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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Stephen P. Donohue..Appellant,

v.

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

Case No. 2013-CP-02-02781
Appellate Case No. 2014-002235

FINAL BRIEF OF RESPONDENTS CITY OF NORTH AUGUSTA, THE MAYOR AND CITY COUNCIL OF NORTH AUGUSTA

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

UNDER THE TAX INCREMENT FINANCING STATUTE, WHERE MAKING BLIGHT FINDINGS AND RELATED FINDINGS ARE NOT INCLUDED AMONG THE STEPS REQUIRED TO ADOPT A REDEVELOPMENT PLAN, MUST SUCH FINDINGS NONETHELESS BE MADE TO LAWFULLY AMEND A PLAN?

II.

WHERE THE STATUTE DEFINING BLIGHTED AREAS SPECIFICALLY STATES THAT AREAS INCLUDED IN A REDEVELOPMENT DISTRICT ARE DEEMED TO BE BLIGHTED, ARE ADDITIONAL FINDINGS NECESSARY TO ESTABLISH THAT SUCH AREAS ARE BLIGHTED?

III.

IN MAKING LEGISLATIVE FINDINGS, IS A MUNICIPAL COUNCIL REQUIRED TO COMPILE AN EVIDENTIARY RECORD AS IF IT WERE A JUDICIAL OR QUASI-JUDICIAL BODY AND NOT A LEGISLATIVE BODY?

IV.

IN LIGHT OF THE EXTENSIVE EVIDENCE THAT WAS PRESENTED AT TRIAL CONCERNING BLIGHT AND RELATED MATTERS, CAN A CONVINCING SHOWING BE MADE THAT THE NORTH AUGUSTA CITY COUNCIL ACTED ARBITRARILY AND CAPRICIOUSLY IN MAKING ITS LEGISLATIVE FINDINGS ON THESE MATTERS?

V.

ARE PUBLIC BODIES REQUIRED TO ANNOUNCE THE "SPECIFIC PURPOSE" OF AN EXECUTIVE SESSION IN GREATER DETAIL THAN AS SUCH PURPOSES ARE IDENTIFIED IN SECTION 30-4-70(A)(1) – (6)?

VI.

IS THE FAILURE OF A PUBLIC BODY TO ANNOUNCE IN SUFFICIENT DETAIL THE SPECIFIC PURPOSE OF AN EXECUTIVE SESSION A JUSTIFICATION FOR THE INVALIDATION OF THE LEGISLATIVE ENACTMENTS TAKEN IN OPEN SESSION IN COMPLIANCE WITH ALL OTHER REQUIREMENTS OF THE FREEDOM OF INFORMATION ACT?

STATEMENT OF FACTS

I. Early Riverfront Redevelopment Efforts

This case concerns the efforts by the City of North Augusta (the "City" or "North Augusta") to redevelop the North Augusta Riverfront Redevelopment District (the "District"), an area of approximately 457 acres that is located along the Savannah River in the heart of the Augusta-Richmond County metropolitan statistical area.

The District includes both the riverfront of North Augusta and the City's historical commercial district. The riverfront is an area where brick manufacturing, oil jobbing, ceramic kilns and other industrial and warehousing activities took place in the 19th and early 20th centuries. It was largely abandoned after major flooding in the 1920s. (R. p. 124, line 6 – p. 125, line 14) The historical commercial district is located on the bluff immediately above the riverfront area. In recent years, it has been subject to decline as strip malls and big box stores have lured commercial traffic out to the perimeter of the City. (R. p. 164, line 9 – p. 166, line 2)

In the early 1950s, construction of the Clarks Hill Reservoir eliminated the flooding threat. In the 1980's, the City successfully petitioned the Federal Emergency Management Agency to remove flood way or flood plain designation from most of the property in the area. (R. pp. 160, lines 13-21) In the early 1980s, North Augusta commissioned Wilber Smith & Associates to conduct a planning study for the possible redevelopment of the riverfront. (R. pp. 120, lines 3-9) In 1991, the City adopted Ordinance No. 91-07 establishing the North Augusta Redevelopment Commission under the terms of the Community Development Act. (R. pp. 718-722) In that ordinance, the North Augusta City Council (the "Council") found that blight existed within the City and established the new

commission to take action to address it. Shortly thereafter, the Council adopted Resolution No. 91-06 specifically designating the District as the area in which the commission was to function.[1] (R. pp. 256 - 261)

Between 1991 and 1996, North Augusta contracted with the urban planning institute at Clemson University and private sector planners and architects to produce a development plan for the District. (R. p. 129, line 4 – p. 131, line 1). The resulting development plan (the "Plan") established, among other things, the anticipated land uses within the District, the location of streets and standards for streetscapes, and the locations and aesthetic values for an extensive set of parks, greenways, and other public spaces. (R. pp. 273 – 325) The Plan also included proposed major public amenities including a hotel and conference center, commercial center, marina, park and theater complex to be built around a dredged basin beside the riverfront. (R. p. 134, line 2 – p. 135, line 4) The Plan identified sources of funding for implementing the Plan including a tax increment financing district under the provisions of the Tax Increment Financing Law, S.C. Code Ann. §§ 31-6-10 *et seq.* (the "TIF Law").

On December 16, 1996, by Ordinance No. 96-10, the City designated the District as a TIF district (the "TIF District"). It also adopted the Redevelopment Plan as the redevelopment plan for the District for the purposes of the TIF Law. Ordinance No. 96-10 included specific findings that the District was suffering from blight and static or declining property values and public assistance was required to address those conditions. (R. pp. 262 – 271)

[1] Resolution No. 91-06 identifies the undeveloped or under-developed areas along the riverfront as the most important –Tier I–areas to be redeveloped. (R. p. 160, line 6 – 161, line 16)

In 2001, the City issued a small TIF bond and began collecting and spending TIF revenues to implement the Plan on a pay-as-you-go basis. (R. p. 97, line 7-16; R. p. 139, line 8 – p. 140, line 11) Using TIF revenue and other non-TIF funds, the City constructed a new City Administration Building to anchor redevelopment in the area, as well as new parks, roadway improvements, streets and streetscaping, and greenways. (R. p. 150, line 22 – p. 151, line 16) Between 2001 and 2003, the City purchased a number of tracts of contiguous property in the most blighted areas of the District to consolidate them into larger parcels suitable for development and use as open space. Some of these consolidated parcels were resold by the City to the developers of the Hammond's Ferry subdivision located on the western end of the District. Certain riverfront portions of this property were retained by the City to serve as parks and a greenway. (R. p. 136, line 16 – 138, line 15) In total, the City has spent $22.6 million, including TIF revenue and other funds, on improvements within the District. (R. p. 141, line 13 – p. 142, line 13)

II. Project Jackson

Until now, private investment along the North Augusta riverfront has been limited to a golf course, high-end riverfront homes and condominiums to the east of Georgia Avenue and the mixed-use Hammond's Ferry subdivision located approximately one-half mile to the west of Georgia Avenue. (R. p. 108, line 16 – p. 109, line 10; R. p. 143, line 22 – p. 144, line 7) Between these two developed areas sits a large undeveloped track of land where brick manufacturing and other industrial and warehousing activities previously took place.

The central axis and major sight lines of the historical commercial district lead directly to this riverfront site as does Center Street, which is the principal boulevard leading

down from the commercial district to the riverfront. The City's new administration building and surrounding parks overlook the site. It is immediately adjacent to one of the principal gateways between downtown Augusta and North Augusta, the Georgia Avenue Bridge. (R. p. 127, lines 18–128, line 24; R. p. 139, line 18 – p. 140, line 15) For these reasons, this site has been the focal point of the Plan since the City's redevelopment efforts began in 1991. (R. p. 126, line 18 – p. 127, line 13) It is there that the 1996 plan envisioned a commercial center, hotel and conference center, marina, park and theater complex would be built. (R. pp. 296 - 299)

Today, the site remains vacant, blighted and undeveloped. (R. p. 153, lines 12-22) Tangled woodlands hide dilapidated and abandoned industrial buildings, remnants of brick kilns, mounds of rubble and abandoned pits and industrial tunnels. (R. p. 175, lines 6-17; R. pp. 576 - 581). The area is frequented by the homeless and squatters. (R. p. 176, lines 12-15) The soil throughout the site contains a large quantity of brick rubble that will require significant subsurface mitigation in order to be suitable for commercial construction. (R. p. 111, line 6 – p. 112, line 7; R. p. 175, lines 17-23)

The 2008 recession brought redevelopment of the District to a halt. (R. p. 143, line 22 – 145, line 5) In 2012, with the beginning of the current economic recovery, the developer of Hammonds Ferry, North Augusta Riverfront, LLC ("Riverfront"), proposed to build the first elements of the city center envisioned for the site. It was to be, however, a very tentative start. Under the 2012 development agreement between Riverfront and the City (the "Riverfront Agreement"), the City would have invested approximately $2.4 million in infrastructure improvements in exchange for an agreement by Riverfront to build

two 4,000 square-foot commercial buildings. (R. p. 72, line 24 – p. 73, line 6; R. p. 114, line 24 – 115, line 12; R. p. 168, line 9 – 169, line 23; R. pp. 226 - 246)

While the Riverfront Agreement was being negotiated, a second developer, Greenstone, came forward with a plan to construct, again in partnership with the City, a baseball stadium for its minor league baseball team, the Green Jackets, and an associated city center development. (R. p. 71, line 7 – 72, line 20; R. p. 168, line 24 – 171, line 4) Under the Greenstone proposal, which became known as "Project Jackson," the City would construct a minor league baseball stadium, a convention center, and parking decks on the City's riverfront site. Greenstone would commit to construct at least 70,000 square-feet of restaurant, retail and office space, a 200-room hotel, and a YMCA on adjoining land. (R. pp. 766 - 777) Because the Council found that Project Jackson presented a superior value to the City and would be a superior catalyst to the redevelopment of the surrounding property, the City Council, in conjunction with Riverfront, determined to pursue it instead of Riverfront's plan. (R. p. 71, line 7 – 74, line 20; R. p. 168, line 24 – p. 171, line 4)

A minor league baseball stadium and structured parking were not envisioned in the original 1996 Plan. Therefore, financing the City's part of Project Jackson using TIF revenue required amending the Plan to include new projected uses and to provide for additional costs. (R. p. 78, lines 9-22) Over a fifteen month period ending in late 2013, and after not less than 13 opportunities for public input before the City, Aiken County and the Aiken County School District, the Council adopted Ordinance No. 2013-19 to make these amendments. (R. pp. 764 – 776; R. p. 117, line 10 – 119, line 2)

During this 15 month period, the Council went into executive session on a number of occasions in order to discuss the ongoing negotiations with Greenstone as well as the

negotiation of intergovernmental agreements with Aiken County and the Aiken County School District. In each instance where the Council went into executive session to discuss the matters, it announced the purpose of the executive session as "negotiations incident to 1 [2] proposed contractual matter." (R. pp. 723 - 763) No votes were ever taken in executive session. (R. p. 146, line 17 – 149, line 14)

STANDARDS OF REVIEW

Questions of statutory construction are subject to de novo review on appeal. *Perry v. Bullock*, 409 S.C. 137, 140, 761 S.E.2d 251, 252-53 (2014). Because this case was heard by the circuit court sitting as finder of fact, any factual determinations of the circuit court are subject to the same standard of review as those of a jury and should not be disturbed if there is any evidence which reasonably supports the judge's findings. *Mosley v. All Things Possible, Inc.*, 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011); *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

Other factual questions under review here concern whether facts exist to support the legislative findings made by the Council in enacting Ordinance No. 2013-19. An ordinance of a municipality is a legislative enactment and the courts give such legislative actions "a strong presumption in favor of validity." *Bob Jones Univ., Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963). Legislative action will be upheld unless it is shown that the action is "arbitrary, unreasonable, or in obvious abuse of . . . discretion, or unless [the municipality] has acted illegally and in excess of its lawfully delegated authority." *Id.* 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 should not overturn the ordinance "as long as the decision is 'fairly

debatable.'" *Petersen v. City of Clemson*, 312 S.C. 162, 165, 439 S.E.2d 317, 320 (Ct. App. 1993) (quoting *Rushing v. City of Greenville*, 265 S.C. 285, 217 S.E.2d 797 (1975)).

Where an ordinance includes factual findings, the validity of such findings are given a similar degree of deference by the courts. A municipality's governing body is "presumed to have investigated and found conditions such that the legislation which it enacted was appropriate." *Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 169-70, 72 S.E.2d 66, 68 (1952) (quoting 58 Am.Jur. 954, § 23). "Legislative findings of fact, while not binding upon the court, will not be overturned except by convincing evidence to the contrary." *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683, 694 (1955).

ARGUMENT

I.

S.C. CODE ANN. § 31-6-80 REQUIRES BLIGHT FINDINGS BEFORE TIF BONDS ARE INITIALLY ISSUED, NOT WHEN REDEVELOPMENT PLANS ARE ADOPTED OR AMENDED.

There are two steps to the establishment and funding of a TIF District: (1) the approval of a redevelopment plan, and (2) the issuance of TIF bonds to fund the plan. S.C. Code Ann. §§ 31-6-80; 31-6-70 (2007). Municipalities may take both steps simultaneously but that is not required. The statute provides that up to ten years may elapse between the steps. S.C. Code Ann. § 31-6-70.

S.C. Code Ann. § 31-6-80(B)-(E) lays out the procedures for approval of a redevelopment plan. Subsection (B) of that section reads:

> Before approving any redevelopment plan under this chapter, the governing body of the municipality must hold a public hearing on the redevelopment plan after published notice in a newspaper of general circulation in the county in which the municipality and any taxing district affected by the redevelopment plan is located not less than fifteen days and not more than thirty days prior to the hearing.

Subsections (C)-(E) go on to specify the notices that must be given to other taxing entities (*e.g.*, counties, school districts, and special purpose districts), the process for such entities to indicate whether they will participate in the plan or not, the newspaper notice that must be published if the municipality adopts the plan, and other matters. Nowhere in the procedures for approving a redevelopment plan are there any requirements of findings of blight or that property values remain static or are declining. *See* S.C. Code Ann. § 31-6-80(B)-(E).

The requirements for blight and property value findings appear only in Section 31-6-80(A). Subsection (A) specifies that these findings that must be made "[p]rior to the issuance of any obligations under this chapter," *i.e.*, before the initial TIF bonds are issued. Thus, these findings are a requirement for the initial issuance of TIF bonds, not for the approval or amendment of a redevelopment plan. The statute is carefully structured to separate the requirements for making blight and property value findings from the processes for the approval or amendment of the redevelopment plan.

The latter point is important because this appeal involves a challenge to the amendment of a redevelopment plan. The parties agree that the procedure for amendments of this kind is established by S.C. Code Ann. § 31-6-80(F)(2), which provides that such amendments shall be made "in accordance with the ***procedures*** provided in this chapter for the ***initial approval*** of a redevelopment project and designation of a redevelopment project area." (emphasis supplied). The procedures for the initial approval of a redevelopment plan are those set forth in S.C. Code Ann. § 31-6-80(B)-(E). They do not include any requirements for findings concerning blight or property values.

Under Appellant's interpretation of Section 31-6-80, if a municipality eliminated the obvious signs of blight in the early stages of implementing a redevelopment plan, it would lose the right to ever amend its redevelopment plan going forward. Thus, the municipality might be locked into implementing an outmoded or misaligned plan, perhaps for decades.

If nothing else, the facts of this case show that redevelopment plans roll out in phases that may be separated by a decade or more. They may be interrupted by economic downturns and other dislocations. In North Augusta's case, the initial designation of the community redevelopment district took place approximately 24 years ago. The acquisition and consolidation of property and the installation of the roads, parks, streetscapes, utilities and other infrastructure to support the plan—including the development of the Project Jackson site—began approximately 14 years ago. Even today, it will take many more years to completely redevelop the District. Over so long an expanse of time, economic conditions, opportunities and development patterns change significantly. For this reason, municipalities need the right to amend their redevelopment plans even after the initial and most obvious signs of blight have been eliminated.

There is nothing sinister about granting this power to the elected representatives of North Augusta, as Appellant would seem to suggest. The logic of the TIF Law is simple. A municipality may designate a redevelopment district and project. To fund redevelopment, it may set aside the increased revenue generated from rising property values in that district. No new taxes are imposed. Taxpayers are not saddled with additional burdens. The municipality may issue bonds to pay for that redevelopment secured by the future revenue growth. Other taxing districts (counties, school districts, or

special districts) may agree that all or part of the growth in their tax revenue from the TIF district may go to the municipality for investment in the district. They make that decision in their sole discretion.

Ours is a representative democracy. *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 642, 528 S.E.2d 647, 651 (1999). Any decision to extend or expand a TIF district or to increase the amount of bonds issued in association with it are committed to the elected representatives of the municipality. Counties, school districts, and special purpose districts may decide whether to participate in any extension or expansion of a TIF district. They do so at their sole discretion. The elected officials who make that discretionary decision are the same elected officials who would decide how to otherwise spend the revenue if there were no TIF district.

Nor is sunsetting an issue. TIF districts sunset when the bonds are paid and the elected representative of the sponsoring municipality decide that further projects benefitting the district are not required. Other taxing entities must consent on a case by case basis to their revenues being subject to any extension or expansion of the redevelopment plan.

Although North Augusta included findings related to blight and declining property values in Ordinance No. 2013-19, it was under no requirement to do so for the Ordinance to amount to a valid amendment of the Plan. The trial court's conclusion of law that "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," was a proper interpretation of the TIF Law. (R. p. 9)

II.

THE DISTRICT IS "DEEMED BLIGHTED" BASED UPON THE STATUTORY DEFINITION OF "BLIGHTED AREA."

S.C. Code Ann. § 31-6-30(1) (Supp. 2014), defines a "blighted area" as follows:

> (1) "Blighted area" means any improved or vacant area within the boundaries of a redevelopment project area located within the territorial limits of the municipality where:
>
> (a) if improved, . . .;
>
> (b) if vacant, the sound growth is impaired by:
>
> (i) a combination of two or more of the following factors: . . . ; or
>
> (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.*

(emphasis supplied) The structure of this subsection plainly shows that both improved and vacant areas within a redevelopment plan established by Chapter 10 of Title 31 are deemed to be blighted areas.

Appellant's insists that the last sentence of this definition applies only to vacant areas. However, notes provided by the Code Commissioner contained in the 2014 Supplement to the South Carolina Code clarify that "[i[n 2013, the Code Commissioner removed text which formerly appeared as the second sentence of subsection (1)(b)(ii) and added it as the last undesignated paragraph under subsection (1)."

Moreover, Appellant points to no logical reason why the General Assembly would assume that unimproved land within a redevelopment plan is per se blighted, but improved land is not. Furthermore, in arguing that "only the vacant land within a redevelopment district" is deemed to be blighted, Appellant admits that all vacant land in the District is

indeed per se blighted. (App. Brief, p. 13) Much of the land in the district is vacant, including the large area between Georgia Avenue and Hammonds Ferry where Project Jackson will be located. (R. p. 87, lines 12–19; R. p. 124, line 16 – 125, line 4; R. p. 162, lines 10-17) If that is the case, then a large swath of blight exists in the heart of the Riverfront Redevelopment District, and the statutory standard is met.

In Section 1.01(4) of Ordinance No. 96-10, the initial TIF ordinance, the City found that the District was designated "within the meaning of the Community Development Law" and specifically that the District was deemed to be blighted as a result. (R. pp. 264 - 265) This determination was reiterated in Ordinance No. 2013-19 at Section 2.08(b). (R. p. 771) This finding is in itself determinative of the issue of blight under the TIF Law. The area comprising the District is blighted per se under S.C. Code Ann. § 31-6-30(1).

III.

THE RECORD CONTAINS EXTENSIVE EVIDENCE SUPPORTING THE LEGISLATIVE FINDINGS OF BLIGHT, STAGNANT OR DECLINING PROPERTY VALUES, AND THE NEED FOR PUBLIC ASSISTANCE TO OVERCOME THEM.

At trial, North Augusta's Mayor, who is a real estate attorney, and its City Administrator, who has a graduate degree in public administration, provided extensive testimony establishing the existence of blight in the District, stagnant or declining property values, and the need for public assistance to overcome them. (R. p. 153, lines 14 – 22; R. p. 155, lines 3–20; R. p. 156, line 23 – 158, line 1; R. p. 160, lines 2–5; R. p. 175, line 6 – p. 182, line 12) They supported this testimony with photographs, maps, and other documents. (R. pp. 542 – 575; R. pp. 576 – 581; R. pp. 582 - 717) Appellant seeks to exclude this testimony from consideration based on his assertion that under South Carolina

law the factual findings of legislative bodies must be supported by facts on a "legislative record." That is not the law.

In *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955), a citizen challenged an ordinance of the City of Columbia alleging insufficient evidence supported statutorily required findings of fact. The ordinance required the repair or demolition of dwellings that were determined to be unfit for habitation. *Id.* at 543, 88 S.E.2d at 685. A recently adopted statute authorized such an ordinance upon a legislative finding by the city council that dwellings within the municipality were unfit for human habitation due to a number of factors. *See* S.C. Code Ann. § 31-15-20 (2007) (originally codified at 36-502 (1952)).

The Court held that "[l]egislative findings of fact, while not binding upon the court, will not be overturned except by convincing evidence to the contrary." *Id.* at 560, 88 S.E.2d at 694.

> [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.

Id. at 561, 88 S.E.2d at 694. The Court affirmed the trial court's reliance upon evidence presented at trial that supported the findings of fact in the ordinance. *Id.* at 562, 88 S.E.2d at 694–95.

For a municipality to find that property within a redevelopment district is blighted, it must find that property within the district is subject to at least 5 of a list of 22 enumerated factors that are detrimental to the public safety, health, morals, or welfare. *See*, S.C. Code

Ann. §31-6-30(1)(a) (2007). Extensive evidence and testimony was presented at trial to support the City's finding that blight exists within the District. The pictures of ruined buildings at the Project Jackson site, along with the testimony of Mayor Lark Jones and City Administrator, Todd Glover, show that buildings and improvements within the District suffer from age, dilapidation, obsolescence, deterioration, falling below minimum code standards, the presence of environmental hazards, and depreciation of physical maintenance. (R. p. 153, lines 14–22; R. p. 155, lines 3–20; R. p. 156, line 23 – p. 158, line 1; R. p. 160, lines 2–5; R. p. 175, line 6 – p. 182, line 12; R. pp. 542 – 575; R. pp. 576 – 581; R. pp. 582 - 717)

Before issuing initial TIF obligations, a municipality must also find that "property values in the area would remain static or decline without public intervention." S.C. Code Ann. § 31-6-80(A)(7) (2007). Contrary to Appellant's assertions, there is no requirement that all property within the redevelopment district decline in value, or that the aggregate value of property within the district decline. Nor is there a requirement that values decline relative to their value when the redevelopment district was originally created. The TIF Law only requires that there exist within the area properties that would remain static or decline in value without public intervention. *Id.* Ample evidence was presented at trial to show that there are properties within and around the District that are of declining or static value. (R. pp. 582 - 717[2]; R. p. 93, line 21 – p. 94, line 2; R. p. 106, line 22 – p. 107, line

[2] Appellant objects to the trial court's reliance on "Defendant's Exhibit 9" (admitted as Def. Ex. 16; R. pp. 582 - 717) that consisted of a number of charts showing the declining value of some properties within the District and an accompanying map that showed each parcel within the District that had declined in value. Appellant's claim that he "objected to its offer into evidence . . . , because he did not have time to scrutinize [it] prior to trial" is not supported by the record. Appellant was provided with the property value data represented on the charts and map weeks before trial. Appellant had, himself, reviewed the data and summarized it for trial. (R. p. 94, lines 3-16) Appellant explicitly consented to the introduction of that data in the form of line graphs showing the values of those properties within the district that declined in value, subject only to his prior motion in limine that sought to exclude from the record extrinsic evidence to support

12; R. p. 179, line 4 – 182, line 12) Mr. Glover testified to the findings contained in the City's Comprehensive Development Plan. (R. pp. 542 - 575) The plan concluded that the City's historical commercial district, which is part of the District, was suffering from decline, increasing numbers of vacant and underutilized buildings, and deteriorating buildings. The plan traced the cause of this decline to the loss of traffic in the area due to strip malls and big lot stores being located on the urban perimeter. As Mr. Glover testified, Project Jackson represents an "anchor tenant" which is specifically intended to bring commercial traffic back to the City core and thereby help reverse the on-going decline of the historical commercial district. (R. p. 164, line 24 – p. 167, line 1)

The creation of a new city center at the Project Jackson site is intended to bring commercial and foot traffic back to the urban core. Administrator Glover testified affirmatively that public assistance is necessary for the Project Jackson site to be developed at all, due in part to the blighting of the property due to rubble, tunnels, pits, foundations and buried brick. (R. p. 175, lines 6-23; R. p. 176, line 22 – p. 177, line 6; R. p. 179, line 19 – p. 180, line 2) But to develop it into a vibrant and attractive city center also requires a high degree of planning and coordination as is shown in the development plans presented at trial. (R. p. 168, line 24 – p. 169, line 23)

Contrary to Appellant's assertions, the January 8, 2013, Agreement between Riverfront and the City does not demonstrate that public assistance was unnecessary to complete the redevelopment of the riverfront. (R. pp. 226 - 246) Under the Riverfront Agreement, Riverfront was only obligated to build two 4,000 square commercial buildings in exchange for an investment of $2.4 million by the City in infrastructure improvements.

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the legislative findings of fact. (R. p. 180, line 14 – p. 181, line 21). No objection as to timeliness or prejudice related to these graphs was raised at trial. Therefore, it is not properly before the court.

The Riverfront Agreement would have ultimately required an investment of substantially more than the City's initial $2.4 million for the development of the site to be fully accomplished.

As the holding in *Richards* shows, the trial court was entirely correct that Appellant's claim that legislative findings must be supported by facts entered into a legislative record "is entirely foreign to the law in South Carolina." (R. p. 11) The facts on the record amply justify findings of blight, static or declining property values, or need for public assistance had such findings been required.

IV.

THE ANNOUNCEMENT OF THE SPECIFIC PURPOSE OF AN EXECUTIVE SESSION, AS SUCH PURPOSES ARE IDENTIFIED BY FOIA, COMPLIES WITH THE REQUIREMENTS FOR ENTERING INTO EXECUTIVE SESSION.

Under FOIA, before entering into an executive session, a public body must vote to do so and the presiding officer must "announce the specific purpose of the executive session." S.C. Code Ann. § 30-4-70(b) (2007). "Specific purpose," as used in subsection (b) is defined by statute as "a description of the matter to be disclosed as **identified in items (1) through (5)** of [Section 30-4-70(a)]." *Id.* (emphasis supplied). Section 30-4-70(a) identifies five enumerated topics that may be the subject of discussion in an executive session. One such enumerated topic is identified as:

> 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.

S.C. Code Ann. § 30-4-70(a)(2).

The plain language of Section 30-4-70 requires that the purpose of the executive session be described as it is identified in subsection (a). Appellant insists that "[c]learly, the legislature intended that more information beside the statutory language was required in describing 'the matter to be discussed,'" and asks that the Court judicially impose a requirement of greater specificity than what is stated within the plain language of FOIA. (App. Brief, p. 19. However, because violations of FOIA can carry a criminal penalty, this Court has "declined to impose restrictions that are not expressly provided by the General Assembly in FOIA." *Lambries v. Saluda County Council*, 409 S.C. 1, 760 S.E.2d 785 (2014) (citing *Wiedemann v. Town of Hilton Head Island*, 330 S.C. 532, 500 S.E.2d 783 (1998) and *Herald Publ'g Co. v. Barnwell*, 291 S.C. 4, 11, 351 S.E.2d 878, 882 (Ct. App. 1986)).

Appellant also cites to the recent decision of the Court of Appeals of South Carolina of *Brock v. Town of Mt. Pleasant*, Appellate Case No. 2012-208787, No. 5279 (S.C. Ct. App. November 5, 2014) in support of his argument. In *Brock*, the City of Mount Pleasant announced that it was going into executive session to discuss "Legal and Contractual matters pertaining to properties near Shem Creek." However, after coming out of the executive session, the council voted both to proceed with the acquisition of the properties near Shem Creek, and also to "to authorize the Mayor and members of Council to obtain their individual attorneys for all lawsuits now and in the future with all fee statements to be reviewed by the Town Attorney." *Brock* at 10. The Court of Appeals held that it was appropriate to vote in open session on matters arising in executive session even if those matters were not listed on the agenda. *Id.* at 7. However, the court also concluded that the announcement of the specific purpose of the executive session was insufficient where

Town of Mt. Pleasant announced it would "discuss 'legal matters' or obtain 'legal advice' on a particular issue" and then took action to "obtain[] individual attorneys for 'all lawsuits now and in the future' as a result of the executive session discussion." *Id.* at 8. Mt. Pleasant violated FOIA by taking actions subsequent to the executive session that "were not consistent with the announced purpose." *Id.*

The facts here are quite different. As indicated in the minutes, the executive sessions complained of by Appellant were held at "study sessions" scheduled prior to council meetings. (R. pp. 723 - 763) At these study sessions, Council received reports and held discussions as a committee of the whole, *i.e.,* without formal debate and motions. These study sessions were duly noticed under FOIA and, apart from executive sessions held during them, were open to the public. No formal action was taken in them. (R. pp. 723 - 763, R. p. 148, lines 2-6) After the conclusion of the study sessions, and at the scheduled meeting time for the council meeting, Council would reconvene in council chambers, adopt its agenda for the formal council meeting, and proceed to take action as specified in its agenda. (R. p. 146, line 21 – p. 149, line 14) None of the executive sessions complained of by Appellant were held during formal council meetings. There is no allegation that the Council voted in open session on matters that were raised for the first time in executive session, and that were outside of the stated purposes of the executive session. All actions related to the adoption of Ordinance No. 2013-19 were taken in open session of formal council meetings. (R. p. 149, lines 1-14) Appellant does not allege that the City ever took any action related to Ordinance No. 2013-19 that was not fully noticed in the Council's agendas.

Appellant complains specifically of the 17 executive sessions held by the City between March 2013 and December 2013 where the announced purpose was to discuss negotiations incident to contractual matters.[3] The procedure reflected in the minutes of the March 4, 2013, study session of Council are indicative of the procedure followed in all such meetings:

> Upon the request of the City Administrator and in accordance with Section 30-4-70(a)(2) and on motion by Councilmember Baggott, second by Councilmember Adams, City Council unanimously voted to go into executive session for the purpose of discussion of negotiations incident to 1 proposed contractual matter.
>
> On motion by Councilmember McDowell, second by Mayor Jones, the executive session was adjourned. There was nothing to report out.

(R. pp. 723 - 763) The minutes of other such meetings during this period reflect that the Council followed the identical procedure where the subject to be discussed also included legal or personnel matters, with a reference to the appropriate statutory subsections included. (R. pp. 723 - 763, R. p. 149, lines 1-14) The testimony of Appellant confirms that this procedure was followed. (R. p. 89, lines 22-24) Moreover, the trial court determined that the testimony of both Mayor Jones and Administrator Glover indicating that the City used the correct process for entering into executive sessions was credible and persuasive. (R. p. 14) The trial court's findings of fact and conclusions of law are correct and should be affirmed.

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[3] Although an insignificant discrepancy, a review of the minutes of council meetings held during this period shows that the City held 19 executive sessions where the announced purpose was the discussion of negotiations incident to contractual matters.

V.

IN THE EVENT THAT THE CITY IS FOUND TO HAVE VIOLATED FOIA, THE APPROPRIATE REMEDY IS TO AFFIRM THE VALIDITY OF THE ORDINANCE AND REMAND FOR CONSIDERATION OF APPROPRIATE ATTORNEY FEES.

Courts have broad authority to order equitable relief that is considered appropriate for violations of FOIA. S.C. Code Ann. § 30-4-100 (2007). The statute specifically states that the courts may grant declaratory judgments and injunctive relief to enforce the provisions of FOIA and that an individual may be awarded reasonable attorney fees upon prevailing in such an action. *Id.* In most cases, the sole remedy for FOIA violations has been the award appropriate attorney fees. *See Brock*, at 9; *Braswell v. Roche*, 299 S.C. 181, 183, 383 S.E.2d 243, 244 (1989); *Cockrell by Cockrell v. Trustees of Dist. 20 Constituent Sch. Dist.*, 299 S.C. 155, 157, 382 S.E.2d 923, 924–25 (1989).

In a few instances, the courts have taken the drastic action of invalidating an act of a legislative body due to a violation of FOIA. In those instances, the FOIA violation directly involved the actions taken to enact or adopt the ordinance or resolution. *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) (commissioners voted in executive session to terminate an employment contract); *Business License Opposition Comm. v. Sumter Cnty.*, 311 S.C. 24, 26-27, 426 S.E.2d 745, 746-47 (1992) (council "reached a consensus" regarding an amendment to a proposed ordinance in a closed meeting of which no public notice was given and gave third reading to the amended ordinance without a vote on the proposed amendment).

Appellant does not claim here that the City took any action to adopt Ordinance No. 2013-19 that in any manner violates FOIA. Unrefuted evidence in the record shows that Ordinance No. 2013-19 was adopted upon three readings in open meetings of the Council

on October 21, November 4, and November 18, 2013. A public hearing was held, as required by statute, on October 21, 2013, along with first reading. (R. pp. 723 – 763; R. pp. 764 – 773; R. p. 174, line 3 – p. 175, line 5)

The record shows that the City, the County and the School District went to great efforts to ensure that the consideration of Project Jackson allowed ample opportunity for public comment. By Appellant's own testimony, he spoke in opposition to Project Jackson on 13 occasions in front of three different elected bodies. (R. p. 117, line 10 – p. 119, line 7) When the members of Council traveled to Greenville to view its baseball stadium, Administrator Glover included members of the public on the bus so that they could see for themselves that members of Council did not deliberate. (R. p. 174, line 10 – p. 175, line 6)

The City acted in good faith under FOIA and no action by Council related to Ordinance No. 2013-19 was taken in violation of FOIA. *Cf. New York Times Co. v. Spartanburg Cnty. Sch. Dist. No. 7*, 374 S.C. 307, 312-13, 649 S.E.2d 28, 31 (2007) (no good faith exception exists for an award of attorney's fees under FOIA). Therefore, in the event that the City's has violated FOIA, the appropriate remedy is to grant injunctive relief requiring future compliance and to remand to the circuit court to determine the appropriate award of attorney fees.

CONCLUSION

The circuit court's conclusions of law are entirely correct and its factual determinations are well supported in the evidence and testimony presented at trial. For the reasons stated above, the Court should affirm the order of the circuit court as to all matters.

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January 29, 2015

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In the Supreme Court

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J. Ernest Kinard, Jr., Circuit Court Judge

Stephen P. Donohue..Appellant,

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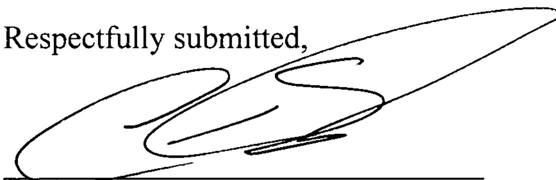
the Mayor and City Council
of North Augusta..Respondents.

Case No. 2013-CP-02-02781
Appellate Case No. 2014-002235

CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I served the Final Brief and Certificate of Counsel in the above captioned matter on Appellant by depositing a copy of the same in the United States Mail, postage prepaid, on January 29, 2015, addressed to the counsel for Appellant at the following address:

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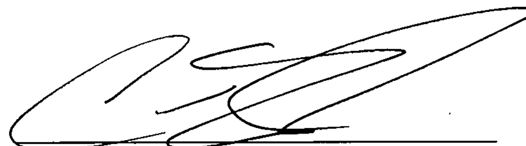

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