



THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

RECEIVED

OCT 21 2014

SC Court of Appeals

Stephen P. Donohue

Appellant,

v.

City of North Augusta,
the Mayor and City Council
of North Augusta

Respondents.

**MOTION FOR CERTIFICATION BY SUPREME COURT
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 requests that this Court certify this case for review pursuant to Rule 204(b) of the South Carolina Appellate Court Rules. The speedy resolution of this case is of significant public interest to the citizens of North Augusta and further delay may result in the loss of a significant and unique economic development opportunity. This case also involves matters of statutory interpretation arising under a) the South Carolina Freedom of Information Act ("FOIA") South Carolina, and b) the Tax Increment Financing Law located at Chapter 6 of Title 31 of the Code of Laws of South Carolina 1976, as amended (the "TIF Law"). The pendency of these appeals has a negative impact on all local governments seeking to understand and comply with FOIA and on cities and counties that are seeking to lawfully finance local improvements through Tax Increment Financing districts.

I. PROCEDURAL HISTORY

This case was brought by Appellant, Stephen Donohue, in order to invalidate the City's Ordinance 2013-19 (the "Ordinance") which was enacted on November 18, 2013, after 13 months of intensive public debate and review. The Ordinance involved a Tax Increment Finance District (the "Redevelopment District") created by the City pursuant to the TIF Law. Specifically, the Ordinance amended the redevelopment plan for the Riverfront Redevelopment District to allow the City to construct a minor league baseball stadium to support other private development including a hotel and convention center, retail and office space and residences along the City's riverfront ("Project Jackson"). Mr. Donohue alleged that the Ordinance was invalid because the City did not follow the statutory requirements for amending redevelopment plans and because the City violated provisions of FOIA by improperly going into executive session at various times during the year that issues related to Project Jackson were under consideration. Mr. Donohue also alleged that the baseball stadium constituted a speculative nuisance.

The Complaint in this action was initially filed on December 9, 2013, and an Amended Complaint was filed on December 23, 2013. The Amended Complaint was served on the City on December 27, 2013. On January 15, 2014, the City filed a petition with this Court to remove this action to its original jurisdiction due to the important public issues involved and the risk of losing Project Jackson due to delay caused by this litigation. This Court denied the City's petition on April 3, 2014, but gave Judge Ernest J. Kinard exclusive jurisdiction to hear and dispose of the matter. The trial in this matter was held on July 18, 2014, and in an order entered August 20, 2014, the trial court found for Respondents as to all of Appellant's claims.

Appellant initially filed a Notice to Appeal to the South Carolina Court of Appeals on October 17, 2014 (the "Notice of Appeal"). Respondent received a copy of this Notice of Appeal from the Aiken County Courthouse early Monday, October 20, 2014. On the basis of this filed Notice of Appeal, Respondent filed a Motion to Expedite this appeal and a Motion to Dismiss this appeal as untimely with the Court of Appeals. Late in the afternoon of Monday, October 20, 2014, Respondent received a Notice of Appeal to the Supreme Court (the "Replacement Notice of Appeal"). This Notice of Appeal was evidently filed with the Clerk of Court of Aiken County on Monday, October 20, 2014. In the interest of avoiding confusion, Respondent is providing copies of the motions filed with the Court of Appeals along with this motion and supporting affidavit.

II. IMPACT OF FURTHER DELAY

The final resolution of this case is of great importance to the citizens of North Augusta and Aiken County. At stake is Project Jackson; a project to redevelop the North Augusta riverfront area. Redevelopment will transform that area from a blighted and overgrown former industrial site into a thriving urban center. Doing so will fulfill expressly stated urban planning and economic development goals that have guided the City's leadership since the early 1990's in their efforts to create a vibrant district of mixed commercial and residential uses to become the core urban area along the Augusta riverfront. Project Jackson is the culmination of twenty-three years of work by North Augusta's administration and City Council to fulfill this vision. The longer that the City is delayed in moving forward with Project Jackson due to this litigation, the greater the possibility that these opportunities will be lost. The risks of delay that were present when

the City petitioned this Court in January 2014 to remove this case remain present today and have grown greater now that Project Jackson has been delayed for nearly a year.

In order for Project Jackson to move forward, the City must invest \$55 million in various public infrastructure projects, including a new minor league baseball stadium. This investment by the City will incentivize private investment in the Riverfront Area of as much as \$125 million. *See* Affidavit of Todd Glover at ¶¶ 4-5. The most high-profile aspect of Project Jackson is the relocation of the Augusta Green Jackets minor league baseball team to North Augusta. This relocation will be made possible by the City's new baseball stadium in Project Jackson. The Green Jackets and the new stadium will serve as an entertainment and recreational anchor to draw foot-traffic, restaurants and hospitality businesses into the new town center. Among the businesses that have entered written letters of intent to locate in the riverfront area around the baseball stadium include a nationally recognized flagship hotel chain that intends to build a hotel adjacent to the City's planned conference center, a nationally recognized craft beer-maker that intends to build a restaurant and brewery near the stadium, an award-winning restaurant group that specialized in fine southern cuisine, and two upscale local retailers. *See* Affidavit of Todd Glover at ¶¶ 13-14. Each of these businesses has a draft-letter of intent with the City to locate in the district and are awaiting only the resolution of this case to formalize their commitments. *See* Affidavit of Todd Glover at ¶¶ 13-14. Protracted delays in getting the project underway could result in the loss these tentative commitments.

In addition, a 600 employee technology-based corporate headquarters has chosen to locate within the Riverfront District. *See* Affidavit of Todd Glover at ¶ 5. Given the corporations move-in schedule, the City is proceeding with interim financing for structured

parking and other infrastructure to support this new facility. But as the permanent financing source the City intends to use the same TIF financing that it will use for the other elements of Project Jackson.

City Council has determined that the best way to fund the City's investment in Project Jackson is through issuing TIF bonds which will be paid from the additional revenue that will be created as existing millage rates are applied to increasing property values within the Redevelopment District. If the City is unable to issue TIF bonds to finance its portion of Project Jackson, the private development committed for Project Jackson will not occur. The issuance of these bonds is entirely dependent upon the final resolution of this case. *See* Affidavit of Todd Glover at ¶¶ 16-20.

The successful development of Project Jackson hinges on the construction of the baseball stadium and the window for starting this construction is extremely narrow. Due to complications related to season ticket sales and sponsorships, the Green Jackets cannot move into the stadium during the middle of the baseball season. *See* Affidavit of Todd Glover at ¶ 16. Construction has to be timed so that the stadium is complete before the season begins. *See* Affidavit of Todd Glover at ¶¶ 16-18. To meet the schedule of having the stadium available for play at the start of the 2016 minor league baseball season, construction must begin in late 2014 or in the first weeks of 2015. If the bonds to finance construction are not issued by the end of January 2015, the entire project—the hotel and conference center, restaurants and retail, and all of the benefits that will come with it—will be delayed for an entire year. *See* Affidavit of Todd Glover at ¶¶ 16-22. This would delay by a year the ability of the hotels and restaurants referenced above to begin operations, putting their commitments in jeopardy.

If Project Jackson is delayed for a year, the cost to the citizens of North Augusta will be great. During the past year of delay, both interest rates and the costs of construction have gone up significantly. During the pendency of this appeal, these costs will continue to increase, driving up the overall costs of Project Jackson to the City and its taxpayers. *See* Affidavit of Todd Glover at ¶ 22.

In the event that this case is permitted to be heard in the Court of Appeals, it is a very likely that any decision there will be further appealed to this Court. The requirements of bond financing are such that even with a favorable decision by the Court of Appeals in this matter, financing could be blocked until all opportunities for petitions for rehearing, for hearing en banc, and for supersedeas to the Supreme Court were exhausted. This process could add many months to the date by which finality is achieved, thereby delaying the start of the Project Jackson by the period in question, and creating real questions about whether developers and others will be willing to wait out the delays. Even if this Court declines to hear such an appeal, the delay caused by the possibility of additional proceedings on appeal will likely result in the loss of an entire year in the development of Project Jackson.

III. IMPACT UPON OTHER CITIES AND COUNTIES

Mr. Donohue's claims have created uncertainty regarding the proper interpretation the TIF Law and FOIA as well as uncertainty concerning the need for a formal "legislative record" upon which he asserts all decisions of the governing bodies of local governments across South Carolina must be made. Mr. Donohue's interpretation of FOIA is in contradiction to the universally accepted standard for designating the subject matter of executive sessions on public agendas. This standard is applied on a weekly basis by the

governing bodies of hundreds of different counties, cities and special purpose districts. In addition, his assertion that a written “legislative record” is required to support the findings of fact in resolutions and ordinances of local governments is counter to the most basic practices of local governments and calls into question the ongoing practices of local governing bodies throughout South Carolina.

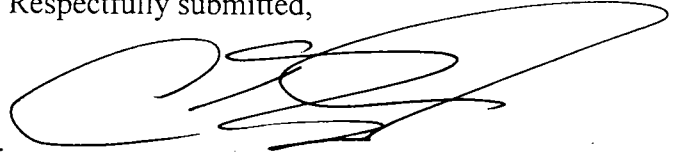
Mr. Donohue’s appeal also challenges the most commonly accepted interpretation for the requirements of amending a redevelopment plan under the TIF Law. A large percentage of cities and counties throughout South Carolina have created TIF Districts and regularly amend them as North Augusta has done. Until this appeal is resolved, the accepted process for carrying out such amendments is called into question. The pendency of this claims, spurious through they may be, has a negative effect on the efficiency and certainty of local governments throughout the State.

IV. CONCLUSION

Mr. Donohue has had every opportunity to challenge and test the process used by the City to amend its Redevelopment Plan and prepare for Project Jackson. In response, the City has taken every step that it could to protect this important economic development opportunity while responding to Mr. Donohue’s claims. However, a very real possibility exists that the all or part of the benefits of Project Jackson could be lost due to the delay caused by this appeal, regardless of its lack of merit.

WHEREFORE, pursuant to Rule 204(b), SCACR, and the reasons set forth herein and in the supporting affidavit submitted herewith, the City respectfully requests that this Court certify this appeal for review and transfer all related motions currently before the Court of Appeals to this Court for review.

Respectfully submitted,



By: _____

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ATTORNEYS FOR RESPONDENTS

Columbia, South Carolina
October 1, 2014

5. The principal reason for this increase is that the development has attracted Medac Inc. to relocate its corporate headquarters and approximately 600 jobs to the Development District. The City will construct structured parking and other infrastructure to support Medac.
6. For its part, the amount that the City plans to finance to build the necessary facilities and infrastructure has increased from \$43 million to \$55 million.
7. The City remains in the position of not being able to proceed with Project Jackson and the redevelopment of its riverfront area until there is a final resolution of this litigation and any appeals.

Progress of Project Jackson to Date

8. These increases in investment reflect that the City has continued to work since initiation of this litigation to promote the development to draw in additional businesses and private investment and that the private developers remain committed to Project Jackson.
9. In addition to promoting Project Jackson, the City and the developers have continued to perform any design and engineering work that could prudently be done without the full assurance that Project Jackson would move forward.
10. The architects have moved beyond the conceptual stages of planning for the baseball stadium and are in the design stages; planning for a construction start date as early as December 2014. The City has put the construction of the stadium out for bid and plans to select a contractor by the end of October 2014.

11. Site engineering work has progressed throughout the past nine months to analyze the Project Jackson site to determine the amount of remediation that will be necessary due to the presence of high levels of brick rubble in the soil.
12. To date, the City has spent over \$650,000 on designing Project Jackson and planning for the City's financing of the facilities and infrastructure.
13. The City has on hand draft letters of intent from a number of different businesses that intend to locate within Project Jackson. These letters of intent have been fully negotiated and await the signatures of the parties.
14. Although the specific names of the businesses remain confidential, they include a national flagship hotel and conference center operator, one restaurant branded by a nationally recognized craft brewery, one award winning fine dining restaurant with a focus on regional cuisine, and two upscale local retailers.
15. Each of these commitments from businesses is contingent upon the City constructing the baseball stadium to be occupied by the Augusta Green Jackets minor league baseball team. At this time, the ownership of the Green Jackets remain committed to occupying the baseball stadium.

Effect of Further Delay Caused by an Appeal

16. The City has been informed by the Green Jackets ownership that it is not feasible to relocate the team into the new stadium in the middle of a season. Complications with sponsors and season ticket holders require that the stadium be ready for the Green Jackets to move in at the beginning of a season.
17. The 2016 Green Jackets baseball season begins in April 2016.

18. It will take approximately 14 months to construct the stadium. Therefore, in order for the stadium to be ready by the beginning of the 2016 season, construction must begin by the end of January 2015. In order to finance the costs of the stadium, and in order for construction to begin, the City must have in place bonds that cannot be issued until this appeal is resolved.
19. Before the City may issue bonds to finance the costs of the stadium, it must go through an approximately eight-week process of preparing the disclosure documents for the bonds, having the bonds rated by rating agencies, marketing the bonds and working with potential investors and closing the transaction.
20. One critical issue that must be resolved prior to the issuance of any debt is the existence of any litigation or related appeals that could endanger the revenue streams that would support the bonds. While this appeal remains unresolved, it is not possible to market the bonds for sale. It is irrelevant to potential investors that Mr. Donohue's claims in this appeal are entirely without merit.
21. Since the bonds cannot be issued until this appeal is resolved, and construction cannot begin until the bonds are issued, in order to have the baseball stadium complete in time for the 2016 baseball season, this appeal will have to be resolved by approximately December 15, 2014.
22. If this appeal is not resolved in time, the development of Project Jackson will have to be delayed for an entire year. The costs of this project have already increased due to increases in construction costs and interest rates and will continue to do so. More importantly, during this year-long delay, the City could

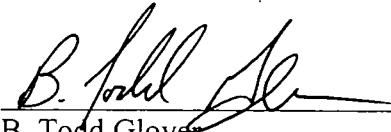
easily lose many of the commitments that it currently has from businesses to locate in Project Jackson.

23. Mr. Donohue appears to have been aware throughout the entirety of this case that the City cannot move forward with Project Jackson as long as his case stands in the way.

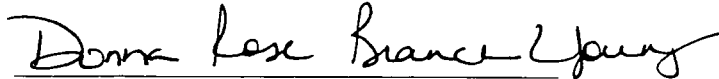
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SIGNATURE PAGE OF TODD GLOVER


B. Todd Glover

SWORN to BEFORE me the 20th day of October, 2014.


Notary Public for South Carolina
My Commission Expires: 4/10/19

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I have served the Motion for Certification by the Supreme Court, along with a supporting affidavit (the "Motion") on Stephen P. Donohue by depositing a copy of the Motion in the United States Mail, postage prepaid, on October 21, 2014, addressed to his attorney of record, James D. Mosteller, III, P.O. Drawer 328, Aiken, SC 29801.

By: 
Drew Hunsicker

Columbia, South Carolina
October 21, 2014



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October 21, 2014

VIA HAND DELIVERY

Mr. Daniel Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

RECEIVED

OCT 21 2014

SC Court of Appeals

Re: Appeal of Stephen P. Donohue v. City of North Augusta

Dear Mr. Shearouse:

Please find enclosed the City of North Augusta's Motion for Certification by the Supreme Court related to the above captioned appeal. The Appellant, Stephen P. Donohue, filed his Notice of Appeal to the Court of Appeals (the "Notice of Appeal") with the Aiken County Clerk of Court on Friday, October 17, 2014. The City received a copy of this Notice of Appeal from the Aiken County Courthouse, on Monday, October, 20, 2014. On Monday, Appellant filed a replacement Notice of Appeal with the Aiken County Clerk of Court appealing the above captioned action to the Supreme Court (the "Replacement Notice of Appeal"). The City received the Replacement Notice of Appeal late Monday afternoon.

On Monday, October 20, 2014, in the interest of further expediting the appeal as the City is has requested, the City filed in the Court of Appeals its Motion to Dismiss the appeal of the above captioned case as untimely, along with a supporting memorandum and affidavit, and Motion for an Expedited Schedule. Now that the City is aware that the appeal was filed in the Supreme Court, the City hereby provides copies of the motions that are before the Court of Appeals as well as the enclosed Motion Consenting to the Certification by the Supreme Court. By call this afternoon, I have made the Court of Appeals aware of this situation and will file with them a copy of this motion and supporting affidavit.

I apologize for any confusion that our haste in resolving this appeal may have in getting these motions disposed of. If you require my assistance in any way in properly presenting these motions to the Court for review please do not hesitate to let me know. Opposing counsel has been served by a copy of this letter, the enclosed Motion Consenting to Certification by the Supreme Court and affidavit. Thank you for your attention to this matter. If you should have any questions please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be 'C.D. Rhodes', written over a large, light-colored oval shape.

C.D. Rhodes

Enclosures as stated

cc: Ms. Jenny Abbott Kitchings (*Via Hand Delivery*)
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

James D. Mosteller, III (*Via U.S. Mail*)
The Mosteller Law Firm, LLC
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