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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court Of Appeals

APPEAL FROM AIKEN COUNTY
Ernest J. Kinard, Circuit Court Judge

Stephen P. Donohue — Appellant,

v.

City of North Augusta,
the Mayor and City Council
of North Augusta — Respondents.

MOTION TO DISMISS APPELLANT'S APPEAL AS BEING UNTIMELY AND MEMORANDUM IN SUPPORT

Respondents, the City of North Augusta and the Mayor and City Council of North Augusta (the "City" or "North Augusta"), respectfully request that this Court dismiss Appellant's appeal of this matter as being untimely pursuant to the requirements of Rule 203(a) of the South Carolina Appellate Court Rules and Rule 59(e) of the South Carolina Rules of Civil Procedure.

I. Introduction

Appellant's notice of appeal, served October 17, 2014, was not served within the deadline provided by Rule 203(a), SCACR. Pursuant to Rule 203(a), SCACR, a motion to alter or amend judgment under Rule 59(e), SCRCP (a "Rule 59(e) Motion") tolls the time for noticing an appeal only if the motion is timely. *See Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010). Rule 59(e) requires service of such a motion within 10 days of receiving written notice of the entry of the underlying order. In this case, notice of the entry of the trial court's order in this matter (the "Order," attached hereto as **Exhibit A**)

was received by Appellant's attorney in his personal mailbox at the Aiken County Courthouse on August 20, 2014. Appellant did not file his Rule 59(e) Motion (attached hereto as **Exhibit B**) until September 2, 2014, and according to the certificate of service, did not serve that motion on Respondent until September 5, 2014, which is 16 days later. This is clearly outside of the deadlines for filing a Rule 59(e) Motion. Because Appellant's Rule 59(e) Motion was not timely, the thirty-day period to serve a notice of appeal was never tolled and ran from August 20, 2014, the date Appellant's counsel received written notice of the entry of the Order. The deadline for filing an appeal expired on September 19, 2014; 28 days before the notice of appeal was filed with the Clerk of Court for Aiken County. As such, Appellant's appeal is untimely and should be dismissed.

II. Procedural Background

The procedural history of this case is notable given that any delay in the resolution of this matter could significantly inhibit the City's ability to move forward with its riverfront redevelopment efforts ("Project Jackson").

The Complaint in this action was initially filed by the Appellant on December 9, 2013, on the nineteenth day of the twenty-day statute of limitation for challenges to the amendment of a redevelopment plan. *See* S.C. Code Ann. § 31-6-80(E). The original Complaint, however, was never served on Defendants. On December 23, 2013, the Appellant filed an Amended Complaint removing the River Club Homeowner's Association as a party to this action. This Amended Complaint was then served upon the City four days later on December 27, 2013. On January 15, 2014, the City petitioned the Supreme Court of South Carolina to remove this action to its original jurisdiction. The Court denied the City's petition on April 3, 2014, but gave exclusive jurisdiction to hear

and dispose of this matter to Judge Ernest J. Kinard. The City then served its Answer on April 14, 2014.

A scheduling conference was held on May 2, 2014, and a date certain for trial was set for trial 55 days later on June 26, 2014. Appellant's first interrogatories and general requests to produce, the standard discovery specified by rule, were received on April 28, 2014, four and one-half months after the complaint was filed. These requests were answered by the City nine days later on May 7, 2014. Appellant then served its only specific request to produce on May 23, 2014. The request sought among other things, all emails and other documents mentioning Mr. Donohue or Project Jackson. Responding to this request required the City to review approximately 30,000 emails and other documents. Nevertheless, the City did so and hand-delivered its response on June 20, 2014, within the thirty day window for such a response. On June 16, 2014, ten days before the date set for trail, Appellant requested that the trial be postponed, principally on the grounds that he would not have time to review the emails that the City had produced in response to his last-minute request. The Court granted this request and set a second trial date for July 18, 2014.

The trial was held on this date and, at its conclusion, the attorneys for the two parties were notified that if proposed orders were submitted by July 23, 2014, Judge Kinard would decide the case on the following day. The City hand-delivered a proposed order on July 23, 2014 as ordered. The Appellant did not place his proposed order in the mail until fifteen days later on August 2, 2014. On August 18, 2014, Judge Kinard emailed the parties saying that he had signed the Order deciding the case in favor of the City, and that he was sending it to the Aiken County Clerk on that day to be filed. Judge Kinard included an unsigned electronic copy of his Order with the email. On August 20, 2014, the Clerk of Court for

Aiken County entered Judge Kinard's order and delivered it to the City's attorney, Kelly F. Zier, and Mr. Donohue's attorney, James D. Mosteller, by placing it in their personal mailboxes located in the Aiken County Courthouse. That same day, the Clerk mailed a copy of the Order to the law firm of Pope Zeigler, LLC ("Pope Zeigler") in Columbia. Pope Zeigler received the Order two days later on August 22, 2014.

The ten-day time period for the filing of a post-trial motion commenced on August 20, 2014 when a copy of the Order was delivered to Plaintiff's Attorney. It then expired ten days later on August 30, 2014. Appellant served his Rule 59(e) Motion on Respondent on September 5, 2014, six days after the deadline for a timely filing had expired. On September 19, 2014, the order from Judge Kinard denying Appellant's Rule 59(e) Motion was entered by the Clerk of Court (attached hereto as **Exhibit C**).

III. Appellant's Untimely Rule 59(e) Motion

The affidavit affixed to the Order that was provided by the Clerk of Court confirms that the Order was received by Mr. Mosteller in his personal box in the Aiken County Courthouse on August 20, 2014. Within a matter of hours of having been placed in Mr. Zier's box, copies of the Order were in the possession of all of the City's attorneys. In addition, the local media had received copies of the Order. By the following day, August 21, 2014, every local media outlet had published stories reporting the contents of the Order in detail and several had links to digital copies of the Order on their websites.[1] Two days

[1] *See* Scott Rodgers, *Details Released on Project Jackson Lawsuit*, Aiken Standard, August 21, 2014, 12:01 a.m., http:// http://www.aikenstandard.com/article/20140821/AIK0101/140829936/0/SEARCH&slId=8 (includes a link to a pdf copy of the signed order); Scott Rodgers, *Details Released on Project Jackson Lawsuit*, North Augusta Star, August 21, 2014, http://www.northaugustastar.com/article/20140820/STAR01/140829935; Travis Ragsdale, *Project Jackson prepares for next steps*, August 21, 2014, WRDW, http://www.wrdw.com/home/headlines/Project-Jackson-prepares-for-next-steps-272218971.html.

later on August 22, 2014, the City's attorneys of Pope Zeigler received a mailed copy of the Order at their offices in Columbia, South Carolina.

In his Rule 59(e) Motion, Appellant claims that the Order was not received until August 27, 2014, a full week after it was entered by the Clerk and received by Mr. Mosteller in his courthouse mailbox. Mr. Mosteller had been placed on notice on August 18, 2014, by the trial court that the Order had been mailed to the Clerk of Court for entry on that day.

IV. Conclusion

August 20, 2014, was the date that Appellant received written notification of the entry of the Order. Because Appellant's Rule 59(e) Motion was filed 16 days after receipt, it was untimely and did not toll the time period to serve a notice of appeal. Accordingly, the deadline to serve a notice of appeal expired on September 19, 2014. Appellant's notice of appeal was not served until October 17, 2014; nearly a month later. Appellant's appeal is untimely and should be dismissed by this Court as such.

WHEREFORE, pursuant to the deadlines provided of Rule 203(a), SCACR and Rule 59(e) SCRCP, the City respectfully requests that this Court dismiss Appellant's appeal of this matter.

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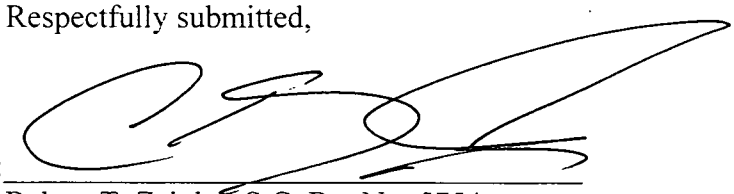
Respectfully submitted,

By: 

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ATTORNEYS FOR RESPONDENTS

Columbia, South Carolina
October 20, 2014

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	CASE NO.: 2013-CP-02-02781
	)	
Stephen P. Donohue,	)	
	)	
Plaintiff,	)	ORDER
	)	
v.	)	
	)	
City of North Augusta, the Mayor and City Council of North Augusta,	)	
	)	
Defendants,	)	
	)	

August 20th 14
1:20pm

This case was brought by Stephen P. Donohue, a resident of the City of North Augusta (the "City"). Mr. Donohue seeks to invalidate City Ordinance No. 2013-19 (the "Ordinance"). The Ordinance amended the redevelopment plan for the North Augusta Riverfront Redevelopment District to allow for the construction of a minor league baseball stadium and other amenities on a 25-acre tract of land fronting the Savannah River in downtown North Augusta. Mr. Donohue's home is located several thousand feet downriver from the stadium site. In addition to seeking to invalidate the Ordinance, the Complaint also alleged that if the stadium is built, it would represent a nuisance to Mr. Donohue's enjoyment of his property. Mr. Donohue sought money damages for the prospective nuisance.

FACTUAL/PROCEDURAL BACKGROUND

The Complaint in this action was filed on December 9, 2013. The two initial plaintiffs were Mr. Donohue and the River Club Homeowners Association. On December 23, 2013, counsel for both filed an amended complaint (the "Complaint") which dropped the River Club Homeowners Association as a party.

20th August 14

On January 15, 2014, Defendants petitioned the Supreme Court of South Carolina to remove this action to its original jurisdiction. The Court denied that motion but by administrative order gave exclusive jurisdiction over this action to this Court. Defendants answered the Complaint on April 14, 2014, effectively denying all claims. The trial of this matter was held on July 18, 2014.

The evidence at trial showed that beginning in the 19th Century, the City's riverfront area was used for industrial activities, clay mines for brick works, a public dump and similar purposes. North Augusta Mayor Lark Jones, who has served on City Council since 1985, testified that by the 1980's the riverfront area was largely abandoned and overgrown.

In 1991, the City established the North Augusta Redevelopment Commission under the terms of the South Carolina Community Development Law, S.C. Code Ann. §§ 31-10-10 *et seq.* *See* Ordinance No. 91-07 (**Joint Exhibit 1**). The City gave the commission the responsibility for "acquiring and replanning blighted and potentially blighted areas." Ordinance No. 91-07 at Section 18-10. The City also created the North Augusta Riverfront Redevelopment District to include the riverfront areas adjacent to downtown North Augusta and other adjoining properties. *See* Resolution 91-06 (**Joint Exhibit 2**). The City gave the Redevelopment Commission responsibility for redevelopment of the riverfront district.

In the early 1990's, the City contracted with the planning firm of Lane Frenchman and Associates of Boston and others to prepare a redevelopment plan of the Riverfront Redevelopment District using work down by Clemson University's planning institute. *See* Ordinance 96-10 (**Joint Exhibit 5**). Among other things, this plan established anticipated land uses within the District and the nature and potential locations of public buildings, parks, greenways and other amenities. *See* Ordinance 96-10 at Section 1.01(14)-(16). The plan

identified potential sources of funding for redevelopment including the establishment of a tax increment financing ("TIF") district under S.C. Code Ann. §§ 31-6-10 *et seq.* (the "TIF Statute").

In 1996, the City designated portions of the plan developed by Lane Frenchman as the official redevelopment plan for the District (the "Redevelopment Plan"). *See* Ordinance No. 96-10. The City also created the North Augusta Tax Increment Financing District (the "TIF District") to finance the Redevelopment Plan in part. *Id.* The City expanded the Riverfront Redevelopment District to include more of the declining commercial area on upper Georgia Avenue in the District. *Id.*

After the passage of Ordinance No. 96-10, the City began assembling title to the lands along the riverfront, the ownership of which was fragmentary or confused. The City also constructed parks and constructed and streetscaped access roads to support development of the River Club; a golf course and high-end residential development located of the riverfront east of Georgia Avenue. On the west end of the riverfront, the City located and assisted a private development group in establishing Hammond's Ferry, a walkable, mixed use development on lands assembled by the City. In addition, the City streetscaped thoroughfares and made other improvements to the older commercial area along upper Georgia Avenue, which is on the bluff immediately behind the riverfront. The City built parks and a new city administration building to help link the declining commercial district to the riverfront.

In 2001, the City issued a TIF bond in the nominal amount of $5,000 to begin the collection of revenue generated by the TIF District. *See* S.C. Code Ann. § 31-6-70. The City then used TIF revenues generated by increasing assessed values in the TIF District to pay the costs of authorized redevelopment projects on a pay-as-you-go basis.

In 2012, the City began discussions with North Augusta Riverfront Development Company, LLC, (the "Riverfront Company"), about developing the vacant 25-acre site which was immediately west of Georgia Avenue and directly on the riverfront. The Riverfront Company is the developer of Hammond's Ferry. At the time, the Riverfront Company was willing to commit to build two 4,000 square foot commercial buildings in exchange for the City's commitment to invest between $2.4 million and $3.4 million in streetscaping and parks in the adjacent area. Development Agreement at Article 5 (**Defendant's Exhibit 10**). However during these negotiations, the City was approached by a promoter about the possibility of relocating the Augusta Green Jackets minor league baseball team to a site adjacent to the City's industrial park. As the City's Administrator, Todd Glover, testified, these discussions led to discussions with the owner of the Green jackets about relocating to the 25-acre site beside Georgia Avenue. The owner, who is a developer, eventually organized Greenstone Properties, LLC and committed to a plan for the construction of a city-center development on the 25-acre site anchored by a new baseball stadium. The plan, called Project Jackson, would include a 200-room hotel, a 275 unit apartment complex, 70,000 square feet of office, commercial and restaurant space, 25 residential units and a YMCA facility. *See* Ordinance No. 2013-19 at Section 1.01 (**Joint Exhibit 14**). To support this private investment, estimated at approximately $128 million, the City would construct the baseball stadium and a convention center adjacent to the hotel. The City investment in Project Jackson would be approximately $40 million. (**Financing Scenario 43, Defendant's Exhibit 13**)

Pursuing Project Jackson required the City to amend the Ordinance 96-10 to designate a baseball stadium as part of the redevelopment project, and to extend the amount and term of TIF

obligations to finance the project. *See* Ordinance No. 2013-19. The City adopted Ordinance No. 2013-19 on November 18, 2013. This lawsuit followed.

The trial of this case took place without a jury on July 18, 2014. Based upon the documentary evidence presented, a review of all applicable statutes and ordinances, the testimony of witnesses and a review of affidavits filed by several witnesses and their credibility, the Court finds and concludes that the ordinance as passed met the form and substance of the TIF law. I further find and conclude that Plaintiff fails on his Freedom of Information Act claims and also dismiss his claim for prospective nuisance all as set forth more fully below.

LAW/ANALYSIS

Plaintiff alleges that Ordinance No. 2013-19 is invalid for two reasons. First, Plaintiff alleges that the ordinance does not comply with the statutory requirements for amending a redevelopment plan under the TIF Statute. Second, Plaintiff alleges that the City violated the provisions of the South Carolina Freedom of Information Act ("FOIA") in its enactment of the Ordinance.

I. Validity of Ordinance No. 2013-19

Plaintiff argues that for the City to amend the current Redevelopment Plan and to change the term and amount of the TIF obligations (collectively the "TIF Plan"), it was required to make findings that a) conditions of blight were present in the district currently, and b) that property values in area could remain static or decline without substantial public assistance. But that argument is based on an incorrect reading of the TIF Statute and its provisions that govern amendments of an existing redevelopment plan.

Amending the TIF District Redevelopment Plan

The TIF Statute requires findings as to blight, declining or static property values and the need for public assistance to correct them. S.C. Code Ann. § 31-6-80(A). However, I find these findings of need are made only once, before any TIF obligations are issued and within ten years of the adoption of the TIF Plan. *See* S.C. Code Ann. §§ 31-6-70 & 80(A). In this case, the required findings were made in 1996, when the TIF Plan was adopted. *See* Ordinance 96-10 Section 1.01(3)-(6).

The sections of the TIF Statute that govern the amendment of the TIF plan do not require additional or updated findings as to blight, declining or static property values or the need for public assistance to correct them. *See* S.C. Code Ann. § 31-6-80(B), (C), and (D). Instead, they require that eh procedures involve public notice and haring before the adoption of the ordinance amending the TIF plan, and notice to other taxing entities in the county—which then have the right to participate in the financing of the TIF plan or to exempt themselves from it. *Id.* There is no evidence that the City failed to follow these procedures in adopting Ordinance No. 2013-19.

Furthermore, Plaintiff's reading of the TIF Statute would result in an impractical reading of the statute as each improvement made on the property should reduce blight. The TIF Statute requires the enumerated findings to be made before issuance of TIF obligations and within ten years of the adoption of a redevelopment plan. S.C. Code Ann. § 31-6-70. Those provisions are inconsistent with Plaintiff's argument that such findings were required in 2013; 17 years after adoption of the Redevelopment Plan and 12 years after issuance of TIF obligations. Furthermore, the practical effect of Plaintiff's argument could be to prevent municipalities from making even the most simple and necessary changes in a partially completed TIF plan. That would be the case if, during the initial stages of its implementation, the initial blight and property value concerns had been ameliorated. Municipalities could be locked into implementing

outdated plans that did not meet current needs. Such a result would violate the rule that statutes are to be interpreted in a way that harmonizes their provisions, avoids inconsistency and gives them a reasonable and practical effect. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

For the reasons stated above, the Court finds that in amending the TIF Plan under S.C. Code Ann. § 31-6-80(F)(2), the City was not required to make updated findings related to blight, declining or static property values or the need for public assistance to correct them.

Other Grounds for Upholding the Ordinance

There are several additional grounds for upholding Ordinance No. 2013-19 against the challenge that it lacks valid or sufficient findings related to blight, declining or static property values or the need for public assistance to correct them.

First, under the TIF Statute, any area designated to be a redevelopment district under the Community Redevelopment Act is "deemed to be blighted." S.C. Code Ann. § 31-6-30(1). The TIF District is such an area. *See* Resolution 91-06. Accordingly, it has been deemed blighted as a matter of law. In this regard, the Court notes that at trial, Plaintiff took the position that the existence of declining or static property values and the need for public assistance to correct them are incorporated into the blight definition and so are part and parcel of a required finding of blight. Accordingly, if blight is presumed, these other findings must be presumed also.

Second, the Ordinance in fact contains express findings of blight, declining or static property values and the need for public assistance to correct them. Ordinance No. 2013-19, Section 2.08 (c) and (d). These findings would be sufficient to meet the statutory requirements if such finding were in fact required, which I find are not. The absence of the word "values" in the

discussion of "static and declining property" is immaterial. The intended meaning is entirely clear.

The Standards for Review of Legislative Findings

At the trial in this matter, and its pretrial motion in limine, Plaintiff argued that in justifying legislative findings required by the TIF Statute, the City Council was limited to matters established in the "legislative record." In Plaintiff's view, that record consisted of documents placed before Council when considering the Ordinance and matters referenced in the minutes of the Council's deliberations concerning it. Plaintiff argued that absent sufficient facts in the "legislative record," any findings made by City Council in adopting the Ordinance, whether independently supportable or not, should be found to be arbitrary and capricious. This is not the law.

As to factual questions related to legislative determinations:

> The matter is largely within the discretion of the legislative authority, which is presumed to have investigated and found conditions such that the legislation which it enacted was appropriate, so that if the facts do not clearly show that the bounds of that discretion have been exceeded, the courts must hold that the action of the legislative body is valid. In this respect, it has been declared that the municipal governing bodies are better qualified because of their knowledge of the situation to act upon those matters than are the courts, which will not substitute their judgment for that of the legislative body.

Talbot v. Myrtle Beach Bd. Of Adjustment, 222 S.C. 165, 169-170, 72 S.E.2d 66, 68 (1952) (quoting 58 Am. Jur. 956, 975 § 23).

Courts will not overturn legislative findings in ordinances except on "convincing evidence to the contrary" showing that the findings are "clearly erroneous." *Richards v. City of Columbia*, 227 S.C. 538, 560-61, 88 S.E.2d 683, 694 (1955). The party challenging an ordinance bears the burden of proof and must show by clear and convincing evidence that the ordinance is arbitrary and capricious, and the Court will not overturn the ordinance "as long as the decision is

'fairly debatable.'" *Peterson v. City of Clemson*, 312 S.C. 162, 165, 439 S.E.2d 317, 320 (Ct. App. 1993) (citations omitted).

> [T]here are many instances where the constitutionality of an act depends upon pertinent facts and in such a case it is presumed from the mere passage of the act that there was a finding of such facts as were necessary to authorize the enactment. However, by the better rule, such implied or express finding is subject to judicial review, **and the court may consider extrinsic evidence or this purpose**, although the statute will not be held unconstitutional unless such (legislative) finding is clearly erroneous.

Richards v. City of Columbia, 227 S.C. at 561, 88 S.E.2d at 694 (emphasis supplied).

These authorities establish a highly deferential standard for the judicial review of legislative findings, one which provides for the consideration of any competent evidence supporting them. The argument that legislative are reviewed on a "legislative record" that limits the facts that may be shown to support them is entirely foreign to the law in South Carolina. Accordingly, the Court rules as a matter of law that any competent evidence relevant to the findings made in ordinance No. 2013-19 is properly before the Court.

Facts Supporting the Findings of Ordinance No. 2013-19

At trial, the City's Mayor Lark Jones, and its Administrator, Todd Glover, testified in detail concerning the continued existence of blight within the TIF District, the fact that certain properties were static and declining in value, and the fact that continued public assistance is necessary to prevent future decline. The Court finds their testimony to be credible and persuasive.

In this regard, the Court finds are a matter of fact:

1. That the specific property on which Project Jackson will be developed is unimproved since the TIF District was established 18 years ago.

2. That this property is characterized by collapsing buildings, vacant buildings, and ground which is contaminated on the surface and below the surface by waste brick, rubble and debris, including debris that is contaminated with lead-based paint.

3. That, as indicated by the testimony of Mr. Glover, a sufficient number of elements of the statutory definition of blight are met by properties within the TIF District.

4. That, for the reasons set forth in the testimony of Mr. Jones and Mr. Glover, and as documented in Defendant's Exhibit 9, there are multiple properties within the TIF District and the surrounding area that exhibit static or declining values.

5. That persuasive evidence supports the finding that substantial public assistance is necessary to allow the Project Jackson property to be developed, including evidence that the property is contaminated by waste brick and rubble, that it will require nearly $2.4 million to remediate it, and the fact that it has remained unimproved since the TIF District was established 18 years ago. This conclusion is also supported by direct and affirmative testimony of the City's witnesses that public assistance is required to counteract static or declining values in the area of the TIF District.

6. That Project Jackson is part of a larger project to reverse the ongoing decline of the City's commercial district, which is suffering from the migration of customer traffic and commercial activities to new malls and strip malls in more suburban locations.

7. That public investment in the riverfront area is necessary to attract commercial traffic back to the North Augusta downtown commercial district and thereby counteract conditions of stagnation and decline in that district. The City Administrator also indicated all officials were aware of economic improvement in similar ball park additions to cities such as Greenville, South Carolina.

8. That the 2013 development agreement with the Riverfront Company involved public investment of between $3.4 million and $4.4 million in exchange for guaranteed private investment of approximately $1.2. million.

9. That the 2013 development agreement with the Riverfront Company is not evidence that the stagnation and decline in the City's riverfront and commercial area will be counteracted without public investment, but to the contrary, it shows the need for substantial public investment to support even modest development activities on sites like the Project Jackson site.

In light of the testimony and other evidence presented at trial, the Court finds as a matter of fact that blight and declining or static property values existed within the TIF District when the Ordinance was adopted and that substantial public assistance was necessary to correct them. For that reason, the findings contained in Ordinance No. 2013-19 are neither arbitrary, capricious nor clearly erroneous as a matter of law, and I carefully considered the testimony of Tom Regan.

II. Freedom of Information Act Claims

Plaintiff alleges that the City Council violated FOIA by (1) meeting in executive sessions between January 2013 and September 2013 without properly announcing the specific purpose to be discussed and (2) by taking action in an executive session on March 11, 2013, to postpone a public hearing with the Aiken County School Board related to Project Jackson.

Announcing Executive Sessions

Under FOIA, all meetings of governmental bodies must be open to the public unless the subject being discussed falls within one of the five topics enumerated in S.C. Code Ann. § 30-4-70(a)(1)-(5). These topics include contractual negotiations, personnel matters and the receipt of legal advice, among others. Where a governmental body enters into an executive session to

discuss one of these topics, it must vote in open session to do so and the presiding officer must announce the specific purpose of the executive session. S.C. Code Ann. § 30-4-70(b).

The FOIA statute clearly establishes the level of detail required to meet the "specific purpose" standard. Specific purpose is defined as "a description of the matter to be discussed, as identified in items (1) through (5) of [Section 30-4-70(a)]." *Id.* The plain language of the definition of "specific purpose" requires only that the purpose of the executive session be identified as it is described in Section 30-4-70(a), *e.g.*, contractual negotiations, personnel matters and the receipt of legal advice. *Cf. Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001) (finding a violation of FOIA where the mayor made no announcement whatsoever as to the specific purpose of an executive session).

The record before the Court includes the minutes of all City Council meetings during the period which Project Jackson was under consideration. It also includes the affirmative testimony of the Mayor and City Administrator concerning the City's practice in convening executive sessions. Both the minutes and the testimony indicate that in each case where an executive session was held, the Mayor announced the purpose of the executive session and the Council properly voted to enter executive session. In each instance, the "specific purpose" was a description of the matter as it was identified in the list of approved purposes for executive sessions provided for in FOIA. **(Council Minutes, Joint Exhibit 6)**

The Court finds this evidence credible and persuasive. The means used by City Council to announce and convene executive sessions did not violate FOIA.

Alleged March 11, 2013 Violation of FOIA

In the Complaint, Plaintiff alleged that on March 11, 2013, the City took action in executive session to postpone certain public hearings, including a public hearing that the City

had requested before the Aiken County School Board. The City had requested the hearing to formally request that the School District enter into an intergovernmental agreement consenting to participate in the TIF financing plan under S.C. Code Ann. § 6-31-85. The decision to reschedule the presentation of this request was based on an unexpectedly negative initial reaction from County Council to a similar request.

At trial, Mayor Jones and Mr. Glover testified that Mayor Jones made the decision to postpone a public hearing several days before the executive session. He did so pursuant to the authority given to him by the City Council in Resolution 2012-01 (**Joint Exhibit 7**). The purpose of the executive session was to brief the Council on the status of negotiations related to the intergovernmental agreement and the reasons for the delay in the public hearing. Both witnesses testified that no decision of any kind was made during the March 11, 2013 executive session.

This testimony is entirely credible. The Court finds that there is no evidence that would lead to the conclusion that the City Council took any action during the executive session held at its March 11, 2013 meeting. Obviously Mr. Donohue sincerely believes that secret meetings took place, but I have no clear evidence to refute the finding I make as to FOIA compliance.

III. Speculative Nuisance Claim

Plaintiff claims that the implementation of the Redevelopment Plan may create a nuisance related to traffic congestion, noise, light pollution or parking congestion, resulting in the diminution of the value of his property in an unspecified amount at some unspecified time in the future. Speculative allegations of diminution in property value are insufficient to support a claim sounding in nuisance. *See Yadkin Brick Co., Inc. v. Materials Recovery Co.*, 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000) ("[B]ald allegations are insufficient to establish a

claim for diminution in value, and the evidence must not be speculative as to the amount of the alleged diminution.") Where, as is the case here, the claim is one of anticipatory nuisance (*i.e.*, nuisance from an action that has not yet been taken), the plaintiff must show that:

> [A] nuisance will inevitably or necessarily result from the act or thing which it is sought to enjoin. It is not enough to show that the anticipated acts threatened to or may become a nuisance, but the evidence must show that a nuisance is inevitable from the proposed use of the premises or will necessarily result. If the proposed business may be operated in a way as not to constitute a nuisance, an injunction will not be issued. The alleged nuisance must be the necessary result of the operation of a business.

Strong v. Winn-Dixie Stores, Inc., 240 S.C. 244, 254, 125 S.E.2d 628, 633 (1962) (citing 39 Am. Jur. Nuisances, §§ 151 and 152). In addition, evidence was presented that Mr. Donohue's residence is currently exposed to heavy traffic, traffic noise, noise from boats using the river, and occasional lights and noise generated from an entertainment forum across the river in Georgia.

The record at trial includes credible testimony from officials of the City describing a multitude of ways in which the City might operate a baseball stadium that would mitigate any negative impacts alleged by Plaintiff. Plaintiff cannot support a claim for nuisance on these facts.

CONCLUSION

Based upon the findings of fact and conclusions of law above, the Court denies the relief prayed for by Plaintiff and finds for Defendant as to all of Plaintiff's causes of action.

IT IS SO ORDERED.

Honorable J. Ernest Kinard, Jr.
South Carolina Circuit Court Judge

Camden, South Carolina
August 18, 2014

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP0202781

PLAINTIFF(S)	DEFENDANT(S)
Stephen P Donohue	City Of North Augusta Mayor And City Council Of North Augusta
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge **Judge Code** **Date** August 20, 14

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on **8-20-2014**, and a copy mailed first class or placed in the appropriate attorney's box on **8-20-2014**, to attorneys of record or to parties (when appearing pro se) as follows:

James D. Mosteller III
PO Box 1832
Barnwell, SC 29812

ATTORNEY(S) FOR THE PLAINTIFF(S)

Gary Tusten Pope Jr.
PO Box 11509 Columbia, SC 29211
Kelly F. Zier
PO Box 6516 North Augusta, SC 29861
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PO Box 11509 Columbia, SC 29211-1509

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Liz Godard by Lisa Conley/CC

Liz Godard - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	CASE NO.: 2013-CP-02-02781
	)	
Stephen P. Donohue,	)	
	)	NOTICE OF MOTION; MOTION AND
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	PLAINTIFF'S MOTION TO ALTER
	)	OR AMEND THE JUDGMENT
v.	)	
	)	
City of North Augusta, the Mayor and City Council of North Augusta,	)	
	)	
Defendants,	)	
	)	

TO: The Honorable Ernest J. Kinard, Circuit Court Judge, and opposing counsel

YOU WILL PLEASE take notice that within ten (10) days, or as soon thereafter as the matter may be scheduled for hearing, that the plaintiff moves for an Order amending or Altering the Court's order filed on August 20, 2014, and received by plaintiff on August 27, 2014. This motion is made pursuant to Rule 59 (e) of the South Carolina Rules of Civil Procedure, and the grounds for the motion are set forth below.

I. Court's Findings

The court made the finding that the "Pursuing Project Jackson required the City to amend the Ordinance 96-10 to designate a baseball stadium as part of the redevelopment project, and to extend the amount and term of TIF obligations to finance the project." Project Jackson envisions a significant infusion of public moneys to build a baseball stadium, conference center and parking deck, but there is nothing in the concept that **requires** City to use a TIF district. There was no evidence admitted at trial that supports the Court's finding of fact. The City opted to use

the TIF vehicle to generate the revenues instead of other funding sources such as revenue bonds. Once the TIF option was elected, a new TIF could have been created or the existing TIF could be amended. The City opted to fund these projects through the amended TIF process.

II. Amending the TIF District Redevelopment Plan

The court concluded that the law only requires the finding blight, declining or static property values and the need for public assistance to correct them one time, before any TIF obligations are issued and within ten years of the adoption of the TIF Plan. *See* S.C. Code Ann. §§ 31-6-70 & 80(A). Such an interpretation of the law would permit cities to make the required findings for a small parcel of land in order to create a TIF district and then add any amount of land to that district without any other findings of blight, or declining values or need for public assistance.

For example, per the logic of the City's position, with a seed of merely 2 acres of land a city could amend the TIF repeatedly to 50 or 500 acres and never have to go through the factual findings required of an initial TIF; in fact the TIF statute does not even require the TIF District to be areas of contiguous land. The court's interpretation of the amending provisions would allow a small TIF district to operate like a seed, which once established, permit a city to use its "TIF license" to designate any lands in their jurisdiction whether contiguous or not to the original district, so long as they held a public hearing (B); provide notice to the other taxing districts (C); and the other taxing district are deemed to have consented unless they object (D).

That interpretation of the law should be compared to the amendment process that does not expand the area, or time, or change the uses of the proceeds of the obligations. SC Code § 31-6-80(F)(1). There the legislature was very clear, basically stating, that if you are not going to substantially alter a TIF, then you are required to seek agreement from the other taxing entities

similar to section 31-6-80(C), supra, and publish a notice in the paper of the changes similar to section 31-6-80(B), supra.

The legislature was very detailed when it laid out the amending process for a TIF when the amendment was not substantial, i.e., property wasn't added, area not expanded, or time period not extended. But when it came to substantial changes to the TIF, the legislature clearly indicated that it was required that all of the steps to create a municipal TIF originally must be undertaken, "The municipality may by ordinance make changes to the redevelopment plan . . . in accordance with the procedures provided in this **chapter** for the **initial approval** or a redevelopment project and designation of a redevelopment project area." [Emphasis added] SC Code § 31-6-80(F)(2).

The court's conclusion of law that following the entire chapter and all it procedures in the substantial amendment process would prevent a municipality from amending a project that is no longer viable, or lock it into outdated plans that did not meet current needs completely discounts the streamlined amendment process in the preceding section. See SC Code § 31-6-80(F)(1). Furthermore, if the legislature intended that construction they would have used the words "subsections (B), (C), and (D) of this section" or words to that effect instead of referencing the entire TIF chapter and emphasizing it was to be treated like an initial TIF. The court order allows a TIF to potentially live on in perpetuity. The court's conclusion of law on amending TIF's leads to the unintended result that once created, TIF's can take on a zombie-like existence and never ending – they can spread, and be repeatedly extended with never having to undergo the analysis and findings expected in the TIF statute.

The TIF District the City created in 1996 stands as an example of such a zombie TIF. It did not spend the up to the $13.4 Million authorized in the ordinance; it did not complete all the

projects in the "The Plan" (which is hard to discern since it is composed of "Clemson Study", "Final Master Plan for the North Augusta Riverfront Development District", "North Augusta Riverfront Redevelopment District Summary Plan" and "certain documentation relating to a Hotel and Conference Center, Upper Georgia Avenue, a Town Center, The park System, the Roadway Master Plan, and the Master Financing Plan") all incorporated by reference in Ordinance 96-10. The current TIF only expended money on the Greeneway, streetscaping, and the purchase of about 3 acres across from the municipal building. With a hotel and conference center still not built, the City was facing the end of the current TIF in 2016. With those projects not completed, the City had no statutory complications with regard to rolling back the intended expenditures. The claim that amending a TIF using the entire TIF chapter as the legislature wrote it, not just subsections B,C,and D of section 31-6-80, would lock a city in to obsolete plans is a red herring. As long as bond holders are paid, and the land no longer blighted, the other taxing entities would receive their normal tax revenues sooner rather than later as planned in the TIF, which is an issue easily covered in intergovernmental agreements.

The TIF law is pernicious in that it amasses tax dollars beyond the normal tax revenues of a city for other than their original purposes all without taxpayer approval. For example, school tax dollars are now being spent on baseball stadiums and hotel conference centers. Because those tax dollars are diverted to other than school operations, new children moving into the area will not be paying their education burden on the system. New businesses residents in the area will impose additional burdens on the city for municipal services but will not be carrying their share of police, fire, and other municipal services, because their taxes are now being diverted to building stadiums and conference centers.

It is for this reason the legislature clearly indicated that the entire TIF process be revisited every time a city decided to make substantial changes such as expand the area, or the time, or the projects themselves. The legislature did not intend the law to be a tax revenue playground. The TIF law is clearly intended to eliminate blight, and once that goal is achieved, the playground should be closed. If the essence of the law is not to eliminate blight the legislature could have reduced the TIF law to one page – allowing the amassing of taxes for any purpose the local taxing districts agreed to.

III Other Grounds for Upholding the Ordinance

The court held that a "under the TIF Statute, any area designated to be a redevelopment district under the Community Redevelopment Act is "deemed to be blighted."" Citing S.C. Code Ann. § 31-6-30(1). The entire redevelopment district is not "deemed to be blighted" under the TIF statute, only vacant land within a redevelopment district is because that clause is in a subparagraph of Section 31-6-30(1), to wit:

> (b) if vacant, the sound growth is impaired by:
>
> . . .
>
> (ii) the area immediately prior to becoming vacant qualified as a blighted area. Any area within a redevelopment plan established by Chapter 10 of Title 31 is deemed to be a blighted area. SC Code § 31-6-30(1)(b)(ii)

The uncontroverted evidence at trial was that the 457-acre TIF district had in fact increased in assessed value by more than $100 million. The evidence also showed the 25-acre parcel being used for the designated projects had gone up in value, not down. Furthermore that "vacant" area was not designated as blighted by the City in its redevelopment district. (See Ordinance No. 91-06). It is clear the legislature did not want a City to have to replicate previous findings of blight when they had gone through the process under the Community Development Law SC Code §§ 31-10-10 et. seq. The City made no such finding of blight in 1991.

The court further held that Defendant's Exhibit 9 clearly established declining values in the TIF area. Defense Exhibit 9 is not competent evidence for the court to make that conclusion of law for the following reasons:

1. The Plaintiff was not advised of this evidence until 17 hours prior to trial. Plaintiff objected to its offer in to evidence at trial, because he did not have time to scrutinize that evidence prior to trial, nor was it ever presented to the City Council for deliberation, and did not constitute proper evidence pursuant to the doctrine outlined in Horry Telephone Cooperative, Inc., v. City of Georgetown et al, Opinion NO. 27394, filed June 4, 2014 (S.Ct.), which held that "Municipal records properly authenticated or verified are the **only competent evidence** of the proceedings or the transactions of governing bodies", Horry Telephone Cooperative Inc., supra, (string citations omitted, emphasis added). Furthermore, it violates the discovery rules under Rule 34, SCRCP. Plaintiff had requested documents in support of the City's finding of reduced or static values in the TIF area well before trial. Defense exhibit 9, upon which the court makes finding declining or static property values was not provided to Plaintiff until 17 hours before trial. The movant believes exhibit was improperly admitted into evidence and relied upon by the Court over Plaintiff's timely objection.
2. Defense Exhibit 9 does not support the findings of the court of reduced property values, and is significantly misleading to the Court. The exhibit consists of 132 graphs of parcels in the TIF that the city claims show reduced value. Most of the graphs are of recently completed houses or condominiums each worth hundreds of thousands of dollars built since 2007. (Please refer to the attached affidavit of Steve Donohue regarding this exhibit). Even with these properties recent decline in value, since they were built after the

TIF was created in 1996 their current impact is an increase in value to the property not a decrease. The graphs purport to show a drop in value during the same period the entire nation was experiencing a housing recession. When measuring property values from their origins as undeveloped property to 2013, those 132 properties increased in value well over $14,000,000 as demonstrated by Defense exhibit 9.

3. It is clear the City did not consider those properties in passing the TIF ordinance. The City should not be allowed at trial to supplement the legislative record to justify their findings in the statute. Allowing that evidence to support static or declining values violates the holding in Horry Telephone Cooperative, Inc. v. City of Georgetown, Supreme Ct. Case No. 27394 (2014).

4. The City's TIF amending ordinance, No. 2013-19, only finding as to "value" (note, the word value never appeared in the ordinance) was in section 2.08 (c) to wit:

> (c) Significant portions of the Redevelopment Project Area, and particularly in the Riverfront Redevelopment District area west of Georgia Avenue within the Redevelopment Project Area, have had little or no development since the adoption of the original Redevelopment Plan in 1996 or sixteen years ago, and would remain static or decline without public intervention;

Defense exhibit 9 has mostly developed properties in its listing. Forty-three (43) of the properties are condominiums on the east side of Georgia Avenue, and the decline in value was only measured after they were built. The condominiums listed in Defense exhibit 9 have a current value of $6,718,080. That is value that did not exist prior to the 1996 TIF. Yet the City would have you believe that because the condominiums declined to that value, they are now justified in amended the TIF because of "static or declining values." Ironically these are River Club area properties, the same area the mayor testified how the City's investment in roads helped to develop the area. Once developed, the City now

claims they went down in value after the housing bubble burst which justifies their TIF amendment. One property in that exhibit is a $906,000 house in Hammond's Ferry, that had gone down in value to $824,000. It strains credulity to assume the legislature had that kind of "declining value" in mind when they drafted the TIF statute.

5. Defense exhibit 9 does not even contain parcel number 007-17-02-001, the 25 acres of the Riverfront Development District and the very area the City claims has gone down in value as interpreted by the court and the very area were the baseball stadium is to be built. The very same area the city manager and the mayor testified was full of loose bricks and dilapidated structures fails the "declining value" test in the TIF law – that area went up in value not down as proved at trial by Plaintiff.
6. The only evidence of declining values in the TIF area used by the city prior to the ordinance's passage was the 16 properties provided to City Council in October 2013. That list was completely discredited when Plaintiff proved nine of those properties were not even in the TIF, two were not even in the City, and five properties had new houses built on them. The City felt so strongly about this now discredited evidence they attached it to an affidavit of the City manager in their petition to the Supreme Court seeking original jurisdiction in January 2014 some three months later. That evidence proved nothing with regard to the TIF law, yet the City held onto that justification until 17 hours before trial.

The court's finding that substantial public assistance was met because the current development agreement still required the City to widen two roads at a cost of $2.4 million to $4.4 million for only $1.2 million in private investment is also in error since that agreement was only the opening salvo in the planned development that would ultimately

have 337 housing units and over 50,000 sq. ft. of commercial space. The court has only considered the initial contract of development as opposed to the final goal as announced in City Ordinance No. 2012-14. Public investment of $2.4 is a far cry from the $43 million public investment the City now claims is required to eradicate the alleged "blight." The entire Project Jackson has no contract for development in place and is not guaranteed, yet the court looks to the alternative development plan in Ordinance No. 2012-14 and only considers what part of that plan is under contract. The contract is just the first step in a multi-step process for the alternative plan, which does not require a new or amended TIF.

IV. Freedom of Information Act Claims

The court's finding of law that the "specific purpose" is clear and that a governmental entity is only required to announce the purpose of the session, is inconsistent with the language the legislature used. The statute provides as follows:

> § 30-4-70. **Meetings which may be closed; procedure; circumvention of chapter; disruption of meeting; executive sessions of General Assembly.**
>
> (a) A public body may hold a meeting closed to the public for one or more of the following reasons:
> (1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.
> (2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.
> . . . .

(5) Discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses in the area served by the public body

. . .

(b) Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, "specific purpose" means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. **However, when the executive session is held pursuant to Sections 30-4-70(a)(1) or 30-4-70(a)(5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated. (Emphasis Added)**

The court's conclusion, that a City may enter executive session with only announcing the authority for the session, to wit: "discussion or negotiation incident to proposed contractual arrangements" and nothing more, makes the last sentence in subsection (b) irrelevant, surplusage. If the legislature did not intend the City to provide more information than the wording of the statute, why would they add the language in (b) where they exempt naming of the individual or the entity in the specific description under (a)(1) and (a)(5)? Clearly, the legislature intended that more information beside the statutory language was required, but needed to add the last sentence in (b) in order to protect the privacy of the individual, and the economic advantage in recruiting businesses. Under the court's interpretation of the law, the legislature did not need that language. It is a well established principle of statutory construction that laws should be construed so as not to render the language in them as surplusage. The court's holding in the case at bar does exactly that. State v. Sweat, 665 S.E.2d 645, 379 S.C. 367 (S.C.App. 2008) " A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous...." citing Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citing 82 C.J.S. Statutes § 346). See also Pike v. S.C. Dep't of Transp., 332 S.C. 605, 618, 506 S.E.2d 516, 523 (Ct.App.1998), aff'd as modified, 343 S.C. 224, 540 S.E.2d 87 (2000). State v. Sweat, 665 S.E.2d 645, 379 S.C. 367 (S.C.App. 2008).

V. The Essence of the Case

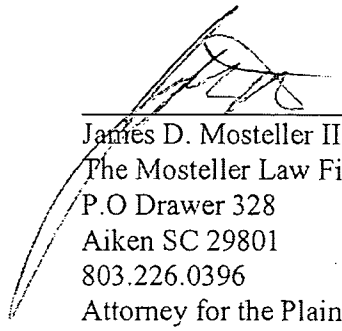
Plaintiff requests the court reconsider its order by considering the overall flavor of the case, its essence. The City wants desperately to build a minor league baseball stadium, believing it delivers economy advantage to its citizens, notwithstanding all the economic research to the contrary. These stadiums are sold to local governments on false promises of economic stimulus. The City treated this from the start as a paperwork exercise and never really attempted to make pre requisite findings of fact with any basis in the legislative record, merely reciting the language as required by the statute.

What is clear from the evidence, the TIF area contains over 500 parcels of property in 457 acres which includes million dollar homes. In such an area the City did not attach the parcel list to the ordinance; no one in the City knows which of those 500 parcels are blighted or which are legitimately declining in value. With the area having increased in value more than $100 million no effort was made by the City to examine the condition of the properties in the TIF area. The citizens, who do not get a vote on this issue, need to know which parcels are still blighted, which parcels truly will never become productive because of persistent blight. The citizens should be able to look at an ordinance and understand why the City took the actions they did. No one including the Defendants can answer that question by looking at the ordinance. This is a blatant case of the City voting for a result, then looking for the evidence later to justify their actions. Every time the City "produces" the evidence, when looked at in detail, as opposed to just a paperwork exercise, it proves the opposite from what the City claims it proves.

There may be blight somewhere in the existing TIF or in the City, but if there is, the voters and the citizens should not have to guess where the blight is. The actions of the City in

the case at bar meet neither the spirit nor the letter of the TIF statute. For the reasons set forth above, Plaintiff respectfully requests the court reconsider its order and find for the plaintiff. .

Respectfully submitted on this the 2nd day of September, 2014.



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Attorney for the Plaintiff

STATE OF SOUTH CAROLINA	COURT OF COMMON PLEAS
Stephen P. Donohue,	SECOND JUDICIAL CIRCUIT
Plaintiff, Respondent	CASE No.: 2013-CP-02-02781
vs.	AFFIDAVIT OF STEPHEN P. DONOHUE
City of North Augusta, the Mayor and City Council of North Augusta,	
Defendants, Petitioners	

COPY
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SEP 02 2014
4:10 KS
AIKEN COUNTY
CLERK OF COURT

Comes now the undersigned, Stephen P. Donohue, after having been duly sworn deposes and states the following:

1. I am Stephen P. Donohue, the plaintiff in this case and a resident of the River Club, the neighborhood immediately to the east of the proposed development by the Defendants, the city of North Augusta, which has been designated by them as Project Jackson.
2. On July 17, 2014 late in the afternoon, my attorney forwarded an email from the Defendant's attorneys that they intended to submit 132 graphs of declining values in the TIF area. Neither my attorney nor I had been advised of this development until only 17 hours before trial.
3. Up to that point our discovery requests for all documents submitted to City council substantiating the finding of "static or declining values" in the TIF area prior to the passage of Ordinance No. 2013-19 had produced no documents. The City had only relied on the much discredited 16 properties which was submitted to City council in October 2013 and then used to support the City's petition to the South Carolina Supreme Court for original jurisdiction in this case in January 2014.
4. Plaintiff was preparing its case for trial and had no opportunity to review in detail, the 132 graphs and what they represented. Plaintiff made timely objections to these graphs at trial.
5. Since the trial, Plaintiff spent two full working days reviewing the graphs. Checking parcel numbers against the Assessor's database, reviewing the deeds, as well as street addresses and pictures of current property.

6. The result of that research is nothing short of shocking. In fact, instead of showing a decrease in value, the parcels increased in value since the TIF was started in 1996. Apparently the City submitted the graph of any parcel that showed any decrease in value since the start of the TIF.

7. For example, Parcel No. 007-18-02-031, shows a decrease of $37,350 from 2008 to 2013. The property was valued in 2008 at $171,870 and in 2013 decreased to $134,520. That parcel is a condominium. It was built on vacant land in 2007. Defense exhibit 9 includes 45 such condominiums in the same complex, the Landings at River Club. The City claims those properties declined in value, using the time period from 2007, the start of the nationwide housing recession, to 2013. In fact, those condominiums were built on a 4.28-acre parcel of land, deeded to the Landings developer in 2004 (Deed book 2467, page 65). Total value of that acreage in 2004 was $500,000. Today those condominiums have added over $6,000,000 in value to the TIF area. All 45 of those condominium parcels have substantially increased in value since the TIF was created in 1996.

8. I then looked at the Hammond's Ferry properties included in Defense Exhibit 9. There are 73 such properties: some vacant lots, some with houses on them, and about three commercial properties. Again, the City claims these went down in value. These parcels are all part of the Hammond's Ferry development that began with 47.77 acres deeded to the Hammond's Ferry developer in 2004 (Deed Book 2457, pages 126-131) by the City for $816,205. Those parcels are now valued at over $19 million. That is an $18 million increase since the current TIF started. Every one of those parcels has gone up in value since the TIF's creation in 1996 not down. These are properties west of Georgia Avenue for which the City made findings in section 2.08 of Ordinance No. 2013-19 was especially blighted, undeveloped and would remain static or decline [in value] according to the Court's order.

9. Two of the parcels in question, 007-14-02-009 and 007-14-02-010, are located at 207 Clifton Avenue, one of the sixteen properties the City used in October 2013 and their petition to the Supreme Court. Their own graph shows these parcels went up in value $61,369 since 2002.

10. Another parcel, 007-14-17-008, which Defendant provided to Plaintiff in discovery is located at 505 Sikes Avenue the only other property in the original 16-property list provided to Council and the Supreme Court wherein the City claimed decreased in value. In fact, that parcel more than doubled in tax value between 2002 to 2013 going from $20,985 to $44,100.

11. It is a complete misrepresentation of the true facts for the City to submit 132 property graphs claiming proof of declining values only 17 hours before trial. When analyzed in detail, the evidence proves the Plaintiff's case – property values in the TIF and in the area west of Georgia Avenue have gone up and gone up dramatically. It is this very practice of evidence ambushing that the discovery rules were intended to eliminate.

12. The total increase in property values in the parcels submitted by the City is over $24 million since the TIF started in 1996. The City's Exhibit 9 proves not only is the defendant arbitrary and capricious in its implementation of the TIF statute, it actually misrepresents the facts of property values.

13. The ultimate irony is that the 25-acre parcel upon which Project Jackson will be built and which the mayor and the city manager testified was blighted with old bricks and defunct factories went up in value, by $22,726 since 2007 (Plaintiff's Ex. 6). Even that parcel fails the "static or declining value" test of the TIF law.

FURTHER AFFIANT SAYETH NOT.

Stephen P. Donohue

SIGNED AND SWORN TO BEFORE ME THIS 2nd DAY OF Sept, 2014.

Carla Williams

Notary Public for South Carolina
My commission expires: 8/13/2017

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Stephen P. Donohue,	
Plaintiff,	**Case No. 2013-CP-02-2781**
vs.	**CERTIFICATE OF MAILING**
City of North Augusta, the Mayor and City Council of North Augusta	
Defendants.	

THIS IS TO CERTIFY that I, the undersigned employee of the Mosteller Law Firm, did this day place in the United States, postage prepaid and return address clearly marked and indicated, in the case of **Stephen P. Donohue v. City of North Augusta, the Mayor and City Council of North Augusta,** the Defendants, **City of North Augusta, the Mayor and City Council of North Augusta**; the **Notice of Motion; Motion and Memorandum in Support of Plaintiff's Motion to Alter or Amend the Judgment** addressed as follows:

Mr. Belton Zeigler
P.O. Box 11509
Columbia, SC 29211

Kyle Tennis
Clerk to the Honorable J. Ernest Kinard, Jr.
P.O. Box 1707
Camden, SC 29021

9/5, 2014
Aiken, SC

Carla Williams
Carla Williams
Paralegal to James D. Mosteller III

EXHIBIT C

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN) FOR THE SECOND JUDICIAL CIRCUIT
) CASE NO.: 2013-CP-02-02781
Stephen P. Donohue,)
)
Plaintiff,)
)
v.)
)
City of North Augusta, the Mayor and)
City Council of North Augusta,)
)
Defendants,)

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

SEP 19 2014

Liz Godard
C.C.C.P. & G. A., Aiken County, S.C.
Deputy Clerk

ORDER

Subsequent to the order I executed that was filed on August 20, 2014, Plaintiff filed a motion on September 2, 2014 seeking an order to alter or amend the previous order I signed that was filed on August 20, 2014.

I have carefully considered each of the issues raised in the 12 page motion, memorandum, and the attached affidavit. I decline to alter or amend as I feel that all issues were addressed in the original order I signed, although I concede that I could have made the order much more lengthy by discussing in more detail the issues addressed.

Accordingly, the motion to alter or amend is denied.

IT IS SO ORDERED.

Honorable J. Ernest Kinard, Jr.
South Carolina Circuit Court Judge

Camden, South Carolina
September 17, 2014

FILED 9.19 2014
Liz Godard
C.C.C.P.&G.S
12:00 pm
Deputy Clerk

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP0202781

Stephen P Donohue	City Of North Augusta Mayor And City Council Of North Augusta
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

9/19/2014

Circuit Court Judge | Judge Code | Date

For Clerk of Court Office Use Only

This judgment was entered on **September 19, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **September 19, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

James D. Mosteller III PO Box 1832 Barnwell, SC 29812

ATTORNEY(S) FOR THE PLAINTIFF(S)

Gary Tusten Pope Jr. PO Box 11509 Columbia, SC 29211
Kelly F. Zier PO Box 6516 North Augusta, SC 29861
Belton Townsend Zeigler PO Box 11509 Columbia, SC 29211-1509

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.