IN THE MISSOURI SUPREME COURT

BONZELLA SMITH, *et al*	)	
	)	
Respondents	)	
vs.	)	**No. SC 92646**
	)	
TIF COMMISSIONERS, *et al*.,	)	
	)	
Appellants.	)	

Appeal from the Circuit Court of St. Louis City, Missouri
Case No. 0922-CC9379
Hon. Robert H. Dierker, Jr.
Division 18

On Transfer from the Missouri Court of Appeals, Eastern District

SUBSTITUTE BRIEF OF APPELLANT NORTHSIDE REGENERATION, LLC

Paul J. Puricelli, #32801
Stone, Leyton & Gershman,
A Professional Corporation
7733 Forsyth Blvd., Suite 500
St. Louis, Missouri 63105
(314) 721-7011
(314) 721-8660
pjp@stoneleyton.com

Attorneys for Appellant Northside Regeneration, LLC

TABLE OF CONTENTS

REDEVELOPMENT ORDINANCES DID NOT OTHERWISE CONTAIN A REDEVELOPMENT PROJECT, THE COURT SHOULD HAVE ALLOWED NORTHSIDE TO PRESENT EVIDENCE OF REDEVELOPMENT PROJECTS APPROVED BY THE CITY BOARD OF ALDERMEN IN THAT THE COURT IS ALLOWED TO CONSIDER MATTERS OUTSIDE THE ORDINANCES AND SUCH EVIDENCE WOULD HAVE DEMONSTRATED THAT THE CITY APPROVED A VIABLE REDEVELOPMENT PROJECT EVEN UNDER THE TRIAL COURT'S DEFINITION.

TABLE OF AUTHORITIES

Cases

Statutes and Court Rules

JURISDICTIONAL STATEMENT

Appellant Northside Regeneration, LLC ("Northside") has filed a motion to dismiss this appeal for lack of jurisdiction.

This Court otherwise has jurisdiction pursuant to Missouri Rule of Civil Procedure 83.02 and Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

I. THE PARTIES

Appellant Northside Regeneration, LLC ("Northside") is the redeveloper of the redevelopment project known as the Northside Regeneration Tax Increment Financing (TIF) Redevelopment Plan and located in the City of St. Louis. The City of St. Louis, its Board of Aldermen and TIF Commission, have also appealed the trial court's ruling.

Respondents/Cross-Appellants Bonzella Smith and Isaiah Hair reside within the redevelopment area and were two of the original plaintiffs in this lawsuit (LF 12).

Cheryl Nelson was also an original plaintiff and a resident of the redevelopment area (LF 12). Ms. Nelson later joined Elke McIntosh, who owns property within the redevelopment area, as an "intervenor," and thereafter was represented by both counsel for Plaintiffs and counsel for intervenors. Ms. Nelson and Ms. McIntosh filed a separate Petition for Declaratory Judgment, and have filed a cross-appeal from the trial court's ruling (LF 23, 528-533).

II. NORTHSIDE'S REDEVELOPMENT PLAN

Section 99.810 of the TIF Act[1] lists the prerequisites for municipal approval of a redevelopment plan, including a blighting analysis, compliance with the

[1] The Real Property Tax Increment Allocation Redevelopment Law, RSMo §§99.800 et seq.

municipality's comprehensive plan, a "cost-benefit" analysis, among others. In 2009, Northside submitted its proposed Redevelopment Plan to the City of St. Louis accompanied by the items listed in §99.810. On October 30, 2009, the Board of Aldermen of the City of St. Louis adopted two ordinances (the "Redevelopment Ordinances"):

- Ordinance No. 68484, which, among other things: (i) adopted and approved a redevelopment plan entitled the "Northside Regeneration Tax Increment Financing (TIF) Redevelopment Plan" dated September 8, 2009 (the "Redevelopment Plan"), and (ii) designated the Northside Regeneration Redevelopment Area (as described in the Redevelopment Plan) as a "redevelopment area" as that term is defined in the TIF Act (the "Redevelopment Area") (A27)
- Ordinance No. 68485, which, among other things: (i) designated Northside as the Developer of the Redevelopment Area, and (ii) directed the City to enter into a Redevelopment Agreement with Northside (A36)

The City and Northside executed a Redevelopment Agreement dated as of December 14, 2009 (the "Redevelopment Agreement")(McIntosh Int. Ex. 3, A151).[2]

[2] The Redevelopment Agreement provides that "[t]he use of eminent domain will not be allowed pursuant to the Redevelopment Plan or pursuant to this Agreement" (McIntosh Int. Ex. 3 at §3.2, A151).

The Redevelopment Ordinances contemplate 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, theaters, shops and other uses (McIntosh Int. Ex. 4 at 1, A255; LF 249). The ordinances also contemplate TIF financing to assist the Northside's rehabilitation of the City's streets, sidewalks, sewers and other infrastructure (McIntosh Int. Ex. 4 at 6, 13, 14; A263, 270, 271). Northside must spend its own money to rebuild public infrastructure before it can ask the City to issue TIF Notes (Tr. Tab 3 at 133-34; Tr. Tab 4 at 252, 323; LF 249; McIntosh Int. Ex. 3, ¶4.2). The City will only be obligated to reimburse Northside from those Notes if Northside is able to create the incremental value anticipated by its cost-benefit analysis submitted with its Redevelopment Plan (Tr. Tab 4 at 318-20; LF 249; McIntosh Int. Ex. 3, ¶4.2). In that sense, the City's adoption of TIF financing enables the redeveloper to build streets and other public infrastructure that the City cannot afford at no risk to the City (Trial Transcript Tab 3 at 133-34; Tab 4 at 318-20; LF 249; McIntosh Int. Ex. 3 ¶4.2, A172).

Most of Northside's Redevelopment Plan targets the City's 5th Ward, which residential and commercial developers have long ignored (Tr. Tab 3 at 135; Tr. Tab 4 at 243-44, 251; LF 250). The 5th Ward, and its neighboring communities, are in dire need of private and public assistance. Respondents introduced an independent study at trial called A Plan for the Neighborhoods of the 5th Ward c. 2000 ("5th Ward Plan")(McIntosh Int. Ex. 10; A337). Completed nearly ten years before the City approved the

Redevelopment Ordinances, the 5th Ward Plan observed that "significant levels of neglect and dilapidation exist within the Ward" (McIntosh Int. Ex. 10 at 2-6). The plan identified 369 condemned buildings, 456 vacant properties and an additional 102 buildings in "very poor" condition (McIntosh Int. Ex. 10 at 2-7). The plan pointed out that "the Ward has many pedestrian ways…in poor condition, or that have been completely obliterated" (McIntosh Int. Ex. 10 at 2-9). The residents complained of "abandoned houses, stray dogs, drug activities and debris" (McIntosh Int. Ex. 10 at 4-3). The plan concluded that the area could not expect meaningful economic progress without tax increment financing and large scale planning:

> Large-scale planning ideas are needed as a catalyst for development
>
> The recommendation for a large land use should be explored and pursued in this portion of the St. Louis Place neighborhood for the stabilization of the Fifth Ward and surrounding communities and for continuous positive economic growth
>
> In an area that has long been in decline, large-scale planning ideas should be considered
>
> Given the necessity of substantial reliance on incremental tax revenue raised from the new development as the primary revenue source to fund the

> Ward projects, completion of planned public projects will be a multi-year effort and progress will occur slowly

(McIntosh Int. Ex. 10 at 6-1, 6-5, 6-6, 19-1; A341-344; LF 250).

Northside's Redevelopment Plan divides the 1500 acres into four redevelopment areas generally referred to as Redevelopment Project Areas ("RPA") A, B, C and D (McIntosh Int. Ex. 4 at 7, 19-27; A264, 276-284). The Redevelopment Plan contemplates a phased redevelopment of the four areas over the 23 year life of the Plan, with total redevelopment costs exceeding $8 billion. *Id.* The Redevelopment Plan delineates the proposed land uses for each of the four RPAs. *Id.*

The Redevelopment Agreement acknowledges that the City approved the redevelopment projects in RPA A and B (McIntosh Int. Ex. 3 at 1, 2; A157, 158). The Redevelopment Agreement established commencement dates for construction:

> The Developer shall commence or cause the commencement of the following components of the Work for the Redevelopment Projects and shall complete the construction of the Redevelopment Projects, all as identified below and in accordance with this Agreement and the Individual RPA Redevelopment Agreements, each of which Individual RPA Redevelopment Agreements must be executed on

> or before the date of the commencement of the Site Work, regarding the related Redevelopment Project Area, set forth in the table below….(McIntosh Int. Ex. 3, ¶ 3.4; A167).

The Redevelopment Agreement contains detailed provisions relating to the hiring of subcontractors, the preparation of construction plans and the inclusion of sustainability features within the redevelopment projects (McIntosh Int. Ex. 3, ¶¶ 3.4, 3.6, 3.9; A167, 168, 169).

The Redevelopment Agreement also obligates Northside to complete property maintenance and a portion of the demolition and rehabilitation on an accelerated schedule:

> A specific plan for property maintenance (the "Property Maintenance Plan") is attached hereto as Exhibit K and incorporated herein by this reference and the Developer hereby agrees to comply with such Property Maintenance Plan. In any contracts or agreements for the sale or leasing of any parcels within the Redevelopment Area owned by the Developer, the Developer will require any subsequent owner or lessee to maintain the buildings and improvements on such parcels in accordance with the aforesaid standards and

> the Property Maintenance Plan. 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 (b) by December 31, 2011, rehabilitate those buildings located on the properties identified for rehabilitation on said list.

(McIntosh Int. Ex. 3, ¶ 7.19, A183-184).

Northside seeks $390,600,000 in TIF financing, $345,500,000 of which is earmarked for the completion of public infrastructure, including the renovation and installation of sewers, streets, sidewalks and utilities and demolition and abatement of existing structures and land (McIntosh Int. Ex. 4 at 30; A287).

III. RESPONDENTS' LEGAL CHALLENGE

Three residents of the 5th Ward filed suit on October 22, 2009, and filed a Second Amended Petition on November 30, 2009 (LF 12). The original plaintiffs alleged that the Redevelopment Ordinances "do not conform to State legislative requirements" and "insufficiently satisfy the minimum statutory requirements" (LF 15) without further

explanation. The original plaintiffs did recite a number of fairly specific challenges to the evidence of financing commitments set forth in the Redevelopment Plan (LF 15-17) and claimed that the TIF Commission failed to follow appropriate procedures in the conduct of its hearing in several respects (LF 19-21).

On December 3, 2009, one of the original plaintiffs and another 5th Ward property owner "intervened" (LF 23). In their Petition for Declaratory Judgment, Intervenors[3] alleged that:

- "City's determination that plaintiff's real and tenant household properties are blighted is unreasonable, arbitrary and capricious" and was made "in bad faith" (LF 26)
- The City failed to make a proper finding that the redevelopment area would not be redeveloped but for the implementation of TIF financing (the "but for" test)(LF 27)
- The City failed to make a proper finding that the Redevelopment Plan conformed to the City's comprehensive plan (LF 27)

The trial court set the case for a bench trial. On the first morning of trial, Attorney Amon (counsel for the original plaintiffs) submitted a motion *in limine* asking the Court to exclude evidence "mentioning or identifying" a redevelopment project (Tr. Tab 1 at 3). Attorneys Vickers, Shock and Schottel (for the intervenors) did not join in

[3] The original plaintiffs and intervenors may sometimes be collectively referred to as "Respondents."

the motion and did not file any motion, present any evidence, argue or brief any issue directed to the sufficiency of the redevelopment projects described in the Redevelopment Plan. The trial court did not rule on the motion, indicating that it would take the motion with the case (Tr. Tab 1 at 3).

Following a bench trial, the trial court entered a Memorandum, Order and Judgment on July 2, 2010 (the "7/2 Ruling"; LF 311 et seq.). The trial court overruled all of the original plaintiffs' and Intervenors' pleaded challenges, but proceeded to develop a new definition of "project" under the TIF Act and to analyze whether the redevelopment ordinances satisfied that definition. The trial court defined a "project" as "'a specific plan or design' or 'an undertaking devised to effect the reclamation or improvement of a particular area of land'" (7/2 Ruling at 38, LF 348). The trial court decided to use the first of the two definitions and indicated that the ordinances should have recited, for example, that "sanitary sewers will be constructed in City Block 1000, commencing on such-and-such a date, at an estimated cost of so many dollars" (7/2 Ruling at 38, LF 348). The trial court declared that the Redevelopment Ordinances were void "in the absence of" defined "redevelopment projects and a cost-benefit analysis of such projects" (7/2 Ruling at 47, 50; LF 357, 360).

The trial court acknowledged that this was an issue "detected by the Court" and that the City and Northside may have a legitimate complaint that this issue "was not fairly embraced by the pleadings in this case" (7/2 Ruling at 47; LF 357). The trial court indicated that the City might supplement the Redevelopment Ordinances (7/2 Ruling at fn

3, LF 360), and included language in the Judgment allowing for prospective curative action by the City:

> FURTHER ORDERED, ADJUDGED AND DECREED that defendants, their officers, agents, employees, and all persons acting in concert with them with notice of this Order and Judgment be and they are hereby permanently restrained and enjoined from implementing Ordinances 68484 and 68485 of the City of St. Louis, including but not limited to implementing any special allocation fund pursuant to said ordinances, transferring revenues to or from any such fund, or otherwise taking action under said ordinances; provided, that **this judgment shall not be construed to forbid defendant City of St. Louis to amend or supplement said ordinances in accordance with law** or to forbid defendant Northside Regeneration, LLC from proceeding with the acquisition or construction of any land, buildings or improvements at its own expense and in pursuance of private agreements;

(7/2 Judgment at 50; emphasis added; LF 361).

Both Northside and the City filed motions for a new trial. Northside argued that, although neither the TIF Act nor the pleadings required it, Northside could have presented evidence that, in addition to its explicit rehabilitation and demolition obligations, Northside had provided the City with detailed information relating to the infrastructure projects contained in the Redevelopment Plan (LF 367-68). The information itemized, phased and provided costs estimates for, among other things:

- The replacement and rehabilitation of sanitary sewers by street block;
- The identification of dilapidated streets targeted for replacement with "new streets, including curb and gutter, sidewalks, handicap ramps, sidewalks, tree lawns, street trees, streetlights, pedestrian lights, signage, signals & fire hydrants";
- The replacement and rehabilitation of water systems by street block;
- Demolition and environmental abatement by street block; and
- The development of new parks by specific location (LF 367).

The trial court over-ruled the motions, and indicated what it thought was necessary to supplement the ordinances:

> Certainly defendant Northside could **now seek** to procure an executed **project agreement** from the City and **so cure** the defect in the ordinances at issue, but the fact that the project comes at the end of the

> sequence, rather than simultaneously with the adoption of the ordinances designating the redevelopment area and approving the redevelopment plan, does not seem to the Court to be inconsistent with the statute.

(LF 522)(emphasis added). The Court ruled that "[t]he project must be part of a contract or ordinance" and must specify "precisely what will be built, when, and at what cost" (LF 523).

IV. THE PROJECT AGREEMENT

On February 11, 2011, the City Board of Alderman approved Ordinance 68876, which authorized the City Mayor and Comptroller to enter into a Project Agreement with Northside. *See* Exhibit A to Northside's Motion to Dismiss Appeal. The City and Northside thereafter executed the Project Agreement. *See* Exhibit B to Northside's Motion to Dismiss Appeal.

The Project Agreement obligates Northside (1) to construct and develop a recycling center for building materials and building aggregates, known as the "SMART Center" in RPA B, and (2) to perform demolition and abatement of parcels located within RPA B at a cost of $3,149,865. The Project Agreement obligates Northside to begin construction of the SMART Center on the later of April 1, 2011 or written authorization from the City, and to complete construction within twelve (12) months (Project Agreement, ¶2.a.). Similarly, the Project Agreement obligates Northside to begin the demolition and abatement on the later of April 1, 2011 or written authorization from the

City, and to complete construction within forty-eight (48) months (Project Agreement, ¶2.a.). *See* Northside's Motion to Dismiss Appeal, Exhibit B.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN RULING THAT THE REDEVELOPMENT ORDINANCES LACKED A REDEVELOPMENT PROJECT AND THUS DID NOT SATISFY THE TIF ACT BECAUSE RESPONDENTS FAILED TO RAISE ANY LEGAL OR FACTUAL CHALLENGE BASED UPON THE LACK OR SUFFICIENCY OF A REDEVELOPMENT PROJECT IN THEIR PLEADINGS OR AT TRIAL AND THEREFORE WAIVED ANY SUCH CHALLENGE.

Kerth v. Polestar Entm't, 325 S.W.3d 373 (Mo. App. E.D. 2010), reh'g and/or transfer denied (July 28, 2010), transfer denied (Dec. 21, 2010).

City of St. Joseph, Mo. v. St. Joseph Riverboat Partners, 141 S.W.3d 513 (Mo.App. W.D. 2004).

In re: the Marriage of Hendrix, 183 S.W.3d 582 (Mo. 2006).

Allen Quarries, Inc. v. Auge, 244 S.W.3d 781 (Mo. App. S.D. 2008)

II. THE TRIAL COURT ERRED IN RULING THAT THE REDEVELOPMENT ORDINANCES LACKED A REDEVELOPMENT PROJECT AND THEREFORE DID NOT SATISFY THE TIF ACT BECAUSE THE TRIAL COURT'S NEW DEFINITION OF A PROJECT IS CONTRARY TO THE BROAD DEFINITION OF REDEVELOPMENT PROJECT UNDER, AND THE INTENT OF THE TIF ACT; AND THE REDEVELOPMENT ORDINANCES INCLUDED A REDEVELOPMENT PROJECT WITHIN THE MEANING OF THE TIF ACT.

Great Rivers Habitat Alliance v. City of St. Peters, 246 S.W.3d 556 (Mo. App. W.D. 2008)

City of Shelbina v. Shelby County, 245 S.W.3d 249 (Mo.App. E.D. 2008)

RSMo §99.805(14)

Annbar Associates v. W. Side Redevelopment Corp., 397 S.W.2d 635 (Mo. 1965)

III. THE TRIAL COURT ERRED IN RULING THAT THE REDEVELOPMENT ORDINANCES DID NOT SATISFY THE TIF ACT BECAUSE THE ORDINANCES LACKED A COST-BENEFIT ANALYSIS REFERABLE TO A SPECIFIC PROJECT BECAUSE THE TIF ACT DOES NOT REQUIRE A COST BENEFIT ANALYSIS IN CONNECTION WITH INDIVIDUAL REDEVELOPMENT PROJECTS; RATHER, RSMo §99.810.1(5) REQUIRES A COST-BENEFIT ANALYSIS OF THE REDEVELOPMENT PLAN AS A WHOLE.

Land Clearance for Redevelopment Auth. of City of St. Louis v. Inserra, 284 S.W.3d 641 (Mo.App. E.D. 2009).

Great Rivers Habitat Alliance v. City of St. Peters, 246 S.W.3d 556 (Mo. App. W.D. 2008),

RSMo §99.810.1

RSMo §99.820

IV. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN DENYING NORTHSIDE'S MOTION FOR A NEW TRIAL BECAUSE, ASSUMING THE TRIAL COURT'S NEW DEFINITION OF "REDEVELOPMENT PROJECT" AND ASSUMING THE REDEVELOPMENT ORDINANCES DID NOT OTHERWISE CONTAIN A REDEVELOPMENT PROJECT, THE COURT SHOULD HAVE ALLOWED NORTHSIDE TO PRESENT EVIDENCE OF REDEVELOPMENT PROJECTS APPROVED BY THE CITY BOARD OF ALDERMEN.

Andersen v. Osmon, 217 S.W.3d 375 (Mo.App. W.D. 2007)

In re G.P.C., 28 S.W.3d 357 (Mo.App. E.D. 2000)

Nance v. Kimbrow, 476 S.W.2d 560 (Mo. 1972)

State ex rel. Devanssay v. McGuire, 622 S.W.2d 323 (Mo. App. E.D. 1981)

ARGUMENT

INTRODUCTION

Respondents pleaded several specific challenges to the Northside Redevelopment Ordinances and the trial court overruled all of them. That should have ended the trial court's analysis, but the trial court instead proceeded to re-write the definition of "redevelopment project" under the TIF Act--without ever being asked to do so or explaining why it needed to be done, and the court of appeals followed suit.

The Act defines "redevelopment project" as "any development project within a redevelopment area in furtherance of the objectives of the redevelopment plan." RSMo §99.805(14). In other words, the legislature had already indicated the type of project that would qualify as a redevelopment project, a "development" project. Presumably, the legislature meant to use that term as it is commonly understood in the development community. Nonetheless, the trial court proceeded to add its own definition of the single word "project," without regard to, or further mention of the fact that the Act already specified a "*development* project" (7/2 Ruling at 37-38, LF 347-48). The trial court defined project as either "a specific plan or design" or "an undertaking devised to effect the reclamation or improvement of a particular area of land" (7/2 Ruling at 38, LF 348). The trial court chose the former, although the latter more appropriately describes a development project in the commercial context. The trial court indicated that the ordinances should have recited, for example, that "sanitary sewers will be constructed in

City Block 1000, commencing on such-and-such a date, at an estimated cost of so many dollars" (7/2 Ruling at 38, LF 348).

The trial court's definition ignores the purposefully broad language of the Act and fails to take into consideration the practical and economic realities of large-scale, phased development projects. Long term, area development projects—unlike their single building or single lot counterparts—depend upon the developers' ability to react as economic and market forces and investor and user preferences change over time. The placement of sewers, streets and other infrastructure in an area project is likely to evolve with changing market and economic forces. Thus, historically, municipalities have not insisted that area redevelopers make up front promises to build a particular street or sidewalk, recognizing that infrastructure installed before commitments from new users may become obsolete depending upon the evolution of the development project. Instead, municipalities protect themselves (and their taxpayers) with comprehensive redevelopment agreements that reserve the City's right to approve all discrete work before it begins. Within the parameters established by the redevelopment agreement, the City can (and did) insist that the redeveloper submit more specific bid documents that speak precisely to the "what, where and when" of project infrastructure as market demand shapes the project.

The lower courts' "solution"--an upfront agreement by the developer to repair a sewer or sidewalk--does nothing to solidify the developer's commitment to spend billions of dollars over twenty years, and does even less to provide the municipality with

the tools to ensure the revitalization of a redevelopment area. It is an empty requirement that interferes with the orderly and efficient redevelopment of any large redevelopment area where priorities as to the location, nature and the delivery of new public infrastructure will determined by market requirements, not developer or municipal forecasting.

Northside's Redevelopment Ordinances and Redevelopment Agreement constitute a redevelopment project under any standard, and certainly as contemplated by the broad language and overarching purpose of the Act.

I. THE TRIAL COURT ERRED IN RULING THAT THE REDEVELOPMENT ORDINANCES LACKED A REDEVELOPMENT PROJECT AND THUS DID NOT SATISFY THE TIF ACT BECAUSE RESPONDENTS FAILED TO RAISE ANY LEGAL OR FACTUAL CHALLENGE BASED UPON THE LACK OR SUFFICIENCY OF A REDEVELOPMENT PROJECT IN THEIR PLEADINGS OR AT TRIAL AND THEREFORE WAIVED ANY SUCH CHALLENGE

Standard of Review

The Court reviews de novo whether a judgment should be vacated because it is void. *Kerth v. Polestar Entm't*, 325 S.W.3d 373, 378 (Mo. App. E.D. 2010).

Discussion

"The purpose of a pleading is to limit and define the issues to be tried in a case and [to] put the adversary on notice thereof." *City of St. Joseph, Mo. v. St. Joseph*

Riverboat Partners, 141 S.W.3d 513, 516 (Mo.App. W.D. 2004). A judgment beyond the issues defined by the pleadings is void. *In re: the Marriage of Hendrix*, 183 S.W.3d 582, 588-89 (Mo. 2006). *See also, Allen Quarries, Inc. v. Auge*, 244 S.W.3d 781, 783 (Mo. App. S.D. 2008)("judgment is void to the extent it is based upon issues not raised by the pleadings") and cases cited therein.

Chapter 99 provides a broad definition of "redevelopment project":

> (14) "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;

RSMo §99.805(14).

Respondents did not cite §99.805(14) or question the sufficiency of the redevelopment projects set forth in the Redevelopment Plan in their original petition (SLF 550), amended petition (SLF 564), second amended petition (LF 12) or the Intervenors' Petition for Declaratory Judgment (LF 23).

The morning of trial, Attorney Amon submitted a motion *in limine* seeking to exclude evidence "mentioning or referencing" a redevelopment project (Tr. Tab 1 at 3). The trial court took the motion with the case (*Id.*). Attorney Amon's motion *in limine* was not a substantive pleading and it "preserves nothing for appeal." *Hancock v. Shook*, 100 S.W.3d 786, 802 (Mo. 2003)(citations omitted). A motion *in limine* is designed to

prevent the disclosure of evidence to the jury and serves no purpose in a bench trial. Even if granted, the ruling is interlocutory and the proponent must thereafter make a specific objection at trial. *Slankard v. Thomas*, 912 S.W.2d 619, 627-28 (Mo. App. S.D. 1995).

Attorney Amon's motion did not question whether Northside's redevelopment projects required further specificity based upon the statutory definition of "redevelopment project." The Motion began with the cryptic allegation that "the Redevelopment Project is a phantom mentioned, referenced, and priced but not proposed and does not exist in reality" (A345). Later, he conceded that "the Commission by the above language qualifies the RPA A and RPA B as the 'redevelopment project'" (A346), but followed that with "The Northside Redevelopment Plan (The Plan) contains no such reference or trinity" (A346).

Attorney Amon thereafter requested a continuing objection "to the question of whether or not a redevelopment project actually exists or not" (Tr. Tab 1 at 3). However, like his motion *in limine*, there was no way to determine what he meant by that remark without the benefit of an operative pleading setting forth a substantive challenge. Further, the objection failed to establish a valid continuing objection:

> When a [party] requests a continuing objection the trial court is afforded an opportunity to determine and consider the exact nature and scope of the requested objection and the inherent problems associated with

> such an objection.... The request also gives the [opposing party] an opportunity to address to the trial court any prejudice it believes it may suffer as a result of allowing the [requesting party] to preserve an objection to evidence while at the same time appearing to the jury to have "no objection" to such evidence. After hearing from both parties the trial court can then, in the exercise of its discretion, either grant or deny the continuing objection. If granted, the trial court then has the opportunity to give the parties explicit directions as to the exact nature and scope of the objection.

Baker v. Gonzalez, 315 S.W.3d 427, 435-36 (Mo.App. S.D. 2010). Attorney Amon's objection was general, conclusory and Appellants' counsel were not heard on the issue. Attorney Amon thereafter asked a couple of witnesses whether they thought the ordinances contained a redevelopment project.

Attorney Amon never argued or filed a pleading advocating that the Court should adopt or apply any particular definition of "redevelopment project" or "project." Attorney Amon never questioned any witness about what a redevelopment project should contain. He did not offer any lay or expert opinion testimony relating to the requirements of the TIF Act. Attorney Amon seemed to be arguing only that the redevelopment

project had to be a separate document from the redevelopment plan. To this day, Amon has never articulated what believes should be included in a Chapter 99 "redevelopment project."

Only the trial court spoke to the requirements of the TIF Act. After overruling every issue explicitly raised by Respondents' operative pleadings, the trial court proceeded to create and then apply its own definition of a redevelopment project. The trial court acknowledged that "[t]here may be an argument that the defect in Ordinances 68484 and 86485 detected by the Court was not fairly embraced by the pleadings in this case" (7/2 Ruling at 47; LF 357). The trial court felt it could decide the issue because the original plaintiffs had made a general allegation that the redevelopment plan "failed to conform to the requirements of §§99.800 *et seq.*," had filed a motion *in limine* and thereafter offered the Redevelopment Ordinances into evidence (7/2 Ruling at 47; LF 357).

None of the circumstances that the trial court cites preserved the issue "detected by the court" for review. Respondents never alleged that the Redevelopment Plan did not include a redevelopment project or that the redevelopment projects contained in the Redevelopment Plan failed to satisfy the TIF Act. Respondents' bare allegation that the Redevelopment Ordinance may have violated the TIF Act, without saying how, did not preserve anything and should have been disregarded by the trial court. *Henkel v. Pevely*, 488 S.W.2d 949, 951 (Mo.App. E.D. 1972)("general allegations of illegality,

voidness, impropriety and unconstitutionality, supported by 'reasons' which are mere conclusions of the pleader…cannot be taken as true and must be disregarded").

Attorney Amon's evidentiary objections did not constitute substantive pleadings and, without any reference point in Respondents' operative pleadings, failed to put compliance with §99.805(14) at issue either legally, procedurally or substantively.

The fact that Respondents thereafter introduced the Redevelopment Ordinances into evidence is of no legal consequence. "To fairly say a party implicitly consented to try a new issue, such evidence should warn that a new issue is being injected. Thus the evidence in question *cannot be relevant to any other issue before the trial court; it must bear solely on the new issue*." *Allen Quarries*, 244 S.W.3d at 784 (emphasis added). Obviously, the Redevelopment ordinances were relevant to many issues before this Court. *City of St. Joseph v. St. Joseph Riverboat Partners*, 141 S.W.3d at 516.

The Court should reverse the decision of the trial court because Respondents did not allege the lack of a redevelopment project and did not allege that the redevelopment projects contained in the Northside Plan did not satisfy the TIF Act and, therefore, the trial court was without jurisdiction or authority to rule on that basis.

II. THE TRIAL COURT ERRED IN RULING THAT THE REDEVELOPMENT ORDINANCES LACKED A REDEVELOPMENT PROJECT AND THEREFORE DID NOT SATISFY THE TIF ACT BECAUSE THE TRIAL COURT'S NEW DEFINITION OF A REDEVELOPMENT PROJECT IS CONTRARY TO THE BROAD DEFINITION OFREDEVELOPMENT PROJECT UNDER, AND THE INTENT OF THE TIF ACT; AND THE REDEVELOPMENT ORDINANCES INCLUDED A REDEVELOPMENT PROJECT WITHIN THE MEANING OF THE TIF ACT.

Standard of Review

This Court must determine whether substantial evidence supports the City's compliance with the TIF Act in the enactment of the Redevelopment Ordinances:

> Our usual standard of review for a court-tried case under *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), does not apply where, as here, the trial court reviewed the propriety of a determination by a legislative body. *Centene*, 225 S.W.3d at 437 n. 3 (Stith, J., concurring). Rather, we examine the record to determine whether substantial evidence supports the legislative decision. *Id.* (quoting *Binger v. City of Independence*, 588 S.W.2d 481, 486 (Mo. banc 1979)).

Land Clearance for Redevelopment Auth. of City of St. Louis v. Inserra, 284 S.W.3d 641, 648 (Mo.App. E.D. 2009).

The Court examines whether the City's action was fairly debatable:

> 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. 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." 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.

Great Rivers Habitat Alliance v. City of St. Peters, 246 S.W.3d 556, 562 (Mo. App. W.D. 2008), quoting *Spradlin v. City of Fulton*, 924 S.W.2d 259, 263 (Mo. banc 1996). *See also, Meramec Valley R-III School Dist. v. City of Eureka*, 281 S.W.3d 827, 836 (Mo.App. E.D. 2009).

Discussion

Section 99.805(14) provides a broad definition of "redevelopment project":

> (14) "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;

The legislature could have, but did not use a more restrictive definition or include a detailed list of requirements for redevelopment projects. *See, e.g.*, RSMo §99.810 (providing a detailed listing of requirements for redevelopment *plans*). The courts below took it upon themselves to do so, but there is nothing in the purposes underlying the TIF Act or its language that suggests that this Court should follow suit.

"[W]here a statute contains general words only, such general words are to receive a general construction." *State v. Lancaster*, 506 S.W.2d 403, 404 (Mo. 1974);

DeMere v. Mo. State Hwy. & Transp. Comm'n, 876 S.W.2d 652, 657 (Mo.App. W.D. 1994). The Court "may not add provisions to a statute under the guise of construction…." *Jordan v. State,* 841 S.W.2d 688, 690 (Mo.App. E.D. 1992). The expansive definition—simply *any* development project-- is consistent with the legislature's intent "to foster urban renewal of blighted areas." *St. Louis County v. Berck*, 322 S.W.3d 622, 628 (Mo.App. E.D. 2010). It is also consistent with the public policy of the State of Missouri, codified in the TIF Act's sister statute and acknowledged by this Court:

> The public policy of this state has been declared in the Land Clearance for Redevelopment Law (Chapter 99, RSMo 1959) to be: "A municipality, to the greatest extent it determines to be feasible in carrying out the provisions of this law, *shall afford maximum opportunity*, consistent with the sound needs of the municipality as a whole, to the rehabilitation or redevelopment or renewal of [blighted, etc.] areas by private enterprise."

Annbar Associates v. W. Side Redevelopment Corp., 397 S.W.2d 635, 639 (Mo. 1965)(emphasis added), *quoting* RSMo §99.310. The Court must afford municipalities considerable latitude to implement these important ideals: "[Judicial review] 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." *Great Rivers Habitat Alliance*, 246 S.W.3d at 562.

Notably absent from both the trial court's and the court of appeals' decisions is any discussion of the policies underlying the TIF Act and, more important, how their new definition of "project" furthers those policies. The legislature defined redevelopment project in the broadest possible terms. What statutory purpose does it serve for the City, on day one of a 23 year, $8 billion project, to contract for the installation of a sewer or a sidewalk? That certainly would do little to foster maximum opportunity for meaningful urban renewal, and would offer the City little, if any, assurance the balance of the project will occur.

The trial court never indicated why the term "development project" did not provide sufficient guidance or constitute a workable definition , given the latitude typically afforded municipalities under the Act. The trial court did not offer its opinion about how a long term "development project" should be structured, or how an initial agreement to build a sewer might somehow serve that structure. The trial court did not appear to consider "development projects" at all, and instead proceeded to isolate and define the word "project" in a vacuum, concluding it meant either "'a specific plan or design' **or 'an undertaking devised to effect the reclamation or improvement of a particular area of land**" (7/2 Ruling at 38, LF 348)(emphasis added). The more general "undertaking" definition—which the trial court ignored without explanation—actually

tracks the broad language of the statute and the practical reality of a long-term area project:

> There are two different kinds of TIF applications and proposals that we look at. One kind is for the development of a specific building or maybe a couple of buildings together, and there you have a developer who you can talk about, who his contractor is, and get a lot of detail.
>
> In other TIF proposals, we deal with a region or a broader area than just a building. For example, in the—what do we call it, the Grand Center. I guess we call it the Grand Center. That is a regional TIF and it was adopted several years ago, as opposed to a single building.
>
> * * *
>
> The choice—I mean, I think it's three or four years ago, we did the Grand Center. Just recently, they…finished a building and that all gets the TIF financing, and there are other buildings in Grand Center that aren't done yet, and we understand under those circumstances that what you can say about the

> financing is less definite that what you can say when it's a given building and somebody is giving a definite amount or a definite lending and financing plan.

(10/29/09 Tr. 108-9, testimony of TIF Commission Chairman Newburger).

The City and Northside clearly *have* undertaken the reclamation or improvement of an area of land, to borrow from the trial court's second definition. The Redevelopment Plan delineated the scope, duration and nature of the development (McIntosh Int. Ex. 4 at 19-30; A276-287). The Redevelopment Agreement established commencement dates for the site work (McIntosh Int. Ex. 3, ¶3.4; A167). The Redevelopment Agreement also established (i) the procedures applicable to the hiring of subcontractors, (ii) the procedures and standards governing the preparation of construction plans and (iii) the implementation of sustainability features in the redevelopment (McIntosh Int. Ex. 3, ¶¶3.4, 3.6 and 3.9; A167, 168-169). .

All told, the Redevelopment Agreement imposed affirmative obligations upon Northside to complete the work, and included safeguards to ensure that the City might control the progress and assure completion of the development.[4] The City reserved

[4] Paul McKee's intention and incentive to complete the redevelopment were never in doubt. By the time of trial, Mr. McKee had invested nearly $30 million toward the acquisition of blighted property—without the use of eminent domain (10/29/09 Tr. 116, 160-61). In the TIF Commission Chairman's assessment, that investment was "a

the right to require individual and more detailed RPA redevelopment agreements (McIntosh Int. Ex. 3, ¶ 3.4; A167). The City also reserved termination rights triggered by, among other things, Northside's failure to complete the redevelopment work (McIntosh Int. Ex. 3, ¶ 7.27; A185-186).

The Redevelopment Agreement ensured that the City would have no obligation to issue any TIF notes prior to *the actual implementation* of the infrastructure redevelopment projects:

> In order to seek reimbursement for any Reimbursable Redevelopment Project Costs, the Developer shall provide to the City (a) itemized invoices, receipts or other information evidencing such costs; and (b) a Certificate of Reimbursable Redevelopment Project Costs constituting certification by the Developer that such cost is eligible for reimbursement under the TIF Act….

(McIntosh Int. Ex. 3, ¶4.2; A172). Northside must clear at least two hurdles before asking the City to issue TIF notes. First, Northside must apply for City planning and zoning approvals of the work. Second, Northside must provide the City with the finished work product—it must lay the streets, install the sewers, etc.—at its own expense (2/25

---

considerable equity bundle and much more that we would ordinarily see" (10/29/09 Tr. 116; *see also* 10/29/09 Tr. 158-59).

Tr. 73:4-15; McIntosh Ex. 3, ¶4.2, A172). By imposing these hurdles, the Redevelopment Agreement ultimately guarantees specificity well beyond what the trial court would now write into the statute.

In short, in the context of a 1500 acre, 20 year, $8 billion redevelopment plan, the City and Northside committed to and implemented a redevelopment project to the extent contemplated by the TIF Act. The City and Northside agreed to project milestones and objectives, and included contractual safeguards to ensure that the City would never commit TIF proceeds until Northside built the streets, sewer and other public infrastructure desperately needed by the citizens of North St. Louis. The City retained ultimate leverage to ensure Northside's construction of public works—the ability to terminate Northside's redevelopment rights for non-performance.

Even assuming that the trial court was right, and Northside had to present just one "shovel ready" project (7/2 Ruling at 45-46, LF355-356), 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 (b) by December 31, 2011, rehabilitate those buildings located on the properties identified for rehabilitation on said list.

(McIntosh Int. Ex. 3, ¶7.19; A183-184).

Northside's Redevelopment Plan contemplated significant demolition and rehabilitation of existing structures (*E.g.*, McIntosh Ex. 4 at 13, 14, A270-271). The cost-benefit analysis identified demolition and abatement costs of $32,082,549 and building rehabilitation costs of $299,400,000 (McIntosh Ex. 8 at Appendix B; Intervenors' A217). Section 7.19 satisfies even the more restrictive of the trial court's definitions. It obligates Northside to perform discrete work at the City's insistence and for the City's benefit. However, neither the trial court nor the court of appeals mentioned the demolition and rehabilitation work.

Both the trial court and the court of appeals placed emphasis upon the court of appeals' decision in *City of Shelbina v. Shelby County*, 245 S.W.3d 249 (Mo.App. E.D. 2008). However, the court of appeals did not find the TIF Act's definition of "redevelopment project" inadequate in *Shelbina*. To the contrary, the Court referred to and applied the statutory definition without comment or criticism. *City of Shelbina,* 245 S.W.3d at 251 n.4.

Further, because Shelbina's redevelopment plan was in a different stage than Northside's, *Shelbina* offers little guidance here. In *Shelbina,* the City of Shelbina

had approved TIF financing for an admittedly conceptual redevelopment plan, the "primary purpose" of which was to "enable the City to select redevelopers to carry out the redevelopment program activities envisioned by the Plan." *Id.* at 253. The city had not approved or executed a redevelopment agreement with a redeveloper; in fact, the city had only just solicited proposals for the redevelopment of a portion of the redevelopment area. *Id.* All the city had was an idea. The city had not approved "any specific redevelopment projects…*nor* had undertaken acts to establish a redevelopment project as required under Section 99.845.1." *Shelbina,* 245 S.W.3d at 253 (emphasis added).

Adding the trial court's definition of project to the statute presents practical problems. Because there is no statutory basis for the definition, only the trial court knows what level of specificity will satisfy its definition. Is it enough, for example, to propose the replacement of a single sewer line, an entire block, or some other increment when the municipality is considering a 1500 acre redevelopment? Historically, as the trial court points out in its ruling, this decision has been left to the discretion of the municipalities, which are afforded substantial leeway and discretion in administering Chapter 99. Their decisions must be affirmed if merely "fairly debatable" (7/2 Ruling at 20; LF 330). Presumably, the legislature understood that municipalities might want or require different levels of specificity depending upon the scope and duration of different redevelopment plans or the severity of the blight in the redevelopment area.

The Redevelopment Ordinances contain a redevelopment project within the meaning of the TIF Act and this Court should reverse the decision of the trial court.

III. THE TRIAL COURT ERRED IN RULING THAT THE REDEVELOPMENT ORDINANCES DID NOT SATISFY THE TIF ACT BECAUSE THE ORDINANCES LACKED A COST-BENEFIT ANALYSIS REFERABLE TO A SPECIFIC PROJECT BECAUSE THE TIF ACT DOES NOT REQUIRE A COST BENEFIT ANALYSIS IN CONNECTION WITH INDIVIDUAL REDEVELOPMENT PROJECTS; RATHER, RSMo §99.810.1(5) REQUIRES A COST-BENEFIT ANALYSIS OF THE REDEVELOPMENT PLAN AS A WHOLE.

Standard of Review

This Court must determine whether substantial evidence supports the City's compliance with the TIF Act in the enactment of the Redevelopment Ordinances:

> Our usual standard of review for a court-tried case under *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), does not apply where, as here, the trial court reviewed the propriety of a determination by a legislative body. *Centene*, 225 S.W.3d at 437 n. 3 (Stith, J., concurring). Rather, we examine the record to determine whether substantial evidence supports the legislative decision. *Id.* (quoting *Binger v. City of Independence*, 588 S.W.2d 481, 486 (Mo. banc 1979)).

Inserra, 284 S.W.3d at 648.

The Court examines whether the City's action was fairly debatable. *Great Rivers Habitat Alliance*, 246 S.W.3d at 562.

Discussion

In §99.810, the TIF Act lists the prerequisites for a municipality's approval of a redevelopment plan. The required findings to support a redevelopment plan include what is commonly referred to as a "cost-benefit analysis":

> ….No *redevelopment plan* shall be adopted by a municipality without findings that:
>
> * * *
>
> (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;

RSMo §99.810.1(5)(emphasis added).

The cost benefit analysis is a statutorily mandated planning tool for the municipality, designed to assist the municipality's assessment of whether the planned redevelopment will generate incremental tax revenues (the "benefit") that exceed the commitment of a portion of those revenues to repay reimbursable infrastructure project costs (the "cost")(Tr. Tab 3 at 219-20; Tr. Tab 4, 82-83, 101-3). That analysis is only meaningful in the macro sense of the entire project (which is the analysis that Northside provided), because it is the totality of the costs and benefits that are and should be of concern to a municipality. *Id.*

For example, in many redevelopment plans, especially those encompassing large areas and expanded time frames, there may be many discrete projects that are necessary to facilitate the larger concept, but which provide little, if any, incremental tax revenue. Infrastructure work is a good example. Repairing the sidewalks in the outreaches of the 5th Ward is clearly desirable and necessary but, standing alone, may bring little benefit to the affected taxing jurisdictions. The municipality is and should be concerned whether the redevelopment plan as a whole will result in any benefit, not whether discrete elements of the plan might incidentally result in an incremental gain.

The trial court pointed out that, in the context of the approval of redevelopment *plans,* §99.810.1(5) mentions the word "project" and, from that, concluded that each *redevelopment* project approved with the plan must come with its own cost-benefit analysis (7/2 Ruling at 39-42; LF 349-352). However, §99.810.1(5)

does not refer to *redevelopment* projects and, as discussed, such a requirement would make little economic sense. The legislature made specific reference to "redevelopment" projects when discussing other requirements of redevelopment plans in the same statute. *See, e.g.,* §99.810.1(1), (3). The use of the word "project" can only be meant to refer to the overall project proposed under the plan (whether or not more specific *redevelopment* projects are identified).

Section 99.810.1(5) cannot refer to "redevelopment" projects because municipalities are free to adopt redevelopment plans without a corresponding redevelopment project: "No redevelopment project shall be approved unless a redevelopment plan has been approved and a redevelopment area has been designated *prior to or* concurrently with the approval of such redevelopment project. RSMo §99.820.1 (emphasis added). Section 99.825.1 also contemplates the approval of redevelopment plans prior to the approval of redevelopment projects and requires a public hearing "[p]rior to the adoption of an ordinance proposing the designation of a redevelopment area, or approving a redevelopment plan ***or*** redevelopment project…." (emphasis added). The redeveloper need only present a "redevelopment project" when it applies for TIF financing under the plan and there is no statutory requirement that the redeveloper re-submit or submit a cost-benefit analysis at that time. RSMo §99.845.

Moreover, by looking at the plan in the aggregate, the statute ensures that the developer and municipality will analyze *all* estimated projects costs at the outset. The costs of the discrete redevelopment projects are the key elements of cost-benefit analysis

for the overall redevelopment plan and need not be repeated or re-examined each time the municipality approves a phase of the plan over a twenty-three year period. In short, when Northside prepared the cost-benefit analysis for the Plan, it had to incorporate all of the costs of the anticipated redevelopment projects.

Finally, the trial court's reading of the statute would create different rules for redevelopment projects depending upon whether a redeveloper applied for TIF financing when it submitted its redevelopment plan or chose to wait. Those in the former category would be required to submit redevelopment project specific cost-benefit analyses, while those in the latter would not. The legislature could not have intended that the timing of municipal approvals for redevelopment plan and redevelopment projects determine the required submittals.

The Redevelopment Ordinances contained the cost-benefit analysis required by §99.810.1(5) and this Court should reverse the trial court's ruling to the contrary.

IV. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN DENYING NORTHSIDE'S MOTION FOR A NEW TRIAL BECAUSE, ASSUMING THE TRIAL COURT'S NEW DEFINITION OF "REDEVELOPMENT PROJECT" AND ASSUMING THE REDEVELOPMENT ORDINANCES DID NOT OTHERWISE CONTAIN A REDEVELOPMENT PROJECT, THE COURT SHOULD HAVE ALLOWED NORTHSIDE TO PRESENT EVIDENCE OF REDEVELOPMENT PROJECTS APPROVED BY THE CITY BOARD OF ALDERMEN.

Standard of Review

The Court reviews the trial court's denial of a motion for new trial for abuse of discretion. *Andersen v. Osmon*, 217 S.W.3d 375, 377 (Mo.App. W.D. 2007).

Discussion

Rule 78.01 provides in full as follows:

> The court may grant a new trial of any issue upon good cause shown. A new trial may be granted to all or any of the parties and on all *or part of the issues* after trial by jury, court or master. *On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact or make new*

findings, and direct the entry of a new judgment.

(emphasis added)

Rule 78.01 allows the trial court "wide discretion to open a judgment and take additional testimony on a motion for a new trial in court-tried cases." *In re G.P.C.*, 28 S.W.3d 357, 368 (Mo.App. E.D. 2000). Further, "Appellate courts apply a rule of greater liberality in upholding a trial court's action in *sustaining* a motion for a new trial, than in denying it." *Andersen*, 217 S.W.3d at 377 (emphasis added). It is within the trial court's discretion to limit the new trial to a certain issue or issues. *See, e.g., Nance v. Kimbrow*, 476 S.W.2d 560, 562 (Mo. 1972).

If the Court accepts the trial court's most restrictive definition of redevelopment project, and concludes that Respondents had pleaded that Northside should have proposed that "sanitary sewers will be constructed in City Block 1000, commencing on such and such a date, at an estimated cost of so many dollars," to use the example cited by the trial court, Northside was prepared to demonstrate that it had in fact done so.

Northside provided the Aldermen and their City staff with detailed information underlying the infrastructure redevelopment projects mentioned in the Redevelopment Plan and Redevelopment Agreement (LF 367). The information itemized, phased and provided costs estimates for, among other things:

- The replacement and rehabilitation of sanitary sewers by street block;

- The identification of dilapidated streets targeted for replacement with "new streets, including curb and gutter, sidewalks, handicap ramps, sidewalks, tree lawns, street trees, streetlights, pedestrian lights, signage, signals & fire hydrants";
- The replacement and rehabilitation of water systems by street block;
- Demolition and environmental abatement by street block; and
- The development of new parks by specific location.

The trial court could properly consider matters outside the four corners of the Redevelopment Ordinances:

> In determining the propriety of the Board's action, we are not limited to the redevelopment plan itself. It is to be expected that public hearings (held in this case) before the Community Development Agency and the Board of Aldermen or one of its committees would develop in more detail, add to or clarify the plan as submitted. This additional material may be considered in determining whether the action of the Board of Aldermen was arbitrary.

State ex rel. Devanssay v. McGuire, 622 S.W.2d 323, 327 (Mo. App. E.D. 1981). The trial court abused its discretion in refusing to do so.

CONCLUSION

Northside respectfully moves this Court to dismiss this appeal because it is moot and to remand the case with instructions to enter Judgment for the City and Northside. In the alternative, if the Court determines that the 7/2 Ruling is not moot, Northside requests that the Court reverse the trial court.

Respectfully submitted,

STONE, LEYTON & GERSHMAN,
A Professional Corporation

By: /s/ Paul J. Puricelli

Paul J. Puricelli #32801
Robb E. Hellwig #60570
7733 Forsyth Boulevard, Suite 500
St. Louis, MO 63105
314/721-7011 (telephone)
314/721-8660 (telecopy)
pjp@stoneleyton.com
rhellwig@stoneleyton.com

Attorneys for Northside Regeneration, LLC

CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the requirement of Rule 84.04 and Local Rule 365. This brief contains 9,450 words (excluding the cover, signature block and this certificate) as determined by the software application for Microsoft Word.

The undersigned counsel certifies that the foregoing was filed electronically with the Clerk of the Court for the Missouri Supreme Court by using the e-Filing system. Participants in the case were served by the e-Filing system.

D.B. Amon #31287
3201 Washington Ave.
St. Louis, MO 63103

Daniel B. Emerson #56808
Assistant City Counselor
City Hall, Room 314
1200 Market Street
St. Louis, MO 63103

Eric E. Vickers #31784
7800 Forsyth, Suite 700
St. Louis, MO 63105

W. Bevis Schock #32551
7777 Bonhomme, Suite 1300
St. Louis, MO 63105

James W. Schottel, Jr. #51285
906 Olive, Suite PH
St. Louis, MO 63101

/s/Paul J. Puricelli