IN THE MISSOURI SUPREME COURT

No. SC 92646

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.

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

SUBSTITUTE REPLY 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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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTRODUCTION

At issue here is whether urban municipalities, like the City of St. Louis, will be effectively foreclosed from attempting large-scale redevelopment using tax increment financing under the State's TIF Act[1]. The origins of TIF lie in its use as a tool to cure pervasive urban blight. Reviving a long-neglected urban center may require, as here, substantial developer-driven demolition and infrastructure repair work before any redevelopment of residential, retail and commercial areas can occur. Notably, Plaintiffs and Intervenors[2] do not dispute this premise. Instead, without citing any authority, they opine that such public works are merely the stuff of "Alice in Wonderland" because they are not sufficiently "specific." This argument begs the question and should be rejected.

First, Plaintiffs and Intervenors' "specificity" requirement can be found nowhere in the TIF Act, and is inconsistent with the Act's broad definition of a "redevelopment project." Second, their analysis does not address, let alone distinguish, this Court's controlling precedent which declares municipal decisions as presumptively valid and counsels wide deference, provided the ultimate decision can be fairly debated. Third, they incorrectly suggest that this Court must overrule the Court of Appeals' decision in *City of Shelbina v. Shelby County*, 245 S.W.3d 249 (Mo. App. E.D. 2008) to uphold

[1] Real Property Tax Increment Allocation Redevelopment Act, §§ 99.800 *et seq.*, RSMo. Statutory citations are to the 2012 Electronic Update to the Revised Statutes of Missouri.

[2] This Reply Brief identifies the parties as they were aligned in the trial court, as suggested in Intervenors' Brief. (Int. Br. at 9).

the City's ordinances, even though they tacitly concede that its facts differ meaningfully from the facts here. Finally, they offer no alternative basis for determining what qualifies as a legitimate project. Taken to its logical end, their approach will unavoidably require Missouri's courts to second-guess legislative decisions and micromanage TIF-financed re-development.

The dispute boils down to this: The TIF Act defines a "redevelopment project" as simply "*any* development project within a redevelopment area in furtherance of the objectives of the redevelopment plan[.]" The record demonstrates that Northside presented the demolition and infrastructure projects in its Redevelopment Plan first to the TIF Commission and then to the City's Board of Aldermen. Concluding that Northside's proposal was worth pursuing (perhaps in large part because the nature of TIF is to require the developer to assume all the up-front risk), the Board approved the Plan and began implementing it through the Redevelopment Agreement. In order to invalidate this presumptively valid legislative process, Plaintiffs and Intervenors were required to prove at trial essentially that this decision was "without support in reason and law." Because it is at least fairly debatable or reasonably doubtful that the prerequisite demolition and infrastructure work the City authorized are "*redevelopment* projects" within the meaning of the TIF Act, under *de novo* review, this Court should reverse the trial court and enable the redevelopment of North St. Louis to proceed.

ARGUMENT

A. There Is No "Specificity" Requirement for Redevelopment Projects in the TIF Act.

Plaintiffs and Intervenors alike argue that the City failed to comply with the TIF Act because the Redevelopment Plan, in their opinion, does not contain a sufficiently "specific" redevelopment project. Like the trial court's demand for a "shovel ready" project, these opponents of the City's ordinances seek to impose a level of specificity upon TIF-backed redevelopment that is located nowhere in the statute itself.

As discussed in the City's main brief, the language, structure and purpose of the TIF Act support a broad understanding of the term "redevelopment project" that is contrary to the crimped definition Plaintiffs and Intervenors espouses. The statute contains no particular limits on the geographic scale of a permissible TIF-financed redevelopment. Thus, a TIF redevelopment might involve a single parcel of land or, alternatively, encompass a large section of a city. Many important conclusions flow from this bedrock detail.

For instance, the scale of a particular redevelopment will dictate the shape of its redevelopment plan and underlying projects needed to complete it. Larger redevelopments, particularly in urban areas, may require a greater number of sub-projects, some of which may have to be completed sequentially (e.g., infrastructure repair on a site will necessarily precede building a new retail center there). In this context, a broader, more flexible redevelopment plan can be preferable to meet unexpected contingencies as it is implemented over the course of years. A plan that called uniquely

for "Wal-Mart" instead of simply "retail" would needlessly restrict a municipality in the event Wal-Mart backed out, when Target was prepared to fill the void.

And once it is conceded that some level of generality is necessary for larger-scale development, as the TIF Act tacitly recognizes, it becomes clear that only the responsible legislative body is in a position to determine for itself how much specificity is required. If a city insists on Wal-Mart, then it may do so, but if it prefers flexibility, like the City of St. Louis here, that is its prerogative. The TIF Act likewise affords a city the discretion to use TIF-financing to fund the initial demolition and infrastructure projects that are essential for any subsequent development. If the Missouri legislature had intended that TIF financing could only be used for "retail" or other types of projects, it could have so provided in the Act.

The result sought by Intervenors cannot be reached using the simple language of the Act. Intervenors (and the trial court) repeatedly insert the adjective "specific" before the word "project" or "redevelopment project." This exercise changes the plain and ordinary meaning of the Act because the word "specific" (let alone "shovel-ready") does not appear anywhere in the relevant portions of the statute. The Act's definition of "redevelopment project" is elastic. The instruction to those seeking to implement a TIF redevelopment is straight-forward: formulate a plan to redevelop some thing or some place (the redevelopment plan), and explain, in general, what is first to be done in furtherance of that plan (the redevelopment project).

Section 99.805(14) defines "redevelopment project" as any of the myriad tasks that may advance a redevelopment plan to completion.

> (14) **"Redevelopment project"**, any development project within a redevelopment area in furtherance of the objectives of the redevelopment plan; … .

Absent from the definition are the restrictions which Intervenors and Plaintiffs repeatedly insert to support their argument. The language does not say, for instance any "*specific*" or "*shovel-ready*" or "*detailed*" development project. Nor does it say something like: "improvements to infrastructure shall not be deemed a (development project).

"Specific" is defined as "explicitly set forth; definite." (*The American Heritage Dictionary*, at p. 1780.) The statute does not require an "explicitly set forth" or "definite" project. It only requires a broadly defined "redevelopment project" (i.e., "*any* development project within a redevelopment area in furtherance of the objectives of the redevelopment plan"). The intent of using such terminology must be to defer to the local government to decide what plans to fund with TIF. The only operative modifier in this definition is the word "any" – the opposite of a demand for specificity. By using the phrase "any development project," the Missouri legislature signaled that municipalities are to have wide discretion in determining how to use tax increment financing for redevelopment. A demand for further specificity contradicts this clear legislative intent.

The closest Intervenors come to directly addressing whether demolition or public infrastructure work constitutes a project is to say: "[i]f it is a 'project' to provide a list of buildings for future work, then we are living in the world of Alice in Wonderland." (Int. Br. 54.) This declaration begs the question of what qualifies as a "project." Under the plain meaning of "project" (a "plan" or "undertaking"), doing any one thing which

furthers the plan is a "project." Identifying buildings for demolition or remediation and then demolishing or remediating them, meets this definition.

The legislature knows how to say "specific project" when that is what it means. *See e.g.* §§ 68.240.2, 77.670, 163.300.2, 173.480.2 and 640.605 (each of which expressly employs the term "specific project"). The context of each is entirely different, but the point is that the legislature knows how to use this terminology when it intends to do so.

Moreover, this Court has consistently held that the legislative body's determination in this regard is presumptively valid and will be given great deference. As discussed at length in the City's main brief, when a city's decision is "fairly debatable" or "reasonably doubtful," the trial court has no authority to overrule its determination. *See e.g.*, *Spradlin v. City of Fulton*, 924 S.W.2d 259, 263 (Mo. banc 1996) ("[T]his 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, collusion, or bad faith or is arbitrary and without support in reason and law"). Plaintiffs and Intervenors suggest no reason why that standard should be applied differently in this case. It should not. Neither opponent of the City's ordinances points to any record evidence remotely suggesting that the Board's decision-making was "arbitrary and without support in reason and law." *Id.* Rather, they merely quarrel with the City's conclusion that infrastructure and demolition work qualify as "redevelopment projects."

Intervenors and Plaintiffs also rely heavily upon the testimony of Professor Michele Boldrin in attacking the Redevelopment Plan. Yet, Dr. Boldrin confessed that he had no opinion regarding whether the TIF Commission or the Board followed the proper

statutory procedures. (Tr. 108.) For this reason alone, his testimony is of no moment on the dispositive question of whether the City approved a *bona fide* "redevelopment project." Similarly, his *opinion* that the City and the Board made a "huge mistake" is beside the point, because at issue here is only whether the City's decision was fairly debatable or reasonably doubtful. (Tr. 109.) It is enough that the Board of Aldermen determined at the conclusion of the City's legislative process that the Northside proposal was in its best interest, regardless of whether an academic agrees.

Likewise, the Court need not agree that these "redevelopment projects" merit TIF funding. Rather, 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 opponents of the City's ordinances had the burden to establish that the City did not comply with the statute. In short, nothing in this record provides any basis for declaring the City's determination to be so arbitrary that it has no support in reason or law.

B. The Redevelopment Plan Contains Redevelopment Projects in the Form of Infrastructure and Demolition Work.

Plaintiffs (but not Intervenors) mistakenly contend that under § 99.825, the City's ordinances are void because the Redevelopment Plan does not contain the same level of detail about the demolition and infrastructure projects as the Redevelopment Agreement. This is incorrect. First, Plaintiffs' argument disregards the information included in the Redevelopment Plan about these redevelopment projects. The Plan describes the types of projects to be carried out in Redevelopment Areas A and B, including "infrastructure" and "building rehabilitation," and sets out a specific budget for each. (A286.) Indeed,

the table excerpted below comes directly from the Redevelopment Plan, which was submitted to the TIF Commission. (*Id.*) This table is essentially a mirror-image of the cost breakdown that was later included in the Redevelopment Agreement (and reproduced on page 11 of the City's main brief).

NORTHSIDE REDEVELOPMENT AREA **ESTIMATED TIF FUNDED PROJECT COSTS (In Millions)**					
RPA	Studies & Professional Services	Property Acquisition & Relocation	Public Infrastructure Costs	Building Rehabilitation Costs	TOTAL
A	$.4	$8.5	$117.1	$3.6	$129.6
B	$.2	$12.5	$56.3		$69.0
C	$.7	$7.5	$96.6	$4.0	$108.8
D	$.6	$7.1	$75.5		$83.2
TOTAL	**$1.9**	**$35.6**	**$345.5**	**$7.6**	**$390.6**

Plaintiffs do not dispute that the TIF Commission reviewed the Redevelopment Plan, conducted a public hearing and ultimately recommended the authorization of TIF financing to the Board. (A28-29.) Based upon these project-estimates, which were included in both the Plan *and* the Redevelopment Agreement, the Board authorized

$390,600,000 in total TIF financing when it enacted the ordinances. (A61-A63.) Eighty-eight percent of TIF funds authorized are to reimburse the developer for infrastructure, including the renovation and installation of sewers, streets, sidewalks and utilities, and demolition of existing structures and land. (*Id.*)

Like their argument about whether infrastructure and demolition work constitutes a "redevelopment project," Plaintiffs' argument here begs the question regarding the level of specificity that must be contained in a redevelopment plan. As discussed in the City's main brief, Northside's Redevelopment Plan contains all of the statutorily required elements of a "redevelopment plan." Moreover, as discussed above, the Act contemplates that additional specificity will be added to the Plan as it is implemented (i.e., words like "retail" will in subsequent sub-agreements become "Wal-Mart" or "Target"). In this case, the Redevelopment Agreement further detailed the nature of the initial demolition and infrastructure projects established by the Plan. Thus, it is inaccurate to suggest that the projects themselves were not included in the original Plan. Again, the debate turns on the level of specificity required, about which the Act is silent, thus leaving it to the discretion of each city to decide for itself.

Section 99.825, upon which Plaintiffs rely, requires a return to the TIF Commission only if modifications are made which "substantially change the nature of the redevelopment project" (if proposed prior to the ordinance approving the project) or "chang[e] the nature of the redevelopment project" (if proposed after the enabling ordinance). The Act does not require revisiting the TIF Commission to approve agreements which merely implement the redevelopment plan.

Here, because the Redevelopment Agreement does not change the "essential characteristics" or the "distinguishing qualities or properties of" the Plan, it was not necessary to revisit the TIF Commission. *Ste. Genevieve School Distr. R II v. Board of Aldermen*, 66 S.W.3d 6, 10-11 (Mo. banc 2002). *See also Great Rivers Habitat Alliance v. City of St. Peters,* --- S.W.3d ----, 2012 WL 3656292, at *15 (Mo. App. W.D. 2012) (amendment did not trigger §99.825 because it did not "alter the exterior boundaries of the Area, affect the general land uses, or change the nature of the land uses in the Plan").

C. *Shelbina* Is Distinguishable and Need Not Be Overruled.

Plaintiffs and Intervenors rely heavily on *Shelbina*, and suggest that it must be overruled to sustain the City's ordinances. While the City has its reservations about the soundness of the *Shelbina* decision, it need not be overruled by this Court. Here, the demolition, streets, sewers, and other infrastructure work qualify as "redevelopment projects." In *Shelbina*, not even one such project was identified. The City of Shelbina activated TIF financing in the absence of a developer (let alone a written, binding redevelopment agreement between the City and a developer). Without an identified developer (let alone a developer who had already invested over 20 million dollars in the redevelopment area) all that could be identified as a possible "project" were the "aspirational goals and conceptual frameworks" in the redevelopment plan. *Shelbina*, 245 S.W.3d at 253.

As discussed in the City's main brief, and as Plaintiffs and Intervenors acknowledge, this contrasts markedly from the implementation of the Plan by the City of St. Louis in this case. Here, the Board elected to activate TIF funding for the bones of

the project in the form of streets, sewers, clean-up, demolition and other necessary first steps. 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.) Thus, *Shelbina* is inapposite.

Plaintiffs observe that the Court in *Shelbina* uses the term "specific redevelopment project." (Pl. Br., 27); *Shelbina*, 245 S.W.3d at 253. However, in context, the Court's use of the term is to emphasize the factual circumstances, not to interpret the Act and set forth a new requirement for redevelopment projects. It is telling that, despite using this term, the Court does not suggest particular requirements for a permissible redevelopment project. The decision gives no guidance regarding the difference between a mere "redevelopment project" versus a "*specific* redevelopment project." Rather, it is clear that the Court uses the term "specific redevelopment project" to contrast with the mere "aspirational goals and conceptual frameworks" in the City of Shelbina's plan. In other words, the Court's decision does not say that in addition to identifying a redevelopment project, a plan must identify a "specific" redevelopment project (which does not add anything), but merely that it must specifically reference a project as opposed to mere aspirations. As discussed above, the Redevelopment Plan here satisfies this obligation.

CONCLUSION

The City approved a "redevelopment project" when it authorized TIF financing designed almost exclusively to rebuild the North Side's rotting public infrastructure. The decision of the City's duly-elected legislative body is entitled to the deference long recognized by Missouri Courts. 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 Reply Brief complies with the requirements of Rule 84.04. This Brief contains 2,840 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 September 17, 2012.

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