

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM AIKEN COUNTY

J. Ernest Kinard, Jr., Circuit Court Judge

Case No.: 2013-CP-02-02781

Stephen P. Donohue,

Appellant

v.

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

Respondent.

INITIAL BRIEF OF APPELLANT

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S.C. Supreme Court

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STATEMENT OF ISSUES ON APPEAL

1. WHERE A STATUTE AUTHORIZES POLITICAL SUBDIVISIONS TO UNDERTAKE ACTIONS ON CONDITION OF MAKING CERTAIN STATUTORY FINDING OF FACTS, DOES THAT SUBDIVISION MEET THE STATUTORY CONDITION WHEN IT MAKES SUCH FINDINGS WITHOUT ANY EVIDENCE IN THE PUBLIC RECORD SUPPORTING SUCH FINDINGS?
2. WHERE THE TIF LAW AUTHORIZES POLITICAL SUBDIVISIONS TO ISSUE DEBT PROVIDED THE AUTHORIZING ORDINANCE CONTAINS A LIST OF ALL PARCELS IN THE TIF DISTRICT, A FINDING OF STATIC OR DECLINING PROPERTY VALUES IN THE DISTRICT, AND THAT NO OTHER DEVELOPMENT WOULD OCCUR BUT FOR THE CREATION OF A TIF DISTRICT AND THE SUBDIVISION'S ORDINANCE FAILS TO ADDRESS THOSE CONDITIONS HAS THE MUNICIPALITY COMMITTED AN ULTRA VIRES ACT?
3. WHERE A MUNICIPALITY MEETS IN EXECUTIVE SESSION REPEATEDLY OVER THE COURSE OF A YEAR CONCERNING A MATTER OF INTENSE PUBLIC INTEREST AND ONLY DESCRIBES THE "SPECIFIC PURPOSE" OF THOSE MEETINGS AS "DISCUSSIONS OF NEGOTIATIONS INCIDENT TO 1 [2] CONTRACTUAL MATTERS" AND USES THAT DESCRIPTOR FOR ALL EXECUTIVE SESSIONS NO MATTER THE NATURE OF THE CONTRACT OR THE CONTRACTING PARTIES, DOES THAT CONDUCT VIOLATE SOUTH CAROLINA'S FREEDOM OF INFORMATION ACT REQUIREMENT FOR OPEN MEETINGS?
4. WHERE A MUNICIPALITY REPEATEDLY MEETS IN EXECUTIVE SESSION CONTRARY TO SOUTH CAROLINA'S FOIA AND THREATENS ANY CITIZEN WITH COUNTERSUIT IF THEY CHALLENGE THE PRODUCT OF THOSE MEETINGS, SHOULD THE COURT NULLIFY ALL ACTIONS FLOWING FROM THOSE MEETINGS AND THE THREATENED COUNTERSUIT BECAUSE OF THE SERIOUS INJURY DONE TO THE PRINCIPLE OF OPEN GOVERNMENT?

STATEMENT OF THE CASE

The complaint in this action was filed by Stephen P. Donohue and the River Club Homeowners Association on December 9, 2013 alleging that the City of North Augusta, the mayor and city council (Defendants/Respondents) enacted Ordinance 2013-19 authorizing the issuance of Tax Increment Finance (TIF) bonds in contravention to the required findings of the TIF authorizing statute, S.C. Code Ann. §§ 31-6-10, et. seq. The complaint also alleged repeated violations of the Freedom of Information Act by Respondents in the manner in which they entered executive sessions prior to enacting the ordinance. On December 23, 2013, counsel for both plaintiffs filed an amended complaint which dropped the River Club Homeowners Association as a party. The initial complaint was filed within 20 days of the passage of Ordinance No. 2013 -19.

On January 15, 2014, Respondents 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 the Court of Common Pleas of Aiken County and assigned the case to Judge J. Ernest Kinard. Defendants timely answered the Complaint on April 14, 2014, effectively denying all claims.

The trial of this matter was held without a jury on July 18, 2014 and judgment was entered on August 20, 2014 in favor of Respondent denying all claims of Appellant. Appellant received the lower court's order August 27, 2014. Appellant filed a motion for reconsideration under SCRCF Rule 59(e) on September 2, 2014, and served it on September 5, 2014. The court denied the Rule 59 motion on September 17, 2014.

FACTS

Appellant, Steve Donohue (Donohue) lives on the North Augusta Riverfront, less than half a mile where the respondents propose to build a stadium for the privately owned Augusta GreenJackets. The factual background in this case was essentially agreed upon by the parties at trial. In fact many of the exhibits are official records of the City of North Augusta and were introduced as joint exhibits.

In 1991, the City enacted Ordinance 91-07 (Joint Exhibit 1) establishing the North Augusta Redevelopment Commission pursuant to South Carolina Community Development Law, S.C. Code Ann. §§ 31-10-10 et seq. Shortly thereafter the City passed Resolution 91-06 establishing the Riverfront Redevelopment District as the area of operation for the Redevelopment Commission

Five years later, the City enacted Ordinance No. 96-10 in December 1996 (Defendant's Ex. 5) which, inter alia, created a Tax Increment Financing (TIF) District incorporating much of the prior Riverfront Redevelopment District and expanded it to create a 457-acre TIF District. The ordinance incorporated a list of the 239 parcels in the newly created TIF District. The first bond of just \$5,000.00 was issued on December 5, 2001. The maximum amount to be financed by the TIF was approximately Thirteen Million Four Hundred Thousand (\$13,400,000.00) Dollars.

More than a decade later on December 17, 2012 the City enacted Ordinance No. 2012-14 approving a development agreement between the City and the North Augusta Riverfront Development Company. That agreement was executed by both parties on January 8, 2013.

(Plaintiff's Ex. 5). The developer's/City's obligations in that signed agreement were not contingent upon amending the existing TIF nor creating a new TIF district.

Shortly thereafter the defendants were approached about building a stadium in North Augusta for the Augusta GreenJackets baseball team, initially to be sited at the North Augusta Industrial park. (Tr. P. 40). Somehow, the City changed the concept, and defendants began to pursue the GreenJackets stadium project for Riverfront development - code-named Project Jackson. After public hearings and notices the City enacted Ordinance No. 2013-19 on November 18, 2013 which amended the existing TIF to allow additional borrowing of up to Forty Three Million (\$43,000,000.00) Dollars, and extending the repayment period to the year 2048, in order to pay for the new stadium. (Joint Exhibit 14).

Prior to enacting the amending TIF ordinance, City Council did not conduct a new blight study. City Council only reviewed one document concerning static or declining property values in the TIF district, and that document was not discussed by Council on the record. (Tr. Pp 40-41).

I. THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING FINDINGS OF FACT AND WAS IMPROPERLY INFLUENCED BY ITS ERRONEOUS ADMISSION AND RELIANCE UPON INCOMPETENT EVIDENCE AND TESTIMONY IN RENDERING ITS DECISION.

In its order, (pp. 9-11) the lower court relied upon testimony concerning the respondents' actions and "history of the area to be developed to find that there was support in the record to uphold the recitals contained within the TIF ordinance. However, such testimony was ad hoc, created after the City had enacted the TIF. It was also subject to a motion in limine and a standing objection since government should not take action without creating a record of why it takes such action. (See, plaintiff's motion *in limine*, and Tr. Pp. 47 and 48).

As discussed below, the trial court's decision is clearly based upon incompetent testimony, (and in some cases rank speculation by the Mayor about what his fellow council members "knew" about property values). In the case of Horry Telephone Cooperative, Inc., v. City of Georgetown, et al., Opinion No. 27394, June 4, 2014 (S. Ct.), this court held that, "Municipal records properly authenticated or verified are the only competent evidence of the proceedings or transactions of governing bodies". (Emphasis added).

The entire year of official city council minutes (Joint Ex. 6) do not reflect a discussion of the supporting "facts" set forth in the lower court's order. In fact, with respect to property values and blight, the testimony of the City Manager was that the City Council only reviewed one study of so-called declining values *and it was not on open record, nor reflected in the minutes of City Council*. Moreover, that solitary document, was created by the City's attorneys, analyzing 16 properties, but only seven of which were parcels within the TIF district, and a couple were not even inside of the City of North Augusta. Five of the seven which were actually in the TIF district had new construction on them, and one had been recently sold for \$274,900.00, and it was a duplex. (Scott Gudith Affidavit and Photo, Ex. 9, Tr. Pp. 54, 55, 59).

It is important to note that Gudith's testimony was not directly contradicted by any witness for the respondents. It was also buttressed by the testimony of the Appellant, and his analysis of the value of property within the TIF that was also not contradicted. (As an aside, the City manager or the mayor should have known about the building permits it granted on those five parcels, but they seemed to have ignored that in their presentations.)

The trial court also specifically relied upon defendant's Exhibit 9, in its decision. First, that document was created shortly before trial, and not disclosed to Appellant's counsel until hours prior to trial. Secondly, it was never utilized by the City Council in its deliberations, and

thus cannot support the legislative recitals in the 2013 TIF ordinance. Third, once more, it violated the concept set forth in the Horry Telephone Cooperative case set forth above, and Appellant's standing objection to such material being in evidence at all. Appellant not only relied upon the standing objection, but specifically objected to the exhibit. (Tr. 218 -220).

Moreover, Defendant's Exhibit 9, was 136 pages long, and even the trial court did not appear to rely upon anything other than the first page summary. (Tr. P. 234, ll, 14 -17). The trial court's error in relying merely upon the first page graph, is amply demonstrated by the affidavit of Appellant in support of the Rule 59 motion. The *ad hoc* valuation set forth in Exhibit 9 is further addressed below.

The trial court's bias in favor of the municipality is further demonstrated by its finding that, "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." (Order p. 4) Although it costs a lot of money to build a stadium for someone else's benefit, there is nothing in the record, nor in the transcript of testimony that indicates alternate types of funding could not be pursued. There is nothing in the record indicating that the private owners of the baseball team are contributing a dime to this project, nor that they will stay in the stadium until the bond is paid off. In fact, the record indicates that the private owners are leaving their stadium in Augusta, after being there only sixteen years (Tr. P. 12). The bond to build a stadium for such a fickle owner will take until 2048 to repay, far longer than their stay at their current home. There is no indication in the record that the privately owned baseball team cannot afford to build its own stadium in North Augusta without taxpayer supported bonds. Such wealth transfers to private industry should be

carefully scrutinized and not just run through the grist mill of politics and rubber stamped because local politicians said they liked the project.

The trial court committed further error in its finding that the “blight” could not be alleviated without expanding the debt and the payments obligations of the TIF. In January of 2013, merely ten months prior to the passage of the ordinance obligating the taxpayers almost four fold over the original TIF, the City and the developer signed an agreement for development that required no additional TIF funds. In fact, those monies had been collected and banked by the City already pursuant to the prior TIF at approximately \$700,000.00 per year. (Tr. 183, 207)

Another indication of the Court’s over reliance on the incompetent testimony is its finding that the “specific property on which Project Jackson will be developed is unimproved since the TIF District was established 18 years ago” (Order p. 9). The fact that it had not been improved is irrelevant under the statutory test of “static or declining values, when plaintiff introduced un-contradicted evidence that the particular parcel in question had increased in value from its purchase in 2007 for \$436,920.00 to \$459,646.00 one month before trial. (Plaintiff’s Ex. 6, Aiken County Tax Assessor’s certified value). Moreover, the 2011 development plan of the City two years earlier did not identify that parcel as being “blighted” even though other parts of the city were. (Tr. Pp 226, 227).

The trial court’s deference to legislative findings is the correct standard, but should not be considered a rubber stamp for any action taken by a taxing authority. Simply having crumbling buildings and some brick on the riverfront does not mean that values are static or declining. Appellant’s home and subdivision were built on an old city dump, without TIF money, and they had to excavate the dirt to create stable foundations for a very nice neighborhood with homes ranging between the “high threes to over a million” in value. (Tr. 56 -58).

The Court's findings of fact regarding to the City's efforts to "revitalize" the City's urban commercial district, (Order p. 10), it ignores the testimony and findings of the only expert to testify in the case, Tom Regan, who is a sports economist. His uncontroverted testimony was that the stadium is not going into the urban center of the City, and that it is going into a suburban portion of the City. He further testified that building a stadium could adversely impact the tax revenues of the City since it would not be subject to ad valorem taxes, and high end houses like those already built on either side of the proposed site would have a higher impact on increasing tax revenue. Further that there would be no increase in jobs, and no real net positive impact economically for the City, since the existing team is simply moving across the Savannah River a few miles. (Tr. 10 -17, and Plaintiff's Ex. 1). In response to his testimony, the witnesses or the City contended that their intent was to move the City's commercial center to the River, something that is not supported by any of their development plans since 1991.

The alleged facts relied upon the court in upholding the City's actions were never publically debated, the legislative body bases its decisions on information not readily available to the public; which is not publically debated nor discussed in the sunshine of an open meeting, and it involves increasing the bonded indebtedness of the municipality four fold over what was previously authorized, that entity should lose that judicial deference. Appellant contends that not only was the City's process factually in error, to the degree that it was arbitrary and capricious, but that it violated South Carolina's sunshine act, which is discussed more fully further below.

II. THE TRIAL COURT ERRED IN FINDING THAT ONCE THE PREDICATE IS ESTABLISHED FOR CREATING A TIF DISTRICT THE CITY WAS NOT REQUIRED TO COMPLY WITH ALL ELEMENTS OF THE STATUTE WHEN EXPANDING THE AMOUNT AND PAYMENT OBLIGATION OF THE TIF

The original TIF was created in 1996 by City Ordinance No. 1996-10. That ordinance incorporated the findings of “blight” in City Resolution No. 91-06, adopted five years earlier, in 1991. Resolution 91-06 did not include a finding of blight for the area which the City now intends for Project Jackson. Furthermore, those findings by the City were 17 years and 21 years old, respectively, at the time of adoption of the amended TIF in order to fund a stadium for privately owned minor league baseball team. It is unreasonable to assume that the same conditions that existed in redevelopment project area (TIF District) after the fair market value in that area had increased from 22.7 million dollars in 2002 to over 138 million dollars in 2013 and the assessed value had increased over 500%. (Tr. P. 72, Plaintiff’s Ex 3). Had the City Council been as aware of property values as claimed by the Mayor in his testimony, they should have realized the increase in overall value.

The lower court concluded (Order p.6) that the law only requires the finding of blight, declining or static property values and the need for substantial 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 and 80(A). The lower court also indicated that its analysis of the statute made sense since otherwise, cities and counties would be stuck with outmoded TIF plans, and not able to adjust to current circumstances. Of course, a harmonious reading of the statute would indicate that after passage of time, when a TIF is being expanded in size, debt or duration, all the city is required to do under the statute is to make new findings of fact of the need for such expansion at the taxpayers cost, based upon actual and not ad hoc and erroneous numbers created a few hours before trial.

The lower court's 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 substantial public assistance. For example, with a seed of two acres of land a city could amend a TIF repeatedly to 5, 50 or 500 acres and never have to go through the findings required of an initial TIF; or from 5,000 dollars, to five million, to fifty million, which is more analogous to the case at bar.

The court's interpretation of the amending provisions would allow a small TIF district (or small amount of initial debt) 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).

The lower court's interpretation of the law should be compared to the amendment process when the TIF does not expand the area, or time, or change the amount or uses of the proceeds of the municipal debt obligations. SC Code § 31-6-80(F)(1). The legislature was very clear, basically stating that if the city is not going to substantially alter a TIF, then it is only 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. When expanding a TIF, the State legislature required that all procedures be followed as if creating an initial TIF.

The legislature was very detailed when it laid out the amending process for a TIF when the amendment insubstantial, i.e., property wasn't added, area not expanded, or time period not extended. However, when it came to substantial changes to the TIF, the legislature felt it was such a significant departure that they simply wrote "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). Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010) (" Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, ... the court has no right to impose another meaning.")

The trial court’s conclusion of law that following the entire chapter and all of its 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 ignores the streamlined amendment process in the preceding section. See SC Code § 31-6-80(F)(1).

If the legislature intended the statute to be construed as the trial court did, construction it 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 very TIF District the City created in 1996 stands as an example of a TIF which did not spend up to the \$13.4 Million authorized in the ordinance, nor did it complete all the projects in its original plan, which included all the proposals in the “Clemson Study”, the “Final Master Plan for the North Augusta Riverfront Development District”, the “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 Greenway, streetscaping, and the purchase of

about 3 acres across from the municipal building which is far less than all the incorporated plans in the original TIF ordinance.

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 into TIF obsolete plans is simply not true, and 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 more quickly. The court's conclusion of law on amending TIF's leads to the conclusion that once created, TIF's take on a zombie-like existence; never ending – they can spread, and be repeatedly extended never having to undergo the analysis and findings required in the TIF statute.

The TIF law as enunciated by the lower court and Respondents 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 or referendum. For this reason the legislature required the process to be revisited every time a city decided to make substantial changes such as expanding the area, or the time, or the projects themselves. The legislature clearly did not intend the law to be a revolving charge account, where TIF districts can be repeatedly renewed without factual findings required by law. The TIF law was intended to eliminate blight, and once that goal is achieved, the TIF district should be terminated. If the blight still exists at the end of the initial TIF period the legislature intended for the City to make the required findings of fact as the predicate for amending, extending or as in this case, greatly expanding the scope of the TIF. The residents and electors in the City must be able to discern how the City met the requirements

of the law to fund projects that appear to be more like public funds supporting private companies and political egos instead of eliminating blight.

III. THE COURT ERRED WHEN IT HELD THAT ANY AREA IN REDEVELOPMENT DISTRICT UNDER THE COMMUNITY REDEVELOPMENT (SIC) ACT (CHAPTER 10, TITLE 31, S.C. CODE ANN.), IS "DEEMED TO BE BLIGHTED."

The court held that a "under the TIF Statute, any area designated to be a redevelopment district under the Community Redevelopment (sic) 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.

IV. THE COURT ERRED IN FINDING THAT SUFFICIENT ELEMENTS OF THE STATUTORY DEFINITIONS OF BLIGHT WERE MET BY THE PROPERTIES WITHIN THE TIF DISTRICT.

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

1. The Appellant was not advised of this evidence until 17 hours prior to trial, which is surprising late notice, given the Respondent's repeated claims that any delays would be ruinous for their plans. Presumably, had the trial been held even 24 hours earlier, the Respondent would not have had this evidence to support their case. Appellant objected to its offer into evidence at trial, because he did not have time to scrutinize that evidence prior to trial. Furthermore, it violates the discovery rules under Rule 34, SCRCF. Plaintiff had requested all documents in support of the City's finding of reduced or static values in the TIF area on May 23rd. Defense exhibit 9, upon which the trial court grounded its decision for declining or static property values was not provided to Plaintiff until 17 hours before trial. The exhibit was admitted into evidence over Appellant's timely objection.
2. Defense Exhibit 9 does not support the findings of the court of reduced property values. The exhibit consists of 136 graphs of parcels in the TIF that the city claimed showed reduced value. Almost all of the graphs were of recently completed houses or condominiums each worth hundreds of thousands of dollars built since 2007. Even with those properties recent decline in value after a nationwide recession and the burst of the

real estate bubble, these properties actually had increased in value since the TIF was created in 1996. Had Appellant been given sufficient notice of the Respondent's intention to use these graphs, the Appellant could have presented these facts to the trial court to rebut the "appearance" of declining property values. Appellant demonstrated an actual increase in value in his affidavit in support of the Rule 59(e) motion after the trial. The graphs purport to show a drop in value during the same period the entire nation was experiencing a housing recession. When measuring these property values from their origins in larger parcels as undeveloped property in 1996 when the TIF was created to 2013, those 136 properties increased in value well over \$14,000,000 as demonstrated by Appellant's affidavit in his Rule 59(e) motion to the trial court.

In applying the TIF law in this manner – showing declining values in recently completed houses and condos each of which are worth hundreds of thousands of dollars including one house declining from \$906,000 to \$824,000; the City and therefore the trial court in its ruling, adopted what can only be viewed as an Orwellian application of the TIF law. The TIF law, designed to address "the presence of blighting factors as manifested by progressive and advanced deterioration of structures, by the overuse of housing and other facilities, by a lack of physical maintenance of existing structures, by obsolete and inadequate community facilities, and a lack of sound community planning, by obsolete platting, diversity of ownership, excessive tax and special assessment delinquencies, or by a combination of these factors; that as a result of the existence of blighted areas and areas requiring conservation, there is an excessive and disproportionate expenditure of public funds, inadequate public and private investment, unmarketability of property, growth in delinquencies and crime, and substandard housing

conditions and zoning law violations in such areas together with an abnormal exodus of families and businesses so that the decline of these areas impairs the value of private investments and threatens the sound growth and the tax base of taxing districts,” S.C. Code Ann. § 31-6-20, was not meant to be used to finance minor league baseball stadiums in the most valuable upscale residential area in the city. It is also clear the Respondent did not consider those properties in passing the TIF ordinance. The Respondent should not be allowed supplement the record post enactment of the ordinance in order to justify their “findings of static or declining value” required by the TIF 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).

3. 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 (of which the trial court only considered the first page, supra) consisted of almost all 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 the court interpret the statute such that because the condominiums declined in value reflecting the national property recession, they are now justified in

amending the TIF District because of “static or declining values.” that were never presented to the City Council or debated. One property in Defense exhibit 9 was a \$906,000 house in Hammond’s Ferry, built after the TIF was created in 1996, which had gone down in value to \$824,000. It strains credulity to the point of disbelief to think the legislature had that kind of “declining value” in mind when they drafted the TIF statute.

4. Defense exhibit 9 (136 graphs of alleged declining values) did not even contain parcel number 007-17-02-001, the 25 acres of the Riverfront Development District and the very area where the baseball stadium was 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.
5. The only evidence of declining values in the TIF area used by the Respondents prior to enacting the ordinance’s was the spreadsheet of 16 properties provided to City council in October 2013 by the City manager. That list was completely discredited at trial when Plaintiff proved nine of those properties were not even in the TIF District, 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. That evidence proved nothing with regard to the TIF law, yet the City held onto that justification until 17 hours before trial.

V. FREEDOM OF INFORMATION ACT CLAIM

THE TRIAL COURT ERRED IN FINDING THE RESPONDENTS COMPLIED WITH FOIA WHEN AT LEAST NINE EXECUTIVE SESSIONS WERE ANNOUNCED AND DOCUMENTED IN THE MINUTES FOR THE "SPECIFIC PURPOSE" OF "DISCUSSION OF NEGOTIATIONS INCIDENT TO 1 [2] CONTRACTUAL MATTERS."

The trial court's finding of law that the "specific purpose" language in South Carolina's FOIA law is clear and that a governmental entity is only required to cite statutory authority for an executive session without any addition description, is inconsistent with the language of the statute and contrary to this Court's repeated holdings that the FOIA law is to be liberally construed in favor of openness in government, so that government operates in the sunshine and not behind closed doors. The statute provides as follows:

S.C. Ann. § 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 trial court's conclusion of law, 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, it was unnecessary to add the language in (b) to 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 in describing "the matter to be discussed" such that it needed to add the last sentence in (b) in order to protect the privacy of the individual, and the economic/competitive advantage in recruiting businesses.

Under the trial 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 trial court's holding in the case *subjudice* 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).

In amending the TIF District, the City entered into executive session no fewer than 17 times between March 2013 and December 2013 for the purpose of "negotiations incident to 1 [2]

proposed contractual matter(s).” The agenda for the meetings used that language, the council member moving for the executive session used that language in the motion, the mayor, as the presiding officer, used that language to announce the executive session, and the minutes of the meeting used the same language for recording the rationale for the executive sessions.

The City administrator admitted at least half of those executive sessions were for the purpose of discussing Project Jackson (amending the TIF District) which means at least nine executive sessions were held without describing the “specific purpose” of those session beyond the generic statutory description, to wit: “discussions incident to 2 proposed contractual negotiations.” Project Jackson was not referred to on the record. There was no reason not to inform the public it was about Project Jackson. FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private. Quality Towing, Inc. v. City of Myrtle Beach, 547 S.E.2d 862, 345 S.C. 156 (S.C. 2001). In the case *sub judice* the Respondent made no attempt to describe the specific purpose of the executive sessions other than to state it was about contract negotiations in a vacuum. (Joint Ex 6).

Complying with the dictates of the FOIA, especially when meeting in executive session is more than just a technicality, it goes to the very bedrock of open government, see Quality Towing, *supra*. In Brock v. Town of Mount Pleasant, Appellate Case No. 2012-208787, No. 5279 (S.C. App. November 5, 2014) the Court of Appeals held:

Town Council never announced it would discuss whether or not it may retain its own individual attorneys "for all lawsuits now and in the future" relating "to all lawsuits related to Town business" at the public's expense. Moreover, the actions taken were not consistent with the announced purpose. Announcing it would discuss "legal matters" or obtain "legal advice" on a particular issue was an insufficient announcement when Town Council obtained individual attorneys for "all lawsuits now and in the future" as a result of the executive session discussion.

The process in this case under review was so pervasively poisoned by these violations of FOIA in an attempt to cloak the process from public view, the Court should find the fruit of that process poisoned as well and order the City to start the process anew rather than remand it to the trial court for some curative order. Violations of this number and magnitude require serious consequences as a deterrent to other governmental bodies which might consider conducting their deliberations in cloaks of secrecy. These violations were particularly onerous since the Respondent in an attempt to intimidate its own citizens threatened to file counterclaims against any citizen who sued the City concerning this issue or the TIF ordinance. (Tr. P. 126, 127 and Resolution No. 2013-36)

VII. THE ESSENCE OF THE CASE

Not only is it important that the will of the law-maker be clearly expressed, but it is also essential that it be expressed in due form of law; since nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under all forms which the instrument has rendered essential.

Thomas M. Cooley, *A Treatise on Constitutional Limitations*
155 (6th ed. 1890)

The City wants to desperately build a minor league baseball stadium believing it delivers economy advantage to its citizens, notwithstanding all the economic research to the contrary. (See e.g. Nola Agha, *Economic Impact of Stadiums and Teams: The Case of Minor League Baseball*, *Journal of Sports Economics* (2011); Pat Garofola and Travis Waldron, *The Risky Economics of Sports Stadiums*, *The Atlantic* (Sept. 2012); and John Seigfried and Andrew Zimbalist, *The Economics of Sports Facilities and Their Communities*, *The Journal of Economic Perspectives* 95-114 (2000)) `These stadiums are sold to local governments on false promises of

economic stimulus. The City viewed this from the start as a paperwork exercise. By just amending an existing TIF and they could fund the stadium without going to the voters. Only when challenged by the Appellant did the City try to back their amending ordinance into the language of the TIF statute. First the City administrator submitted the infamous 16 properties to City council later used in a petition to the Supreme Court only to be embarrassed that all but two of those 16 properties did not even support the “findings” in their ordinance. Then 17 hours before trial, the City presented 136 graphs of allegedly declining property values in the TIF District. When examined in detail, all but about 9 of the 136 properties were actually developed and increased in value since the creation of the TIF in 1996 or the Redevelopment Area in 1991. Contrary to Respondent’s representations, the 136 properties showed a dramatic increases in value, including 43 condominiums that were built in 2007 and 73 residential units built since 2004 yet which the Respondent claims justify their finding of declining values because of the housing recession, even though “value” was never used in the Ordinance No. 2013-13.

What is clear from the evidence at trial, the TIF area contains over 500 parcels of property in 457 acres which includes million dollar homes. In adopting the ordinance 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, nor was that ever debated on the record.

With the TIF District 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 to determine if blight still existed and if it did to what extent. The City never made a finding that property **values** were static or declining in the TIF District. The trial court’s holding that “undeveloped property” is synonymous with static or declining value is not supported by normal definitional analysis or a

plain language standard. 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 how the City's amendment to the TIF comported with the authorizing TIF law. No one including the Respondents 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 when challenged to justify their actions. Every time the City "produces" the supporting evidence, when it is looked at in detail, as opposed to just a paperwork exercise, it proves the opposite from what the City alleges it proved.

This is not a case of the Appellant asking the courts to substitute their judgment for that of the City. Nor is it a case of asking the courts to make their own findings of blight. This case is only about whether the City actually did the analysis required in the TIF law, made the predicate findings of fact required in the law supported by sufficient evidence, and did all this while meeting multiple times in executive session contrary to South Carolina's FOIA law. The evidence is overwhelming. The City made no attempt to list the parcels in the ordinance required by law, made no finding of static or declining property values in the TIF District, and made no general finding that the property would remain blighted without substantial public assistance. S.C. Code Ann. § 31-6-80(A).

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. And combining that with the nonconforming executive sessions repeatedly held by the Respondent should move this court to strike down the ordinance as drafted as contrary to law and direct the City to comply with the

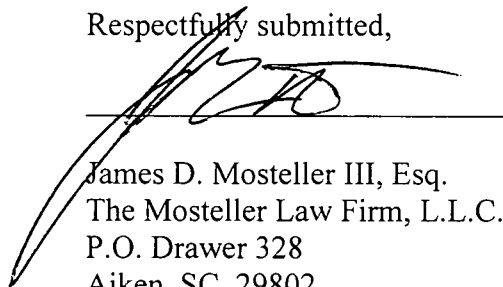
TIF both substance and form while complying with FOIA if it intends to go forward with this project.

CONCLUSION

For all the reasons noted above, this Court should reverse the judgment and order of the circuit court concerning the TIF Ordinance and FOIA. Because the violations of FOIA are so egregious and repeated over the entire process of enacting the TIF Ordinance, this Court should find, on its own, that the resulting Ordinance is the product of a poisonous procedural tree and order the Respondent to repeat the entire legislative process if it still intends to amend the existing TIF District. Moreover, the Appellant should be awarded his costs and attorneys fees pursuant to S.C. Code Section 15-77-300.

December 29, 2014

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM AIKEN COUNTY

J. Ernest Kinard, Jr., Circuit Court Judge

Case No.: 2013-CP-02-02781

Appellate Case No. 2014-002235

Stephen P. Donohue,

Appellant

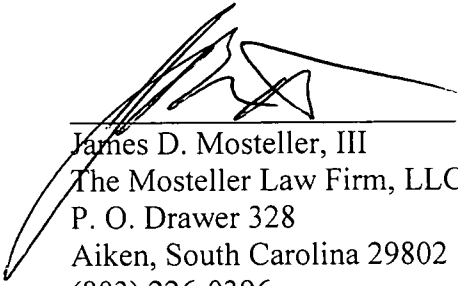
v.

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

Respondent.

PROOF OF MAILING

I hereby certify that on the 29th day of December, 2014, I have served the Appellant's Initial Brief on the Respondents by depositing a copy in the United States Mail to counsel for the defendants with proper postage prepaid to the attorneys at the addresses set forth below.



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S.C. Supreme Court

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