**IN THE MISSOURI SUPREME COURT**

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**No. SC 92646**

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**BONZELLA SMITH and ISAIAH HAIR,**
**Respondents / Cross-Appellants,**

**and**

**CHERYL NELSON and ELKE MCINTOSH,**
**Intervenors-Respondents / Cross-Appellants,**

**vs.**

**CITY OF ST. LOUIS,**
**BOARD OF ALDERMEN FOR THE CITY OF ST. LOUIS,**
**THE TIF COMMISSION FOR THE CITY OF ST. LOUIS**
**and NORTHSIDE REGENERATION LLC,**
**Appellants.**

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

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# SUBSTITUTE BRIEF OF APPELLANTS THE CITY OF ST. LOUIS, BOARD OF ALDERMEN FOR THE CITY OF ST. LOUIS AND THE TIF COMMISSION FOR THE CITY OF ST. LOUIS

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## JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on July 2, 2010, by the Honorable Robert H. Dierker Jr., of the Circuit Court of the City of St. Louis, Missouri. On June 19, 2012, the Missouri Court of Appeals, Eastern District, issued an opinion stating that it would affirm, but ordered the appeal transferred to this Court pursuant to Rule 83.02 because of the general interest and importance of the issues. This Court has jurisdiction pursuant to the Missouri Constitution, Article V, Section 10.

## INTRODUCTION

This appeal involves Missouri's Real Property Tax Increment Allocation Redevelopment Act ("TIF Act" or the "Act"), §§ 99.800 *et seq.*, RSMo.[1] The City of St. Louis passed two ordinances approving tax increment financing to redevelop a large, blighted section of the City's north side. The trial court invalidated the ordinances because no qualifying "redevelopment project" had been approved.

At issue is whether the City's Board of Alderman approved a qualifying "redevelopment project" when adopting the TIF ordinances. Contrary to the trial court's decision, the City complied with the Act because the TIF ordinances approved definitive primary infrastructure and public works projects. The TIF Act's definition of a "redevelopment project" is exceptionally broad. A qualifying redevelopment project can be "any development project within a development area in furtherance of the objectives of the redevelopment plan." § 99.805(14).

In voiding the TIF ordinances, the trial court misapplied longstanding precedent which mandates heavy deference to the decisions of a legislative body when enacting ordinances regulating the use of land. Such legislative decisions will be upheld unless shown by clear proof to be arbitrary or the product of fraud, collusion, or bad faith. The trial court determined that the TIF ordinances were "arbitrary" because the City's approved projects were not, in the trial court's opinion, sufficiently "shovel ready." This

[1] Statutory citations are to the 2012 Electronic Update to the Revised Statutes of Missouri.

requirement finds no support in the TIF Act. Thus, the trial court effectively rewrote the statute.

The issue of the City's compliance with the TIF Act is a legal question and, therefore, the trial court's decision is subject to *de novo* review. This Court must review for itself whether the Board's decision was other than "arbitrary." In so doing, the Court considers only whether it is "fairly debatable" or "reasonably doubtful" that the City approved a qualifying redevelopment project. At stake is whether cities will be able to utilize tax increment financing to fund large-scale redevelopment projects in areas so blighted that infrastructure must necessarily be the first "project."

The TIF Act allows the City to shift the initial economic risk of redevelopment to the developer, Northside Regeneration, LLC ("Northside"). Under the City's plan, Northside must pay, up front, the development costs associated with the construction of streets, sewers and other public necessities. It is reimbursed if, and only if, the redevelopment plan succeeds, and generates incremental tax revenues for reimbursement. Indeed, the trial court characterized TIF financing as "possibly the most ingenious way of enticing the private sector to do well by doing good."

In short, because the City approved a fairly debatable or reasonably doubtful "redevelopment project" when enacting the TIF Ordinances, this Court should reverse the trial court's decision, clearing the way for the rejuvenation of its north side.

## STATEMENT OF FACTS[2]

St. Louis was founded by French settlers in 1764, more than ten years before the United States declared its independence from Great Britain. (James Neal Primm, LION OF THE VALLEY: ST. LOUIS, MISSOURI, 1764-1980, at 7, 118 (3d ed. 1998), STL A2.)[3] The City was incorporated in 1822. (STL A3). By 1860, St. Louis had become the nation's eighth largest city. (STL A4.) Nearly a hundred years later, in 1950, the City's population peaked at nearly 860,000 residents. (STL A5.)

*The North Side of St. Louis*

Recent history has not been as kind. In the late 1970s, a study by a prominent policy institute characterized St. Louis as the nation's most distressed large city. (STL A8.) Since its high watermark in the 1950s, the City's population has steadily declined. By 1980, it had returned to its 1890 level at just over 450,000 residents. (*Id.*) Nationally, the City had dropped in rank from fourth largest in 1910 to twenty-sixth in 1980. (*Id.*)

St. Louis' experience with the "rush to the suburbs" accelerated in the 1950s:

> Block after block of middle-class homes melted in the path of the expressways. Having automobiles and little choice in the

[2] Citations to the record include the Legal File, the Trial Transcript, Northside's Substitute Appendix, and the City's Substitute Appendix (STL A).

[3] The Court may take judicial notice of these historical facts referenced in Professor Primm's book. *Rositzky v. Rositzky*, 46 S.W.2d 591, 599 (Mo. 1931).

> matter, those ousted headed north and west to a new rings of suburbs, and the retail shopping centers followed them. With improved streets, high-speed highways, and larger and larger trucks, land costs became more important in industrial site selection … . Light industry began to disperse to formerly remote corners of the metropolitan area… . New industrial-commercial centers in the county rivaled the central business district…. (STL A6.)

The abandonment of the City has been felt acutely on its north side, and in particular in the redevelopment area at issue in this suit. As far back as 1947, the City's Comprehensive Plan reclassified much of this area as "obsolete or blighted."[4] As the trial court noted, this area today "suffers from declining population, higher than average crime rates, low owner occupancy of residential premises, and a fairly high percentage of dilapidated housing…." (LF 323.) Today, approximately 44% of the redevelopment area is vacant or contains vacant structures, and much of its infrastructure (sewers, utilities and roads) is outdated, deteriorated and incapable of supporting the needs of modern development. (A259.)

[4] The 1947 Comprehensive Plan was discussed by witnesses and the trial court, but was not received in evidence. It is available on the City's website at http://stlouis-mo.gov/archive/1947-comprehensive-plan/.

*Paul McKee's Plan to Redevelop the North Side of St. Louis*

Paul McKee, a local real estate developer and past chairman of the St. Louis area's largest employer (BJC Healthcare), conceived of a plan to create a "21st century sustainable community" on the City's north side. (A259.) In an effort to make this vision a reality, McKee founded a separate company, Northside, which is affiliated with McEagle Properties, LLC ("McEagle"), McKee's established real estate company that is involved in completing large-scale, community-related projects. (Tr. Tab 3, 188-89; Tr. Tab 4, 71, 263, 269.) Prior to its involvement in the north side of St. Louis, McEagle successfully developed WingHaven, a $750 million, 1,200-acre master-planned community in O'Fallon, Missouri. (Tr. Tab 4, 270.)

McKee also secured significant financial backing for land acquisition costs and other costs associated with his plan. (Tr. Tab 3, 78.) The primary lender is the Bank of Washington, a 130-year-old Missouri bank with over $700 million in assets. (Tr. Tab 3, 77; Tr. Tab 4, 307-08.) With these preliminary finances secured, McKee, through Northside and its affiliates, began acquiring properties in the projected redevelopment area. By the time of trial, in the winter of 2010, he had acquired 882 parcels comprising 116 acres in North St. Louis. (LF 316; Tr. Tab 3, 89-90.)

McKee also hired Development Strategies Inc., a St. Louis-based land use planning firm with a national practice, to prepare a detailed roadmap for redeveloping the north side. (Tr. Tab 3, 145.) This culminated in the creation of a formal Northside Regeneration Tax Increment Financing Redevelopment Plan. (A255-344.) The Plan

includes a map showing the 1,500-acre redevelopment area (a copy of which is reproduced in the Appendix hereto at STL A75).

Northside submitted the Redevelopment Plan for consideration by the City in September 2009. (A28, 255.) By the time the Plan was presented to the Board of Aldermen later in the Fall of 2009, Northside had invested more than $20 million in the redevelopment area. (Tr. Tab 2, 40.) By the end of 2009, Northside had borrowed $27.6 million which was invested in the redevelopment effort, all of which was guaranteed by McKee personally. (Tr. Tab 3, 78-80.)

The Redevelopment Plan divides the affected area into four distinct "redevelopment areas" referred to as Redevelopment Project Areas ("RPAs") A, B, C and D. The four RPAs are depicted in a Plan graphic (a copy of which is included in the Appendix at STL A74). (*See also* A276-284.) The redevelopment will occur in phases over the 23-year statutory life of the Plan, with total redevelopment costs to exceed $8 billion. (A285.) The Plan proposes the creation of three major employment hubs, an entertainment hub, retail space and residential development. (*Id.*) The Plan calls for 4,500,000 square feet of office/business space and 1,000,000 square feet of retail/restaurant space. (A270.) Residential development is projected to include 2,200 new single family residences and 7,800 apartments and condominiums. (A263, 270.)

The Plan proposes the redevelopment of RPAs A and B in the initial phases. (A276.) Like hundreds of redevelopment plans implemented in the past 50 years, the Plan's language is general and comprehensive. Infrastructure improvements, which come first, are to be made to "many or all of the major arterial streets in the Redevelopment

Area, such as Dr. Martin Luther King Drive, Cass Avenue, St. Louis Avenue, Parnell Street, N. Florissant Avenue, N. 14th Street, and N. Tucker Blvd." (A282.) The Plan also includes the legal description of the areas where such redevelopment projects will be undertaken. (A293-321.)

RPA A is the southern-most portion of the redevelopment area. It will center on a revitalization of South 22nd Street which will serve as the primary entry into this area from Interstate 64. (A276.) To the south of Olive Street will be a major new employment hub and residential and retail space to coordinate with the existing Gateway Mall. (*Id.*)

RPA B is the eastern-most area to be redeveloped, close to the existing Downtown St. Louis business and residential district. It will center on the new Mississippi River Bridge which is under construction and scheduled for completion in 2014. (A278.) The Plan proposes that the bridge landing will link to a realigned N. Tucker Boulevard at Cass Avenue. (*Id.*) This redevelopment area also includes the "High Line" trestle bridge, which is being designed as a bikeway connection to the Mississippi River Road in Illinois. (*Id.*)

RPA C is a large irregularly-shaped section within the center of the redevelopment area. It will be centered at the intersection of N. Jefferson and Cass Avenues, the former site of the Pruitt-Igoe housing project.[5] (*Id.*) The Plan proposes that this area be

[5] Pruitt-Igoe opened as one in a string of public housing developments built between the late 1940s and early 1960s. By the late 1960s, the mayor's office described Pruitt-Igoe as

transformed into a major residential neighborhood and regional, mixed-use entertainment hub. (*Id.*) Along the major arterial streets (N. Grand Boulevard, Cass Avenue, N. Jefferson Avenue and Dr. Martin Luther King Drive), the Plan proposes open space and commercial and residential developments. (*Id.*)

Finally, RPA D is in the northwest corner of the redevelopment area. It will concentrate around N. Jefferson Avenue, Parnell Street and N. Market Street. This area will become a gateway to a mixed-use development with a possible new medical campus and medical offices. (A279.) Residential units will be constructed on N. 22nd Street, N. 25th Street, St. Louis Avenue and Cass Avenue. (*Id.*)

*TIF Ordinances*

The City's TIF Commission evaluated the Redevelopment Plan and gave notice of a formal hearing to receive the public's comments. (A28.) That public hearing was held September 23, 2009. (*Id.*) In addition to this hearing, Members of the Board convened approximately 40 public meetings with residents as word of the plan spread. (Tr. Tab 4, 241.)

After consideration and public comment, the TIF Commission voted in favor of the Plan, concluding that it "would provide a substantial and significant public benefit through the elimination of blight, the creation of new jobs in the City, the strengthening

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"reminiscent of the worst nineteenth century caricature of an insane asylum." Less than 20 years after opening, it was demolished. (Jarrett Medlin, *North Side Story: A Brief History of the Near North Side*, ST. LOUIS MAGAZINE, Nov. 2009). (STL A68.)

of the employment and economic base of the City, increased property values and tax revenues, stabilization of the Redevelopment Area, [and] facilitation of the economic stability of the City as a whole." (A28.) The Commission determined that, "without the assistance of tax increment financing in accordance with the TIF Act," the redevelopment of this blighted area in St. Louis "is not financially feasible and would not otherwise be completed." (*Id.*)

The Plan then proceeded to the Board of Aldermen. On October 30, 2009, the Board adopted the two ordinances. Five members of the Board introduced and sponsored the ordinances as Board Bill Nos. [09] 218 and 219. (A27-40.) The ordinances were approved by a vote of 27 in favor and one against. (Tr. Tab 4, 326.)

The first ordinance adopted and approved the Redevelopment Plan and designated the Northside Regeneration Redevelopment Area as a "redevelopment area" as that term is defined in the TIF Act. (A27.) The second ordinance designated Northside as the developer of the Redevelopment Area, and approved the terms of Northside's proposed Redevelopment Agreement (an unsigned copy of which was attached to the ordinance). (A39.) This ordinance also authorized the Mayor to execute the Redevelopment Agreement, which was signed on December 14, 2009. (A39, 151.)

*The Redevelopment Project*

The Redevelopment Agreement defines the initial redevelopment project to be undertaken in furtherance of the Redevelopment Plan. The City authorized $390,600,000 in TIF financing, $345,500,000 of which is earmarked for infrastructure, including the renovation and installation of sewers, streets, sidewalks and utilities, and demolition of

existing structures and land. (A61.) The table reproduced below from the Redevelopment Agreement summarizes the breakdown of the TIF funding by project. (A62.)

| | COST SUBCATEGORY | | | | TOTAL MAXIMUM REIMBURSEMENT – ALL COST SUBCATEGORIES |
|---|---|---|---|---|---|
| RPA | Studies & Professional Services | Property Acquisition & Relocation | Public Infrastructure Costs | Building Rehabilitation Costs | |
| A | $400,000 | $8,500,000 | $117,100,000 | $3,600,000 | $129,600,000 |
| B | $200,000 | $12,500,000 | $56,300,000 | $0 | $69,000,000 |
| C | $700,000 | $7,500,000 | $96,600,000 | $4,000,000 | $108,800,000 |
| D | $600,000 | $7,100,000 | $75,500,000 | $0 | $83,200,000 |
| TOTAL | $1,900,000 | $35,600,000 | $345,500,000 | $7,600,000 | $390,600,000 |

Section 3.4 of the Agreement requires Northside to commence certain work by April 1, 2010 (although Northside is granted a "grace period" of 12 months thereafter). (A56.) In particular, Section 3.4 provides as follows:

> [Northside] 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.

(A56.)[6] The Agreement includes a schedule showing the time frames within which the infrastructure work is to be completed.

It defines "Site Work" as "construction, pursuant to a binding executed agreement between the Developer and an experienced general contractor involving the payment of not less than One Million Dollars ($1,000,000), for physical improvements necessary for the completion of one or more Redevelopment Projects." (A163.) The Agreement then specifies that "Work" includes: "***(1) property acquisition; (2) construction, reconstruction, renovation and/or rehabilitation of infrastructure and/or public improvements, including without limitation sidewalks, lighting, landscaping, sewer, water, electrical and other utilities; (3) demolition, site preparation and environmental remediation; (4) construction of the buildings within the Redevelopment Area to be used for the various intended uses….***" (A164.) (Emphasis added.)

Section 4.1 of the Agreement sets forth the maximum costs of the redevelopment projects in each of the RPAs. (A62.) The initial public infrastructure work in RPAs A

[6] Some work had begun as of the date of trial. (Tr. Vol. 3, 210-11.)

and B totals $173,400,000. (*Id.*) Building rehabilitation in these two areas totals $3,600,000. (*Id.*)

In its presentation to the Board, Northside gave further details concerning the initial public infrastructure projects in RPA A and B which are described in the Agreement. The Board was informed about the following:

1. The replacement and rehabilitation of sanitary sewers by street block;
2. 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";
3. The replacement and rehabilitation of water systems by street block;
4. Demolition and environmental abatement by street block; and
5. The development of new parks by specific location.

(LF 367.)[7]

[7] Section 7.19 of the Agreement separately obligates Northside to provide the City with a list of buildings identified for demolition and rehabilitation by March 31, 2010, and actual demolition to be completed by December 31, 2010. (A183.)

*The Mechanics of TIF Funding*

The incremental tax revenue and other taxes generated by new economic activity in the redevelopment area, if any, are set aside to reimburse the developer for fronting the cost of the work. (A31-32.) The City advances none of these costs. Indeed, as one member of the Board of Aldermen candidly testified: "We don't have any money to give …." (Tr. Tab 3, 133.)

The Redevelopment Agreement specifies that the City will issue TIF notes to evidence the City's obligation to reimburse Northside. Thus: "the only revenues that go to pay the TIF redevelopment costs are the revenues that the redevelopment itself generates." (Tr. Tab 4, 252.)

The TIF notes remain illiquid until the tax revenues are actually received and there are funds in the so-called special allocation fund. (Tr. Tab 4, 319.) The note "has to be held until the revenue materializes" in the form of incremental revenues. (Tr. Tab 4, 320.) Meanwhile, the developer "services that capital while he's waiting for the TIF notes to become liquid, so in other words, he owes the bank interest if he used a bank loan for some of those costs." (Tr. Tab 4, 324.) If the revenue does not materialize, the notes become worthless. (*Id.*)

*Trial Proceedings and Judgment*

On October 8, 2009, a few weeks before the Board was scheduled to meet to consider the Redevelopment Plan, Plaintiffs Bonzella Smith and Isaiah Hair filed the underlying action initially seeking to enjoin the yet-to-be-passed ordinances (LF 550-63.) Two additional parties, Cheryl Nelson and Elke McIntosh, intervened. (LF 39-41.)

These residents of the redevelopment area alleged that no ordinances could be enacted because the Plan did not comply with the TIF Act. (LF 12-29.) The trial court framed the issue as whether or not the Redevelopment Plan should be "strangled by the Court at birth." (LF 104.) The court denied the request for a temporary injunction, and scheduled a trial on the merits. (LF 104-16.)

The case was tried over four days in February and March 2010. Fourteen witnesses testified at trial. The evidence of blight in the Redevelopment Area was abundant. (LF 323.) For instance, Freeman Bosley Sr. of the Third Ward, who has been on the Board since 1977, described the blighted redevelopment area as "a mess right now and it needs some help." (Tr. Tab 3, 135.) He explained the history of the blight:

> [T]hey came along and they redlined our area banks and lending institutions. They drew an imaginary line around certain areas, and most of those were in North St. Louis where our poor African-American people lived. Even if your roof was leaking and you needed to upgrade your plumbing, or you needed new electrical services, the banks and lending institutions would not lend you the money to effect that repair. But . . . they would lend you money to go out in St. Louis County . . . in the middle of the night they would move out and the vandals would come in and destroy these homes, ripping all of the plumbing and the metal that was left in them. . . . [I]t is so bad that unless somebody has a pipe dream

> it's not about to come back. . . . All of the TIFs that they're now getting down in those areas. That's how they rebuilt those areas down there is through TIFs and fancy tax maneuvers, and North St. Louis never had a prayer at getting any of that done . . . .

(Tr. 134-36.)

Larry Marks of Development Strategies testified extensively at trial about how the Redevelopment Plan took shape. (Tr. Tab 3, 144-255; Tr. Tab 4, 66-159.) His firm worked together with a number of other professionals, including Civitas, a major planning firm based in Denver, Colorado, and engineers from Cole Engineering on the preparation of the Redevelopment Plan, the blight analysis and cost-benefit analysis. (Tr. Tab 4, 70-72.)

Over the course of several months, this team had weekly meetings in the Mayor's office, which were attended by a number of City representatives, including the Director of Commercial Development for the City, Dale Ruthsatz, Executive Director of Development for the Mayor, Barbara Geisman, City attorneys and others. (Tr. Tab 4, 71-72.) Approximately 20 to 25 people were typically in attendance at the meetings leading up to the formal submission of the Redevelopment Plan. (Tr. Tab 4, 71.) Geisman made formal presentations concerning the Plan and the redevelopment projects to the TIF Commission and the Board of Aldermen. (Tr. Tab 4, 213, 223-26, 240.)

Louis B. Eckelkamp III, Executive Vice President of the Bank of Washington testified concerning the financial arrangements for implementing the Redevelopment

Plan. (Tr. Tab 3, 76-109.) Russell Caplin, the Vice President of Finance for Optimist Development, an affiliate of Northside, also testified concerning the financial arrangements planned for implementation of the Plan. (Tr. Tab 3, 259-325.)

Fifth Ward Alderman April Ford Griffin testified at trial, and explained the Board's understanding of the initial stages of the plan: "Start the cleanup is the first thing we talked about." (Tr. Tab 4, 208.) Ms. Griffin explained that this work had been approved and was not subject to any other ordinances being passed. (Tr. Tab 4, 209.) She elaborated on the initial projects described in the Plan: "there's already been some work started . . . the project that they just got notified a couple of weeks ago that they received the tax credits for, so . . . work is starting on getting that development started." (Tr. Tab 4, 210-11.)

*Trial Court's Judgment*

Following the four-day bench trial, the trial court issued a 52-page Memorandum, Order and Judgment on July 2, 2010. (LF 311-61.) The court concluded that the TIF ordinances met all but one of the statutory requirements. (LF 353.) The trial court found that the ordinances had been arbitrarily adopted and were void because of "the absence of" defined "redevelopment projects and a cost-benefit analysis of such projects." (LF 357, 360.) The court found a satisfactory overall cost-benefit analysis, but concluded that detail as to the opening projects (and their specific cost and benefit) was lacking.

The trial court overruled motions for new trial filed by Northside and the City. Northside sought to introduce additional evidence regarding the details of the initial infrastructure projects presented to the Board of Aldermen. (LF 357.) The Missouri

Court of Appeals wrote an opinion stating that it would affirm the trial court, but, due to the general interest or importance of the questions involved, transferred the case to this Court, pursuant to Rule 83.02.

## POINT RELIED ON

**I. THE TRIAL COURT ERRED BY VOIDING THE CITY'S TIF ORDINANCES, BECAUSE IT MISAPPLIED THE DEFINITION OF A "REDEVELOPMENT PROJECT" UNDER THE TIF ACT, IN THAT IT WAS FAIRLY DEBATABLE OR REASONABLY DOUBTFUL WHETHER THE INFRASTRUCTURE IMPROVEMENTS AND OTHER PUBLIC WORKS THE CITY APPROVED CONSTITUTE A DEVELOPMENT PROJECT IN FURTHERANCE OF THE CITY'S REDEVELOPMENT PLAN.**

*Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. 1966)

*JG St. Louis West Ltd. Liab. Co. v. City of Des Peres*,

41 S.W.3d 513 (Mo. App. E.D. 2001)

*Spradlin v. City of Fulton*, 924 S.W.2d 259 (Mo. banc 1996)

## ARGUMENT

**I. THE TRIAL COURT ERRED BY VOIDING THE CITY'S TIF ORDINANCES, BECAUSE IT MISAPPLIED THE DEFINITION OF A "REDEVELOPMENT PROJECT" UNDER THE TIF ACT, IN THAT IT WAS FAIRLY DEBATABLE OR REASONABLY DOUBTFUL WHETHER THE INFRASTRUCTURE IMPROVEMENTS AND OTHER PUBLIC WORKS THE CITY APPROVED CONSTITUTE A DEVELOPMENT PROJECT IN FURTHERANCE OF THE CITY'S REDEVELOPMENT PLAN.**

### STANDARD OF REVIEW

At issue in this appeal is whether St. Louis's TIF ordinances comply with the TIF Act – a question of law. Accordingly, review is *de novo*. *JG St. Louis West Ltd. Liab. Co. v. City of Des Peres*, 41 S.W.3d 513, 522 (Mo. App. E.D. 2001) (Russell, J.).

Deference to the City's legislative process is considerable: "Out of proper respect for the role of co-equal branches of government, this Court has consistently refused to second-guess local legislative determinations that a statutory condition is met unless there is an allegation made and clear proof is shown that the city's decision is the product of *fraud, collusion, 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) (emphasis added).

If the City's action is "reasonably doubtful" or "fairly debatable," then this Court "cannot substitute [its] opinion for that of the City Council." *Id.* Under these circumstances, "the discretion of the legislative body is *conclusive*." *City of St. Joseph v.*

*Hankinson*, 312 S.W.2d 4, 8 (Mo. 1958) (emphasis added). While engaging in a *de novo* review of the issues on appeal, this Court makes its own independent determination of whether the City's decision was "fairly debatable." *Id.* The "fairly debatable" test is rooted in the well-recognized presumption that "because the validity of legislative enactments is presumed, uncertainties about their reasonableness must be resolved in the government's favor." *Great Rivers Habitat Alliance v. City of St. Peters*, 246 S.W.3d 556, 562 (Mo. App. W.D. 2008) (internal quotations omitted).

## SUMMARY OF ARGUMENT

The TIF Act provides that a municipality may enact an ordinance adopting TIF financing at the time a "redevelopment project" is approved. The statute defines a "redevelopment project" as "*any* development project within a redevelopment area in furtherance of the objectives of the redevelopment plan." When the City enacted the TIF ordinances, the Board knew the detail of the initial demolition and infrastructure projects, including start and completion dates (April 2010 and December 2024), and authorized the City to enter into the Redevelopment Agreement with Northside to begin implementing, among other things, this infrastructure work. The trial court concluded that these projects did not comply with the statute because, in its subjective opinion, the projects were not "shovel ready." At issue is whether the trial court's "shovel ready" requirement correctly applies the TIF Act.

The answer is no. First, the trial court's decision is contrary to the language and purpose of the Act, which gives municipalities broad discretion to determine the nature and scope of the first steps toward redevelopment of a blighted area. Second, the court's

decision disregards a line of cases decided by this Court that prohibit the second-guessing of legislative determinations that are "fairly debatable" or "reasonably doubtful." If upheld, the trial court's analysis will usher in a new era of judicial involvement in City planning where urban redevelopment will be delayed as trial and appellate courts determine whether or not the initial "projects" are sufficiently detailed. Finally, the trial court's decision frustrates the Act's central purpose of enabling cities to eliminate blight because it hinders their ability to finance urban redevelopment through the use of TIF financing.

## DISCUSSION

### A. THE CITY OF ST. LOUIS APPROVED A FAIRLY DEBATABLE OR REASONABLY DOUBTFUL REDEVELOPMENT PROJECT WHEN ENACTING THE TIF ORDINANCES.

#### 1. The Meaning of "Redevelopment Project" Under the TIF Act.

When interpreting a statute, Missouri courts determine the intent of the legislature from the language of the statute itself. *Park Town Imports, Inc. v. Audi of America, Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). The words used are given their "plain and ordinary meaning" unless they conflict with an "ascertained legislative intent." *State ex rel. Maryland Heights Fire Prot. Dist. v. Campbell*, 736 S.W.2d 383, 387 (Mo. banc 1987). Because a municipal ordinance, like a state statute, is presumptively valid, an interpretation that renders it ineffective is disfavored as compared to one that will give it effect. *McCollum v. Dir. of Revenue*, 906 S.W.2d 368, 369 (Mo. banc 1995).

Enacted in 1982, the TIF Act authorizes municipalities to use tax increment financing to fund "redevelopment projects." § 99.845.1 (instructing that "[a] municipality … at the time a redevelopment project is approved … may adopt tax increment allocation financing by passing an ordinance …."). It defines a "redevelopment project" as "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." § 99.805(14) (emphasis added). The term "development project," discussed further below, is not defined.

A "redevelopment area" is defined as "an area designated by a municipality, in respect to which the municipality has made a finding that there exist conditions which cause the area to be classified as a blighted area … which area includes only those parcels of real property directly and substantially benefited by the proposed redevelopment project." § 99.805(12). A "redevelopment plan" is defined as "the comprehensive program of a municipality for redevelopment intended by the payment of redevelopment costs to reduce or eliminate those conditions, the existence of which qualified the redevelopment area as a blighted area … and to thereby enhance the tax bases of the taxing districts which extend into the redevelopment area." § 99.805(13). Each redevelopment plan must also comply with § 99.810, which sets forth the required contents and findings for such a plan. *Id.*

Because the term "project" is not defined in the statute, the Court should give it its "plain and ordinary meaning." *Campbell*, 736 S.W.3d at 387. Below are several dictionary definitions of the term "project."

- A **plan** or proposal; a scheme. . . .[8]
- An **undertaking** requiring concerted effort: *a community cleanup project; a government-funded irrigation project.*[9]
- An individual or collaborative **enterprise** that is carefully planned and designed to achieve a particular aim: a research project; a nationwide project to encourage business development.[10]
- Something that is contemplated, devised or planned; **plan**; scheme.[11]
- A piece of **planned work** or an activity which is finished over a period of time and intended to achieve a particular aim.[12]
- A large or major **undertaking**, especially one involving considerable money, personnel, and equipment.[13]

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[8] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1448 (3d ed. 1992) (emphasis added).

[9] *Id.* (boldfaced added and italics in original).

[10] OXFORD DICTIONARIES, http://oxforddictionaries.com (2012) (emphasis added).

[11] CAMBRIDGE DICTIONARIES ONLINE, http://cambridge.org (2012) (emphasis added).

[12] *Id.* (emphasis added).

[13] DICTONARY.COM, http://dictonary.reference.com (2012) (emphasis added).

- A specific **plan** or design.[14]
- An **undertaking devised to effect the reclamation or improvement of a particular area of land**.[15]

All of these definitions have in common the broad concept of a "plan," "undertaking" or "enterprise." With one exception, these definitions do not include the term "specific" or other restricting modifiers. And the only dictionary which uses the term "specific" in one of its two cited definitions, *Webster's Third International*, does not use this modifier for the definition of a "project" in connection with "the reclamation or improvement of a particular area of land."

The TIF Act itself does not require that a development project be "specific" or otherwise "defined." The Act certainly could have included such requirements, if that is what the legislature intended. Had it so desired, the legislature could have provided a far more detailed definition of "redevelopment project" in the TIF Act.[16] But, to have

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[14] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, http://merriam-webster.com (emphasis added).

[15] *Id.* (emphasis added).

[16] Consider, for instance, the lengthy definition of "project" in the Missouri Development Finance Board Act, passed in the same year (1982) § 100.255(13), or all of the specificity set out in the Housing Authorities Law defining a "Housing Project." § 99.020(12). The presence of these alternative, more detailed definitions indicates that the legislature knows how to place limitations in its definitions when that is intended.

qualified the definition as the trial court suggests would be effectively meaningless without further guidance. The phrase "specific development project" by itself adds no content to the phrase "development project." Is a new highway a development project or a specific development project?

Thus, in its "plain and ordinary usage," the term "project" encompasses any plan, undertaking, or enterprise, regardless of how specific, defined or otherwise shovel-ready it may be. It follows that a "*development* project" is any development-oriented plan, undertaking or enterprise. And a "*redevelopment* project" is, just as the Act says, any development-oriented plan, undertaking or enterprise "within a redevelopment area in furtherance of the objectives of the redevelopment plan," regardless of the level of specificity. § 99.805(14).

A broad interpretation of the term "development project" also comports with other sections of the Act. *State ex rel. Evans v. Brown Builders Elec. Co., Inc.*, 254 S.W.3d 31, 35 (Mo. banc 2008) ("The provisions of a legislative act are not read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each other.") (internal quotations omitted). The fact that the City's goal was to eradicate blight warrants giving the City considerable discretion.

First, a "redevelopment project" is not a required component of the overarching "redevelopment plan." Section 99.810, which specifies the contents of a development plan, requires only a "*general description* of the program to be undertaken to accomplish the [plan] objectives….." (Emphasis added.) This "general description of the program" must contain certain projections, including "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 terms of the sources of funds to pay the costs, the *anticipated* type and terms of the obligations to be issued, the most recent equalized assessed valuation of the property within the redevelopment area which is to be subjected to payments in lieu of taxes and economic activity taxes pursuant to section 99.845, an *estimate* as to the equalized assessed valuation after redevelopment, and the *general* land uses to apply in the redevelopment area." § 99.810.1 (emphasis added). Notably absent from this long list of requirements is any description, general or otherwise, of the *contents* of a redevelopment project.

Second, none of the necessary "findings" under § 99.810.1 relating to the plan concern the *contents* of a redevelopment project. Section 99.810.1(3) requires a municipality to give the "estimate[d] dates … of completion of *any* redevelopment project…." (Emphasis added). For any such project, the date must be "not … more than twenty-three years from the adoption of the ordinance approving [it]." *Id.* And no redevelopment project may be approved "later than ten years from the adoption of the ordinance approving the redevelopment plan under which the project is authorized…." *Id.*

This provision supports the broad definition of a "redevelopment project." By allowing a ten-year window for adopting new projects, the Act gives a city the flexibility to respond to changing circumstances over the course of a large-scale redevelopment. This makes particular sense when the initial work consists predominantly of

infrastructure projects, which can pave the way for retail and other businesses to invest there.[17]

Section 99.810.1(5) also mentions the term "project." It requires a city to prepare 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 development plan under consideration." § 99.810.1(5) (emphasis added). In other words, the cost-benefit analysis must show the effect on each taxing district within the redevelopment area that will be impacted if "the project" is not carried out. This provision does not establish any further requirements for the content of the projects that will collectively complete the redevelopment.

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[17] This is what occurred in the Chesterfield valley (an area located west of St. Louis near the Missouri River), following the great flood of 1993. In October 1994, the city declared the entire valley area, which had been under water, a redevelopment area. At the time, more than $72 million in bonds and notes were committed to various infrastructure projects throughout the valley. As a result of this commitment, numerous retail and other businesses located there. The economic rejuvenation of the valley was so successful that the TIF district was ended ten years ahead of schedule. *See* Mary Shapiro, *City Ends Valley TIF District 10 Years Early*, ST. LOUIS POST-DISPATCH, Dec. 12, 2007. (STL A72-A73.)

Finally, § 99.845.1, mentioned earlier, establishes the requirements for approving TIF financing. Nowhere does it dictate the content of any redevelopment project. Indeed, it is crucial that this provision not do so. Eligible projects can be enacted up to ten years after TIF financing is activated (§ 99.810.1(3) above) so any limiting language at the outset would restrict the types of projects that could be approved in the future, which would undermine the long view contemplated by the TIF Act.

The statutory definition of "redevelopment project" and the relevant statutory provisions surrounding it make clear that the term is to be understood broadly to include any development-oriented plan, undertaking or enterprise that would further the larger-scale redevelopment plan.

**2. The City of St. Louis' Approved Redevelopment Project.**

Here, the City of St. Louis approved infrastructure projects that undoubtedly are in furtherance of the Redevelopment Plan. The Redevelopment Agreement between the City and Northside, which was attached to, and authorized by, the second TIF ordinance, obligated Northside to commence infrastructure work within RPA A and B by no later than April 1, 2010 (or, with a grace period by April 1, 2011). If Northside fails to satisfy this or any other material obligations, the City can terminate the Agreement and walk away. (A67-68, 78-79.)

The Agreement also sets forth the particular categories of infrastructure improvements in the form of Site Work. These 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.) This work qualifies as a "project" under any plausible definition of the term, not least of which is the broad, flexible definition of a "redevelopment project" contained in the TIF Act.

What matters is not whether the Court agrees that these are sufficient "projects" to merit TIF funds. Rather, as discussed above, what is dispositive is whether the City's judgment in this regard is "fairly debatable" or "reasonably doubtful." *Spradlin*, 924 S.W.2d at 263. The plaintiffs had the burden to establish that the City did not comply with the statute. Nothing in this record provides any basis for rejecting the City's determination, in light of the proper understanding of the term "redevelopment project." As discussed below, the plaintiffs, like the trial court, wrongly concluded that the City did not approve any redevelopment project based upon a mistaken definition of the term.

## B. THE TRIAL COURT MISAPPLIED THE TIF ACT.

The trial court's decision concluded that the City of St. Louis did not approve a "redevelopment project" on grounds that it did not comply with the court's narrower conception of a "project" and because the Court of Appeals' decision in *City of Shelbina v. Shelby County*, 245 S.W.3d 249 (Mo. App. E.D. 2008) ("*Shelbina*"), purportedly supports this result. The trial court's analysis is mistaken on both counts.

### 1. The Trial Court's Definition of the Term "Redevelopment Project" Is Contrary to the Statute and the Plain Meaning of the Term "Project."

The trial court redefined the term "redevelopment project" narrowly and then concluded that the City did not approve such a project under its newly-fashioned definition. (LF 353-55.) (emphasis added.) The trial court's lexicography does not

comport with the statute, and has no counterpart in any actual dictionary definition of the term "project."

The trial court defines a "project" as a "*specific* task or undertaking in furtherance of the objectives of the redevelopment plan, pertaining to a particular area of land." (LF 353-55.) (emphasis added.) The term "specific" appears in only one of the eight dictionary definitions of the term "project" described in Section A above. Second, the trial court's definition of "project" is an amalgamation of two different definitions: (a) "a specific plan or design" and (b) "an undertaking devised to effect the reclamation or improvement of a particular area of land." (*Id.*) Without explanation, the trial court spliced (a) and (b) together and introduced the term "task" which appears in neither definition.

There is no reason – and the court does not suggest one – why, to be a "project," an "undertaking" to improve land must also be a "specific task." For instance, undertaking to wash a car is no less of a project than undertaking to wash a windshield. Just as the more general undertaking of washing all one's vehicles is no less of a project than washing one of them. The difference is merely in the level of description. Likewise, undertaking to improve the infrastructure within an entire development area is no less of a project than undertaking to repair a particular street in that area.

More importantly, the Missouri legislature did not require specificity in the TIF Act, leaving it instead to the discretion of the affected municipalities. The only substantive limit the legislature placed on the description of a "redevelopment project" is that it must "include a legal description of the area selected" for it. § 99.805(14). The

legislature certainly could have required further "specifics" about proposed redevelopment projects, but chose not to. *See e.g. City of Fredericktown v. Bell*, 761 S.W.2d 715, 717 (Mo. App. E.D. 1988) (acknowledging that the legislature "knows how to" write different provisions if it elects to do so).[18] Here, contrary to the trial court's restrictive interpretation, the Act itself requires only that some activity broadly considered to be a "project" be approved together with a legal description of the affected area. § 99.805(14).

The trial court's analysis is also unworkable. Judges, and not legislators, will be the arbiters of what redevelopment will qualify for TIF financing. Surely this is not what the legislature envisioned when it passed the TIF Act.

The trial court attempts to justify this usurpation of legislative authority by setting up a proverbial straw man and then knocking it down. It says "[i]f defendants' approach in this case is valid, the City might as well designate its entire corporate boundaries as a redevelopment area, and proceed to capture incremental tax revenue to dispense to

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[18] Arguably, the TIF Act is a "remedial statute" because it was enacted to help cities eliminate blight, which is "conducive to the public good." *See City of St. Louis v. Carpenter*, 341 S.W.2d 786, 788 (Mo. 1961) (Statutes which are "conducive to the public good, are considered remedial in nature and are generally given a liberal construction"). The legislature is presumed to have known of the long-standing "fairly debatable" principle when it passed the TIF Act in 1982. *See e.g., Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. 1988).

favored redevelopers whenever the City feels like it," as if the City might waive its magic wand and make it so. (LF 356.) TIF ordinances cannot be adopted haphazardly (as the above hypothetical imagines) but require that arduous procedures be followed. Indeed, in this case, the trial court found that the City complied with all of the statute's procedural requirements. (LF 332-33.) Also, because TIF is limited to projects that will eradicate or halt the advance of blight, the idea that the City of St. Louis, or any other city, would arbitrarily declare itself "blighted" in its entirety is illogical. § 99.805.

In any event, the proper application of the "fairly debatable" standard forecloses this possibility. The City does not contend that it can call anything it wants a "redevelopment project" and then proceed to collect TIF revenue. Long-standing precedent wisely leaves to municipal bodies a wide path to redevelop blighted areas. This Court's decision in *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. 1966), is instructive. In that case, opponents of the redevelopment of a blighted area argued that the financing statement supporting the city's redevelopment plan was "not in sufficient detail." *Id.* at 655. This Court rejected the challenge holding that it could not substitute its judgment for that of the city's:

> It is sufficient to say that we will not substitute our judgment for that of the city as to how 'detailed' West Side's statement of financing is required to be. The city plan commission and the finance committee of the council, after public hearings, have approved the redevelopment plan as containing a statement of the method of financing in sufficient detail; and,

> there has been a legislative determination by the city council that the method and plan are sufficient. ***Absent allegations of fact and clear proof that approval of the plan was arbitrary or the result of fraud, collusion or bad faith, it will be accepted by the courts as sufficient***; there is no allegation or proof that its approval was arbitrary or the result of fraud . . . .

*Id.* at 655 (emphasis added).

The same is equally true here. The word "project" can be substituted for "statement of financing" with the exact same conclusion that this Court reached 45 years ago in *Annbar*. In short, the trial court should have stayed its hand and deferred to the City's judgment.

**2. The Trial Court's Reliance upon *Shelbina* is Misplaced.**

The trial court relied heavily upon the Court of Appeals' decision in *Shelbina*. (LF 346-47, 353-58.) In that case, the City of Shelbina activated TIF financing in connection with a redevelopment plan containing, in the Court's description, only "aspirational goals and conceptual frameworks" without any discernible projects of any kind. *Shelbina*, 245 S.W.3d at 253. Unlike in this case, Shelbina had not even selected a developer to oversee the plan's implementation. *Id.*

In affirming the trial court's decision invalidating the ordinances, the *Shelbina* Court found "[m]ost telling" the plan's vague description of its anticipated redevelopment of a particular redevelopment area. *Id.* The stated "proposals" were not "approved" projects. Instead, the plan itself conceded that "[i]t is *anticipated* that as

these projects are brought forward they will be presented to the Commission, if required, and subsequently, to the Board of Aldermen *for approval*." *Id.* (emphasis added). The Court concluded "from the excerpts cited" that the City "did not have any specific redevelopment projects approved nor had undertaken acts to establish a redevelopment project…." *Id.*

The City of St. Louis, by contrast, has approved an actual redevelopment project – infrastructure and other public works – when it enacted the TIF ordinances. The Redevelopment Agreement between the City and Northside, which was authorized by the TIF ordinances, establishes the nature of the work, a timetable for its completion, the estimated cost and describes the area selected for the project. (A167-68.)

In short, the City of Shelbina had a sketchy plan with no one identified to implement it. Under those vastly different circumstances, the Court observed that the legislative body had not yet made a judgment for it to consider. In adopting TIF financing and siphoning away tax dollars without more than the mere "concept" of a project, Shelbina put the cart before the horse. Accordingly, the trial court's reliance on this case is unfounded.

### C. THE TRIAL COURT'S READING OF THE TIF ACT MUST BE REJECTED TO ENSURE THAT TIF CAN BE UTILIZED BY URBAN CITIES TO TRY TO CURE FAR-REACHING BLIGHT WITH LARGE-SCALE REDEVELOPMENT.

The trial court poses two questions near the end of its opinion: (1) "If the courts will not enforce the statutory requirements for taxpayer-subsidized redevelopment, who will enforce them?" and (2) "And if they are not enforced, what becomes of the rule of

law?" (LF 359.) Although the trial court states that is has "no desire to return to the era of formalism in American law," it concludes that it "has a job to do" and that it is its "sworn duty" to "enforce" it. Yet, the trial court did not merely enforce the law, but effectively rewrote it in such a way that, if upheld, may cripple redevelopment in North St. Louis for the foreseeable future.

The answer to the trial court's first question – who will enforce the law? – is the City of St. Louis. The adversarial posture that the trial court has adopted toward the City is unnecessary. The interests of the City and its taxpayers are aligned. Not everyone in the City may agree with the Board of Alderman's decision to approve the TIF ordinances to redevelop the north side of St. Louis, but those who objected had their say and were overruled. This is not lawlessness, as the trial court suggests, but democracy.

Ironically, the trial court apparently recognizes the virtue of TIFs in the abstract, which it calls the "most benign form of public subsidy of urban redevelopment yet devised, and possibly the most ingenious way of enticing the private sector to do well by doing good." (LF 359.) As in this case, the TIF "commits the taxpayer to no money down, and requires the redeveloper to assume most of the risks of failure." (*Id.*) And "if he fails, *no one is hurt* except the redeveloper or his investors-perhaps." (*Id.*) (emphasis added). Moreover, the trial court did not find that any of these benefits of TIF-backed development are absent here, which is precisely why the City of St. Louis decided to "try it."

Despite these undeniable virtues, the trial court struck down the City's TIF ordinances because it concluded that the City did not, in its view, "observe the letter of

the law." (LF 360.) This is precisely what this Court's long-standing precedent has for decades sought to prevent by deferring to the state's legislative bodies acting in their legislative capacity for the benefit of their constituents. By overturning the reasoned judgment of the City of St. Louis, the trial court has embarked on a new course of judicial interference in legislative matters.

## CONCLUSION

The City of St. Louis approved a "redevelopment project" when it authorized TIF financing for the infrastructure and demolition work in North St. Louis. The decision of the City's duly-elected legislative body is entitled to considerable deference. It is not for our courts to overrule them when, as here, the trial court concluded that there was no evidence of fraud, collusion or bad faith, and it is fairly debatable or reasonably doubtful that the City's ordinances comply with the statute. This Court should reverse the trial court's judgment, and declare that the TIF ordinances are valid.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

This Substitute Brief complies with the requirements of Rule 84.04. This Brief contains 9,252 words (excluding the cover, signature block, this certificate, table of contents and table of authorities) as determined by the software application for Microsoft Word. The Brief has been scanned and is virus-free. A copy of this Brief was served upon the counsel of record (as registered users of the electronic filing system) upon it being filed with the Court, by means of the Court's electronic filing system on August 8, 2012.

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