such circumstances the restrictions the legislature has put in place should be followed to the letter).

The Redevelopment Plan in this case does not comply with the City's Comprehensive Plan because there is no Comprehensive Plan. The City's finding of compliance with this requirement is therefore arbitrary and not fairly debatable.

Concluding Summary

The trial court dutifully outlined that the court has a limited role in these cases, and must not second guess a co-equal branch of government, Judgment, L.F., 330. When the TIF Application is substantively deficient, however, deference must stop and reality must set in. The documents were arbitrary and not fairly debatable due to the deficiency of omitting a project.

This court should affirm the rejection of the ordinances.

APPELLANT NORTHSIDE'S POINT III –

NO COST BENEFIT ANALYSIS REQUIRED FOR A SPECIFIC PROJECT

Standard of Review

Intervenors believe the Standard of Review for this Point is the same as the one for Point II, and incorporate here, by reference, that statement of the Standard of Review.

Discussion

Appellants argue that the cost benefit analysis's failure to discuss a specific project is no flaw in the TIF application.

They argue the statute at 48, stating that "**Section 99.810.1(5)** cannot refer to 'redevelopment' projects because municipalities are free to adopt redevelopment plans without a corresponding redevelopment project." That statement begs the arguments in their second Point Relied On, and Intervenors incorporate their arguments against that position by reference to their arguments above.

Appellants argue policy at 47, stating that "it is the totality of the costs and benefits that are and should be of concern to the municipality". As has been stated many times by Intervenors in this Brief, Intervenors believe that this case addresses whether TIF applicants are going to have to comply with the literal terms of the TIF Statute or not, and policy doesn't have anything to do with it. Intervenors suppose that if their best

argument was policy they would argue it too. But the question in this court is basic: Does or does not the TIF Statute require a cost benefit analysis for a specific project.

The trial court stated in its concluding "Order and Judgment" section, L.F. 50, that the ordinance was void because, among other reasons, there was no compliance with the TIF statute "in the absence of the inclusion of defined redevelopment projects and a cost benefit analysis of such projects".

As stated elsewhere, the portion of the TIF Statute referencing the cost benefit analysis is at **99.810.1(5)**. To again quote that section:

> No Redevelopment Plan shall be adopted by a municipality without findings that:
>
> (1) – (4)
>
> (5) A cost-benefit analysis showing the economic impact of the plan on each taxing district which is at least partially within the boundaries of the redevelopment area. The analysis shall show the impact on the economy if the project is not built, and is built pursuant to the redevelopment plan under consideration. The cost-benefit analysis shall include a fiscal impact study on every affected political subdivision, and sufficient information from the developer for the commission established in section **99.820** to evaluate whether the project as proposed is financially feasible.

Appellants' point is dispatched by the second sentence of section (5):

> The analysis shall show the impact on the economy if the project is not built, and is built pursuant to the redevelopment plan under consideration.

These words require the impact of a specific project. This is absent here, and so the cost benefit analysis is arbitrary.

Appellants also note that this point may relate to the trial court's rejection of Appellants' post trial offer to put on additional evidence that after the trial court had rejected the TIF ordinances the City's Board of Alderman had passed a new ordinance for a specific project, a building materials recycling center, and so had cured the "Fatal Flaw." In rejecting this evidence the trial court noted in its rejection of Appellants' Motion for New Trial, among other problems, that a single added-in project could not cure the defect because the original cost benefit analysis did not include that project, L.F. 494. In effect, the trial court said the only cure was to start over.

To the extent this supposition is correct, although it is not stated explicitly in Appellants' argument in favor of this Point Relied On, the new ordinance approving the recycling center did not have a cost benefit analysis, and so it did not cure the defect, and so the trial court was correct to reject the new evidence.

The court should therefore reject Appellants' Point Relied On III.

APPELLANT NORTHSIDE'S POINT IV –

MOTION FOR NEW TRIAL

Standard of Review

Intervenors agree with Appellants that the correct standard of review for a denial of a Motion for New Trial is whether there was an abuse of discretion. ***Anderson v. Osmon*, 217 S.W.3d 375, 377 (Mo App. 2007)**.

Discussion

Appellants argue that the trial court erred by not granting Appellants' Motion for New Trial. They say that the court should have allowed additional, post trial evidence of a litany of fine elements of the proposal, including "sanitary sewers", "new streets including curbs and gutters", "water systems by street block", "new parks", etc, Appellants' Amended Initial Brief, p. 52.

In rejecting the Motion for New Trial the trial court accepted as true that all these concepts were proposed, but the trial court concluded that "as a matter of law, the City must approve a redevelopment area, a redevelopment plan, and one or more redevelopment projects in order to comply with the statutory perquisites for tax increment financing, L.F. 493. Of that, there was none.

The court also concluded, L.F. 494, that a cost benefit analysis for such niceties would be required, but is absent for each.

Intervenors have discussed these issues in detail above, and will not repeat the arguments here. Intervenors simply ask this court to conclude that the trial court acted well within its discretion to deny the Motion for New Trial, and the court should therefore reject this final Point Relied On.

CONCLUSION

This court should affirm the trial court's rejection of the TIF ordinances.

INTERVENORS' CROSS APPEAL POINT RELIED ON

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO AWARD INTERVENORS (AND THE ORIGINAL PLAINTIFFS) THEIR REASONABLE ATTORNEY'S FEES, BECAUSE APPELLANTS TIF APPLICATION IS SO FULL OF DECEPTION AND INCOMPETENCE THAT IT DEMONSTRATES "INTENTIONAL MISCONDUCT", IN THAT THE NUMBERS ARE "PIE IN THE SKY" AND "OUT OF THIN AIR, THE FINANCING COMMITMENT IS ONLY AN INDICATION THAT THE BANK IS "EXCITED" ABOUT PROVIDING FINANCING, THE COST BENEFIT ANALYSIS CONTAINS AN UNKNOWN ACCOUNTING CONCEPT "RETURN ON COSTS" - AND THE FORECASTS THEREIN ARE NOT GROUNDED IN REALITY, AND THERE IS NO PROJECT EVEN THOUGH A PROJECT IS REQUIRED BY THE TIF STATUTE.

***Goellner v. Goellner Printing*, 226 S.W.3d 176, 179 (Mo.App. 2007)**

***Bernheimer v. First National Bank of Kansas City,* 225 S.W.2d 745 (Mo. 1949)**

***David Ranken, Jr. Technical Institute v. Boykins,* 816 S.W.2d 189, 193 (Mo. banc 1991)**

INTERVENORS CROSS APPEAL ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO AWARD INTERVENORS (AND THE ORIGINAL PLAINTIFFS) THEIR REASONABLE ATTORNEY'S FEES, BECAUSE APPELLANTS TIF APPLICATION IS SO FULL OF DECEPTION AND INCOMPETENCE THAT IT DEMONSTRATES "INTENTIONAL MISCONDUCT", IN THAT THE NUMBERS ARE "PIE IN THE SKY" AND "OUT OF THIN AIR, THE FINANCING COMMITMENT IS ONLY AN INDICATION THAT THE BANK IS "EXCITED" ABOUT PROVIDING FINANCING, THE COST BENEFIT ANALYSIS CONTAINS AN UNKNOWN ACCOUNTING CONCEPT "RETURN ON COSTS" - AND THE FORECASTS THEREIN ARE NOT GROUNDED IN REALITY, AND THERE IS NO PROJECT EVEN THOUGH A PROJECT IS REQUIRED BY THE TIF STATUTE.

Standard of Review

The Standard of Review for denial of attorney's fees in a declaratory judgment action is abuse of discretion. ***Great Rivers Habitat Alliance v. City of St. Peters*, 246 S.W.3d 556, 559 (Mo.App. 2008).**

Discussion

All Respondents sought a declaratory judgment. In the context of declaratory judgment **Rule 87.09** and **RSMo. 527.100** state, respectively, (with the only difference in italics):

> The court may make such award of costs as may *be* equitable and just.
>
> The court may make such award of costs as may *seem* equitable and just.

In ***Goellner v. Goellner Printing*, 226 S.W.3d 176, 179 (Mo.App. 2007)** the court stated the law interpreting that Rule and statute regarding attorney's fees as a portion of "costs":

> "[C]osts" do not automatically include attorney's fees. ***Washington University v. Royal Crown Bottling Co. of St. Louis,* 801 S.W.2d 458, 468-9 (Mo.App. 1990)**.
>
> In ***Bernheimer v. First National Bank of Kansas City,* 225 S.W.2d 745 (Mo. 1949)**, the Court held that attorney's fees may be awarded in a declaratory judgment action when there are special circumstances. This exception is narrow, strictly applied, and does not apply every time two litigants maintain inconsistent positions.

Further the ***Goralnik*** court listed cases in which attorney's fees were upheld and found a common thread to be:

> Intentional misconduct directly damaged the party seeking attorneys' fees and resulted in litigation expenses.

Finally, the ***Goralnik*** court also cited, with some question, ***Grewell v. State Farm Mutual Auto. Insurance Co.,* 162 S.W.3d 503 (Mo.App.2005)**, for the proposition that:

> Special circumstances can arise in a variety of circumstances, including where a party's conduct is frivolous, without substantial legal grounds, reckless or punitive," *citing* ***David Ranken, Jr. Technical Institute v. Boykins,* 816 S.W.2d 189, 193 (Mo. banc 1991)** *overruled on other grounds,* ***Alumax Foils, Inc. v. City of St. Louis,* 939 S.W.2d 907, 911 (Mo. banc 1997).**

The trial court has discretion on this subject. ***Consolidated Public Water Supply Dist. v. Kreuter,* 929 S.W.2d 314, 316 (Mo.App. 1996)**.

Intervenors suggest the court abused its discretion because of two reasons: the first reason is that both the materials Northside presented to the Board of Alderman and the conduct of Northside and the Board of Alderman have been outside all bounds of reasonableness, and second, the trial court deferred too greatly to the legislative branch in finding that the numbers, the financing commitment, the conformance to the Comprehensive Plan and the cost benefit analysis all met the fairly debatable test and were not arbitrary.

Northside's misconduct directly damaged Respondents by reducing their property values, and the misconduct forced them to incur the expenses of this litigation to protect their homes.

See the conclusion of Intervenors' Memorandum in Opposition to Appellants' Post Trial Brief:

> But the greatest concern Ms. Nelson and the other Intervenors have about Mr. McKee parallels Mistress Quickly's concerns about Falstaff in **Shakespeare's *Henry IV, Part II*, II, i**:
>
> **Mistress Quickly: He hath eaten me out of house and home.**

Northside's TIF application was frivolous, without substantial legal grounds, and both reckless and punitive. Intervenors will not bore the court with a repetition of Intervenors' response to Appellants' Point II. Intervenors incorporate all that discussion by reference, and supplement it here with a few choice highlights:

Regarding the numbers, Professor Boldrin stated:

> My back of the envelope estimate is that in order for those projected tax incremental revenues to make sense, that is, to actually take place, to be realized, to be received by the City of St. Louis over a twenty-year period probably, this project should be able to generate, give and take, something in the order of eighty to a hundred thousand new jobs or residents that may be earning those salaries outside the City strictly but are living in the area.
>
> A. …When something seems to have essentially a zero chance, then you say zero chance.
>
> Q. (By Mr. Schock) Is that where you put this project?
>
> A. That's my view, yes. Tr., Tab 1, 55.

Regarding the novel accounting term "return on costs", Professor Boldrin stated:

> Q. (from Mr. Amon) Is return on project[] costs a valid measure of profitability?
>
> A. Obviously not. Tr., Tab 1, 86.
>
> A. It's not the proper way to measure. In other words, nobody would do that. Tr., Tab 1, 88.
>
> A. These tables are very poorly done, they're not professionally done. Tr., Tab 1, 89.

The normal return reference in accounting is "return on investment". Thus in some mysterious way, bluntly, because of a lack of reference to "return on investment", it appears that Northside is hiding the amount of its investment.

The key line from the Bank of Washington letter is:

> Please be advised that we are excited to provide financing for the redevelopment projects

There is no "commitment" in a letter only stating that a bank is "excited", and the most elementary investigation reveals that a project of this size is for The House of Morgan, not the Bank of Washington. The Bank's commitment letter cannot be taken seriously.

As to the Comprehensive Plan, well, there isn't one. (Intervenors acknowledge that the case law supports leniency on this requirement, and Intervenors incorporate herein their argument above for overturning that case law).

As to the cost benefit analysis Professor Boldrin stated:

> Twenty percent growth rate of market value, I don't know where people come up with that. Tr., Tab 1, 68

The cost benefit analysis is thus nowhere grounded in reality.

The lack of a project is another example of Appellants' complete failure to comply with the TIF Statute.

The trial court at Judgment, L.F., 341 said that bad faith has to be "something more than politics". Intervenors agree, with that, but disagree with the second part of the trial court's statement at that location:

> There is nothing in the record to suggest that the Board of Alderman or the TIF Commission are in the pay of Northside or its principles, or that Northside is seeking to manipulate the legislative process to take unfair advantage of Plaintiffs or any other specific persons or groups of persons.

While Intervenors concede that there is no direct evidence of outright bribery, or anyone being "in the pay", Intervenors suggest that the misconduct demonstrated in the materials precisely does show manipulation of the legislative process, and Intervenors further suggest that they are the ones in the bulls-eye to receive the ill effects of that manipulation in the form of a reduction of their property values as a result of the blight designation and threat of eminent domain.

Is not that reckless and punitive? Does it not show bad faith? Are those not special circumstances? Did it not cause them to come to court and incur litigation expenses to protect themselves?

It is a fair supposition that the trial court's conclusion at Judgment, L.F., 358 that no exception to the "American Rule" is available is based on its conclusion of no bad faith at Judgment, L.F., 341, as quoted immediately above. Intervenors ask this court, however, to conclude the court erred because there was bad faith, yea, even intentional misconduct, and so the denial of attorney's fees was an abuse of discretion.

Special Circumstances

In ***Bernheimer v. First National Bank of Kansas City,*** **225 S.W.2d 745 (Mo. 1949)** the court focused the attorneys' fee inquiry on "special circumstances".

Is not an attempt to get over half a billion dollars in taxpayer benefits, that is, using rough math, about $60 per Missourian, which is $120 per employed Missourian assuming about half the population is employed, or about one day's wage for a minimum wage worker, all in support of a private business enterprise, all with a TIF application which does not meet a basic standard of professionalism and in which a "return on costs" reference is actually deceptive, cumulative evidence of "special circumstances" which allow fees in a declaratory judgment action?

All Respondents' Attorneys Worked Together

Intervenors note that the efforts of Respondents were joint, and if this court grants attorney's fees it should simply grant them uniformly and not try to parse out what worked and what did not work.

An Enigma – Or Not?

Churchill described Russia as "a riddle, wrapped in a mystery, inside an enigma", **Radio Address to the Nation, October 1939**.

It is reasonable to ask why Northside would make this "mysterious" proposal. After all, it is reasonable to assume the officials of Northside, particularly including Mr. McKee, are shrewd and sophisticated businessmen. They knew when they submitted their TIF application that it called for 6000 homes at $451,000 per unit, Tr., Tab 1, 81-82. They knew it called for roughly eighty or a hundred thousand additional high paid professionals to move into the City of St. Louis, Tr., Tab 1, 49-50. They knew it called for a ridiculously high growth rate of 20%, Tr., Tab 1, 68. They knew it included a novel and, frankly, contrived accounting term "return on costs", Tr., Tab 1, 86. They knew it contained a financing commitment that was no commitment at all, Appellants' Appendix, A323.

Why would they submit such documents?

Their Amended Initial Brief has an earnest, almost Norman Rockwellesque tone. For example, at p. 14:

> The Redevelopment Ordinance contemplates the reformation of 1500 acres in North St. Louis into a mixed use community that will include state of the art infrastructure, new schools, parks, residences, office buildings, theatres, shops and other uses. (Citing to A255, L.F. 249)

Why would do they make such statements?

One is reminded of the old Wall Street joke. How does one know a Wall Street Investment Banker is lying? Because his lips are moving.

One is inclined to think that when a shrewd businessman submits a proposal which any shrewd businessman would know has no basis in reality, that then regardless of protestations to the contrary there is something going on other than what is explicitly stated.

But perhaps it is not a riddle, wrapped in a mystery, inside an enigma.

Perhaps the explanation comes from an obvious inference that some of these incentives, whether the tax credits or some aspect(s) of the TIF, would be heading into Northside's pockets whether the project succeeded or not.

But for the efforts of Respondents' team, they would have gotten away with it.

CONCLUSION

Intervenors pray this court to find that the trial court abused its discretion in denying attorney's fees because Appellants committed intentional misconduct and there were special circumstances, and so this court should remand to the trial court with an

instruction to determine and award all Respondents their reasonable attorney's fees from both the trial court and at both levels of the Court of Appeals.

Respectfully Submitted,

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RULE 84.06(c) CERTIFICATION

This Brief complies with the limitations contained in Rule 84.06(b) because the Brief's word count is less than 31,000, that is, the word count is 16,508.

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CERTIFICATE OF SERVICE

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