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.

FINAL REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY ARGUMENT

I. RESPONDENT'S ARGUMENT THAT ONLY CERTAIN PORTIONS OF THE TIF LAW APPLY WHEN EXPANDING THE DEBT OBLIGATIONS OF THE TIF DISTRICT IS SIMPLY NOT SUPPORTED BY THE PLAIN LANGUAGE OF THE STATUTE.

Respondent has tried to make the TIF law a complicated statutory authorization for blight eradication, when in fact the law is straight forward. The Respondent argues as follows:

> 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 (sic) area." (emphasis supplied). The procedures for the 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. (Respondent's brief p. 8)

The statute is worded in the conjunctive, i.e., it incorporates both the "redevelopment project" **and** "designation of a redevelopment project area." The TIF law defines the "redevelopment project area" as:

> . . .[A]n area with the incorporated area of and designated by the municipality, which is not less in the aggregate than one and one-half acres and in respect to which **the municipality has made a finding that there exists conditions that cause the area to be classified as . . . a blighted area** . . . (emphasis added) S.C. Code Ann. § 31-6-30(7).

Furthermore the term "blight" is defined as:

> . . . [A]ny improved or vacant area within the boundaries of a redevelopment project area . . .where: (a) if improved, industrial, commercial and residential buildings or improvements, because of a combination of five or more of the following factors: age; dilapidations; obsolescence; deterioration . . . **and static or declining land values are detrimental to the public safety, health, morals, or welfare** . . (emphasis added) S.C. Code Ann. § 31-6-30(1)(a).

The Respondent's argument that no finding of blight is required is not supported by the plain language of the statute. The statute makes clear that the City must begin anew if they want to amend the plan, the area, the use of the proceeds, or extend the term of the obligations. S.C. Code Ann. § 31-6-80(F)(2). The legislature intended the City to revisit the entire TIF enactment as if it were the initial enactment. The legislature intended the terms "redevelopment project and designation of a redevelopment area" as a stand-in for the entire TIF process, since those are the core requirements in the establishment of a TIF District. If this were the initial or first redevelopment project in a redevelopment project area, the City would be required to undertake an ordinance which included all the elements of Section 31-6-80.

Designating a redevelopment project area, by statutory definition, requires a finding of blight. Furthermore the implementing ordinance for an initial TIF and subsequent bond issue requires a finding of blight, **a specific finding that land values would remain static or declining without public intervention,** and that private initiatives are unlikely to alleviate the blight without substantial public assistance. S.C. Code Ann. § 31-6-80(7). In amending the existing TIF the Respondent made none of those findings on the public record based upon any evidence. In a Florida case involving a similar TIF statute, City of Parker v. State, 992 So 2d 171, (Fla. 2008), the court held that the City's actions were appropriate, because they had received evidence supporting findings of blight, had actually done a study and presented it to the City council. In this case, Respondents argue that the legislative presumption includes facts that "everyone on Council knows", citing mainly to law predating the Freedom of Information Act, which requires public debate of the facts before enacting ordinances, taxes and debt.

Why would the legislature require the City to start anew as if this were the very first project and the initial creation of a TIF District? The answer is the very nature of TIF's in general. The TIF law allows cities to incur debt beyond the normal 8% constitutional limit without a vote of the taxpayers. The TIF law was passed under the revenue bond authorization in the Article X, Section 14(10) of the South Carolina Constitution and upheld as constitutional in Wolper v. City Council of City of Charleston, 336 S.E.2d 871, 287 S.C. 209 (S.C. 1985). The legislature did not intend the law to be an alternative financing scheme for local developers while avoiding the electorate, as evidenced by a detailed statute which goes to great lengths defining blight, conservation area, agriculture area, redevelopment plans, redevelopment projects, redevelopment project area and includes details on obligations on how they are issued and retired, and how taxes are allocated in a TIF, and details of any enabling ordinance.

The legislature's attention to the detail in the statute demonstrates the TIF law was enacted to address the narrow but important problem of blight *and* declining values of property. It is necessarily narrow in scope because it authorizes 30 years of debt obligations over and above the constitutional 8% debt limitation, without a vote of the taxpayers. For that reason, the TIF law must be assiduously adhered to as it is an exception to the basic rule that taxes should not be imposed on the electorate without their consent.

The Respondent next argues:

> 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. (Respondent's brief p. 9)

Implied in this argument is a straw-man argument that Appellant claims no amendment is permitted. That is not Appellant's argument, especially since the statute clearly allows

amendments by following **all** of the procedures required for an initial TIF District. This argument in fact makes Appellant's point. Over the years the blight in the redevelopment project area may have been eliminated and property values increased and the development successful. If that has occurred, it is no longer appropriate to use the TIF law to support any additional private development. That is the very reason the legislature expected the city to reevaluate the redevelopment projects and the redevelopment project area under the mandatory findings in the TIF law. If blight has been eliminated, the TIF District should be allowed to expire and not be renewed. If a city wants to support private economic initiatives, it can use any number of alternatives other than the TIF law including, *inter alia*, tax credits, tax abatement, development agreements, and taxpayer approved bonds. Under the Respondent's theory and the trial court's holding, the city may amend the TIF District for another 30 years, which would be added to the initial 15-year TIF. Forty-five years from now, according to the Respondent's argument, the city may renew the TIF District without revisiting the blight issue or declining land values, because in effect "once an area is declared blighted, it is always TIF qualified." That cannot be the law, nor is it a reasonable interpretation of it. What the Respondent views as an inconvenience, the legislature, voters and the state constitution view as an essential restriction on incurring public debt without a vote of the people.

Respondent argues:

> 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 values in that district. No new taxes are imposed. Taxpayers are not saddled with additional burdens. (Respondent's brief, p. 9)

The word used to describe the impact of TIFs by Appellant, was not sinister. It was pernicious. This argument by Respondent stands the doctrine of "there is no such thing as a free lunch"[1] on its head. This is the canard trotted out by politicians, developers, and their agents when arguing for a TIF, apparently a common phenomenon throughout the Nation (see "Reasons for using TIFs getting away from origins", Island Packet Editorial, Beaufort, SC, October 2009 and "Crony Capitalism and Social Engineering, The Case against Tax-Increment Financing", Randal O'Toole, Policy Analysis, Cato Institute, May 18, 2011). Respondents claim "we will build you a stadium, it will cost you nothing." That is not the case. All of the developed properties in the 457-acre TIF district will now have their city and county taxes diverted to subsidize a team owner, to pay the bonds to fund the stadium, parking decks, and conference center. As designed the TIF district will have a hotel, over 400 residential units, a stadium, and retail and commercial space, when the project is completed. Those facilities will not pay any taxes toward local government services including the local summary court, police and fire protection, safety and building inspections, park and street maintenance, nor city administration. That increased burden of municipal services will fall on the other taxpayers of the city and the county and the taxes must be increased and shifted onto the other taxpayers in order to pay for the increased demand on those services caused by the TIF, all without a taxpayer vote. ("Tax Increment Financing: A Bad Bargain for Taxpayers", Daniel McGraw, Reason Magazine, January, 2006.)

[1] Friedman, Milton, *There's No Such Thing as a Free Lunch*, Open Court Publishing Company, 1975.

Respondent argues:

> 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. (Respondent's brief p. 10)

In fact, the Respondents merely recited the words of the TIF statute in making findings of ongoing blight in the 457-acre TIF district. There was no objective evidence establishing the blight, just a naked declaration, reiterating the findings of blight in 1996 which cited to the 1991 Redevelopment Commission (Ordinance 91-07 and Resolution 91-06). (ROA pp. 758-766) Now, 24 years later, the TIF District has increased in market value more than $100 million, assessed values increased over 500%, (ROA pp. 223,224) and the 25 acres upon which Project Jackson will be built increased in value more than 5% over four years (ROA pp. 246, 247), but without any public debate or discussion of declining values on the record, city council declared there is still blight somewhere within in the district. The taxpayers do not know where the blight was found, and the ordinance does not even list the parcels included in the TIF or the areas that are declining in value in accord with the statute. The Respondent has never gone through an evaluative process to determine if and where the property values declined, nor informed its citizens of where the declining values were.

The law requires more than a **mere recital of blight**, it requires a finding. A finding in modern parlance should have some factual basis in the legislative record. An examination of one year's worth of City Council minutes reveals no such debate nor discussion. (Joint Ex 6)(ROA pp. 717-756). It is a gross misstatement of the facts to argue, as Respondents have, that the City made findings related to "declining property values" in Ordinance No. 2013-19. The ordinance

never addresses property values; **in fact the word "value" does not even occur** in the ordinance. Section 2.2(c) of Ordinance No. 2013-19 provides:

> 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 Project Area in 1996 over sixteen years ago, and would remain static or decline without public intervention.

Noticeably absent is the word "value." Contrary to the trial court's conclusion, undeveloped land is not synonymous with "declining value." The 25 acres of undeveloped property upon which the City proposes to build "Project Jackson" illustrates that very point. The uncontroverted evidence submitted at trial proved that the property was purchased in 2007 for $436,920 and was appraised by the Aiken County Assessor in 2011 at $459,646 an increase of $22,746 or 5.2%. (Plaintiff's Ex. 6, ROA pp. 223,224) More importantly, static or declining property value without public intervention is the *sine qua non* of the TIF law and the TIF amending ordinance did not make such a finding.

II. RESPONDENT'S ARGUMENT THAT ALL PROPERTY IN A REDEVELOPMENT PLAN ESTABLISHED BY CHAPTER 10 OF TITLE 31 IS DEEMED TO BE BLIGHTED "FOREVER" IS AN UNREASONABLE INTERPRETATION OF THE LAW AND VIOLATES PUBLIC POLICY .

The community development plan was passed by the Respondent in 1991 in Ordinance 91-07 and Resolution 91-06. Instead of applying a broad finding of blight over the entire district, when the City created the Augusta Riverfront Redevelopment District, it broke the area into three tiers. Only the third tier was designated as blighted. The other two tiers (Tier 1 and Tier 2) were NOT designated as blighted. Tier 1 was designated as underdeveloped or undeveloped and

included all the properties along the Savannah River. (ROA p. 254) The 25-acre site upon which the Respondent intends to build its "Project Jackson" is in Tier 1 and was not declared blighted. Even if you read the statute literally, i.e., any property in the plan area is deemed blighted no matter how much time has passed or how much development takes place, in the current TIF district some 24 years later with over $100 million in development, which includes million dollar homes, the Respondent argues those properties are deemed blighted because the statute says so. That is an unreasonable interpretation of the law. The "deemed blighted" would be an acceptable adjunct and a reasonable application, if the Respondent had evaluated the TIF District for its current development status, found certain properties were still undeveloped and were static or declining in value, then it would be a reasonable application of that section of the TIF law. S.C. Code Ann. § 31-6-30(1)(b).

III. RESPONDENT'S ALLEGED EVIDENCE SUPPORTING LEGISLATIVE FINDINGS OF BLIGHT, STAGNANT OR DECLINING PROPERTY VALUES AND THE NEED FOR PUBLIC ASSISTANCE WAS NEVER PRESENTED AT CITY COUNCIL MEETINGS, AND EXCEPT FOR SIXTEEN PROPERTIES WAS CREATED AFTER INSTITUTION OF THIS SUIT, CONSISTS OF ANECDOTAL OR INCOMPETENT EVIDENCE, AND CHARTS OF PROPERTIES THAT ACTUALLY INCREASED IN VALUE SINCE THE ENACTMENT OF THE TIF IN 1996.

Respondent argues:

> At trial, North Augusta's Mayor, . . 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. (Respondent's brief p. 12)

When this testimony was proffered, Appellant had a standing *in limine* objection (ROA pp. 37,38) to the Court receiving evidence as to the intent or non public findings of the City council when it passed Ordinance No. 2013-19 based on Horry Telephone Cooperative, Inc. v. City of Georgetown, 759 S.E.2d 132, 408 S.C. 348 (S.C. 2014) in which this Court held "that in

reviewing decisions of municipal governments, " [m]unicipal records properly authenticated or verified are the only competent evidence of the proceedings of the transactions of governing bodies." citing Berkley Electric Cooperative, Inc. v. Town of Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992) (citing E. McQuillan, The Law of Municipal Corporations § 14.05 (3d 3. 1989). Accordingly, the trial court committed reversible error in admitting the Mayor's testimony, and using it as the foundation for its judgment. Much of the testimony was speculative as to what the Mayor thought the other council members did with regard to reviewing the conditions of the TIF District. The proper venue for addressing the required findings of blight, static or declining property values, and whether the property would not otherwise be developed without substantial public assistance is before the ordinance is enacted; not through a post hoc "opinion" of one voting member.

Respondent argues:

> Ample evidence was presented at trial to show that here are properties within and around the District that are of declining or static value. (Def. Ex. 16) (Respondents brief, p. 14).

Quite the opposite occurred. Respondent submitted the rambling speculative testimony of the Mayor as to what his councilmen "knew" about declining values, and blight, and 136 graphs (Def. Ex. 16) of parcel values allegedly showing static or declining values of property in the TIF District. Those graphs were never considered by the City Council. They were not provided to Appellant until 17 hours before trial. In the year and a half the City spent amending the TIF, they only discovered this information 17 hours before trial. (ROA p. 52) The Appellant had no opportunity to examine and rebut this evidence until the trial was over. These graphs were the basis of Appellant's post trial Rule 59e motion for reconsideration. After Appellant had

an opportunity to examine the quality of the evidence in those 136[2] graphs, once again, just like the infamous 16-property spreadsheet emailed to City Council but not debated in public (and filed in its petition for original jurisdiction to this court in January 2014), Appellant demonstrated that those properties had gone up in value since the TIF was created in 1996. The new graphs relied upon by the lower court in its decision, included 45 condominiums built in 2007 that added $6 million in value and 73 developed properties in Hammond's Ferry built after 2004 that added $19 million. (ROA pp. 52-54)

Had the information in those graphs been publically debated discussed or disclosed to the public in open session, there would have been ample opportunity to demonstrate to the City Council that the information was flawed. However, the secretive process of passing this subsidy for a baseball team, prevented such public debate and discovery of error.

In total, the graphs represented more than $25 million dollars in increased property valuation since the TIF was created in 1996, most of which was new construction. (Appellant's affidavit, Rule 59e motion)(ROA p. 53). The original discredited 16-property list, and now these graphs upon which the trial court based its order, demonstrate the arbitrary and capricious manner in which the Respondent tried to establish static or declining value in the TIF District, but only after the lawsuit was commenced.

Respondent argues:

> . . .[T]he January 8, 2013, Agreement between Riverfront (sic) and the City does not demonstrate that public assistance was unnecessary to complete the redevelopment of the riverfront. (Pl. Ex. 5) Under the Riverfront Agreement, Riverfront was only obligated to build two 4,000 square (sic) commercial buildings in exchange for an investment of $2.4 million by the City in infrastructure improvements. The Riverfront Agreement would

[2] Appellant's affidavit in support of his Rule 59e motion mentions 132 properties, which was a typographical error.

> 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. (Respondent's brief p. 15)

This is an argument the City often repeats, looking at only the initial contract and ignoring the rest of the planned development of over 300 residential housing units and over 50,000 square feet of commercial space envisioned in the proposed development approved in Ordinance No. 2012-14 on the very property designated for Project Jackson (ROA p. 246). The TIF law does not limit the development issue as to what is currently under contract. The law clearly states that the city must make a finding that the area is blighted and "private initiatives are unlikely to alleviate these conditions without substantial public intervention." S.C. Code Ann. § 31-6-80(A)(7)(a). The last sentence in Respondent's argument, supra, that the "agreement would have ultimately required an investment of substantially more than the City's initial $2.4 million" is not supported by any evidence or testimony at trial.

Respondents' argument misses the legal point about the Riverfront development agreement. The law requires the city to find **that development is unlikely without substantial public assistance**. The city had entered an initial contract for development that referred to a detailed plan for hundreds of homes and tens of thousands square feet of commercial space with the very same developer that built the Hammond's Ferry neighborhood. This agreement and the development were not dependent on amending the existing TIF and increasing the debt load of the citizenry. The city ignored this agreement completely when it enacted the TIF amending ordinance. By most objective standards of review, the city could not reasonably make the finding that development was unlikely but for an amended TIF because they had an agreement in place for the very same area without increasing the debt. The TIF amending ordinance, Section

2.08(f) only found that Project Jackson would not occur without the long term investment of TIF revenues (ROA pp. 755,756). The ordinance and the City ignored the existing development agreement, contrary to the TIF law, and made no general finding that private development would not occur but for substantial public assistance, i.e., a TIF.

IV. RESPONDENT'S ARGUMENT THAT THEY MET THE REQUIREMENT FOR ANNOUNCING THE SPECIFIC PURPOSE FOR ENTERING EXECUTIVE SESSIONS IS CONTRARY TO THE STATUTE AND REPEATED VIOLATIONS OF THE ACT SHOULD NOT BE CONDONED BY THE COURTS WITH APPROVAL OF THE ULTIMATE ACTIONS OF THE CITY AND NOT MERELY AWARDING ATTORNEY'S FEES.

On this issue there is no disagreement as to the facts. On 17 different occasions (19 according the Respondent) the City council entered into executive session where the only specific purpose cited was "discussion of negotiations incident to 1 [2] proposed contractual matter(s)."(ROA pp. 717-757) Appellant has already briefed the issue of "specific purpose" in its initial brief and need not repeat it here. The case law and the statutory language make it clear that more is required. The city administrator testified at trial that a majority of these executive sessions had to do with "Project Jackson" – amending the TIF. That means the city met at least nine times in executive session where the only notice to the public was "contractual matters." The Court has held that where a specific purpose has not been announced "given the history and the purpose of FOIA, this [is] more than a "technical violation." Quality Towing, Inc. v. City of Myrtle Beach, 547 S.E.2d 862, 345 S.C. 156 (S.C. 2001). The Respondent argues that any actions they took should be reaffirmed even if they convened in secret contrary to law and the principle of open government, and Appellant only awarded his attorney's fees. Given the pervasive nature of the Respondent's violations of FOIA in a very controversial matter, this

Court should not permit a governmental entity to continue with its enactments that were a product of repeated FOIA violations. The actions should be declared null and void and all legal expenses and attorneys fees awarded to Appellant. If the Respondent wants to enact a TIF amendment they should be required to cleanse the process by starting anew with meetings appropriately announced. To permit the product of these improper meetings to remain in place would not serve the public since governmental bodies would have no incentive to be conscious of their FOIA obligations. They would know that they are only required to pay attorney's fees if a citizen successfully challenged their actions – hardly an incentive to comply with a law which is meant to force government to operate in the sunshine.

CONCLUSION

This Court should declare the actions of Respondent in amending the TIF District as contrary to the TIF law because it is fatally flawed in its form, process, and substance. It is flawed in form because it does not list the parcels in the TIF District, makes no finding as to static or declining property values, and fails to make a finding that no other development would occur but for amending the TIF. It is flawed in its process because of the opaque manner in which the Respondent discussed the TIF on at least nine occasions in executive session keeping the public in the dark about the nature of their activities contrary to FOIA and the strong public policy that government operate in the sunshine.

It is flawed in substance because "there is no there, there." The TIF law has several criteria which must be met before its authority may be invoked to issue bonds. The Respondent never demonstrated those criteria were met in amending the current TIF. The data on property

values for the entire TIF District and the 25-acre site for Project Jackson all show property values substantially increasing. 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 Ann. § 15-77-300.

January 30, 2015

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF MAILING

I hereby certify that on the 30th day of January, 2015, 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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