IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

BONZELLA SMITH, et al.,	)	
	)	
Plaintiffs/Intervenors,	)	
	)	No. 0922-CC9379
vs.	)	
	)	
TIF COMMISSIONERS, et al.,	)	Div. 18
	)	
Defendants.	)	

DEFENDANT NORTHSIDE'S MOTION FOR A NEW TRIAL, RELIEF FROM JUDGMENT OR, IN THE ALTERNATIVE, TO AMEND OR SET ASIDE THE COURT'S JULY 2, 2010 MEMORANDUM, ORDER AND JUDGMENT

COMES NOW Northside Regeneration, LLC ("Northside"), pursuant to Rules 75.01 and 78.01, and moves the Court for a new trial, relief from judgment or, in the alternative to amend or set aside the Court's July 2, 2010 Memorandum, Order and Judgment ("Judgment").

INTRODUCTION

In their pleadings, the Plaintiffs and Intervenors alleged a combined nine (9) challenges to the Northside redevelopment ordinances. The Court ruled in favor of the City and Northside on all of them. The Court nevertheless struck down the ordinances because the redevelopment projects described in Northside's redevelopment plan were not sufficiently concrete in the eyes of the Court (Judgment at 36-38).

The Court acknowledged that this was an issue "detected by the Court" and that the City and Northside may have a legitimate complaint that this issue "was not fairly embraced by the pleadings in this case" (Judgment at 47). Northside certainly agrees. Had Northside known that the level of detail was a matter of concern to the Court, Northside would have shown the Court that, among other things, Northside provided the Board of Aldermen with detailed

information relating to the public infrastructure projects referenced in the redevelopment plan and redevelopment agreement. Northside would have shown the Court that, using the Court's language, Northside provided the Alderman with concrete plans showing that "sanitary sewers will be constructed in City Block 1000, commencing on such-and-such a date, at an estimated cost of so many dollars" (Judgment at 38).[1]

Northside asks that, in the interests of justice, the Court re-open this case to permit Northside the opportunity to address the issue raised by the Court and to demonstrate to the Court's satisfaction that Northside did submit detailed project information to the Aldermen.

DISCUSSION

I. STANDARD OF REVIEW

Rule 78.01 provides in full as follows:

> The court may grant a new trial of any issue upon good cause shown. A new trial may be granted to all or any of the parties and on all *or part of the issues* after trial by jury, court or master. *On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact or make new findings, and direct the entry of a new judgment.* (emphasis added)

Rule 78.01 allows the Court "wide discretion to open a judgment and take additional testimony on a motion for a new trial in court-tried cases." *In re G.P.C.,* 28 S.W.3d 357, 368 (Mo.App. E.D. 2000). Further:

> Appellate courts apply a rule of greater liberality in upholding a trial court's action in sustaining a motion for a new trial, than in denying it. Thus, when reviewing the

[1] Northside also would have used the opportunity to persuade the Court that the Court's restrictive definition of "redevelopment projects" is at odds with the broad definition already provided under the TIF Act. While Northside did provide the Board with the level of detail consistent with the Court's new rule, the Court should have upheld the ordinances based upon the plan and other evidence already before it. The broad definition of "redevelopment project" found in §99.805(14) provides a flexible development tool for local governments who are ultimately protected because developers like Northside must spend their own money to build the streets and sidewalks before receiving any tax increment financing.

> grant of a new trial, this court is to indulge every reasonable inference in favor of the trial court and may not reverse unless there has been a clear abuse of discretion.

Andersen v. Osmon, 217 S.W.3d 375, 377 (Mo.App. W.D. 2007). It is within the Court's discretion to limit the new trial to a certain issue or issues. *See, e.g., Nance v. Kimbrow,* 476 S.W.2d 560, 562 (Mo. 1972).

Rule 75.01 also allows the Court "after giving the parties an opportunity to be heard and for good cause, vacate, reopen, correct, amend, or modify its judgment...." Under Rule 75.01, "[g]ood cause is interpreted liberally, and [the appellate court] review[s] the determination of good cause for an abuse of discretion." *Blue v. Harrah's N. Kansas City,* 170 S.W.3d 466, 475 (Mo.App. W.D. 2005). As with Rule 78.01, the Court is vested with "considerable discretion" to act under Rule 75.01. *Corzine v. Stoff,* 565 S.W.2d 162, 164 (Mo. 1973).

II. THE COURT SHOULD SET ASIDE ITS JUDGMENT AND/OR GRANT DEFENDANTS A PARTIAL NEW TRIAL SO THAT DEFENDANTS CAN PRESENT EVIDENCE OF THE SPECIFIC REDEVELOPMENT PROJECTS CONSIDERED AND APPROVED BY THE BOARD OF ALDERMEN

Chapter 99 provides a broad definition of "redevelopment project":

> (14) "Redevelopment project", any development project within a redevelopment area in furtherance of the objectives of the redevelopment plan; any such redevelopment project shall include a legal description of the area selected for the redevelopment project;

RSMo §99.805(14). Before trial, neither Plaintiffs nor Intervenors filed any pleading mentioning this definition or questioning the sufficiency of the redevelopment projects set forth in the plan. In fact, Plaintiffs/Intervenors' pleadings acknowledge that the City enacted an "ordinance affirming adoption of a redevelopment plan, redevelopment area and *redevelopment project* proposed by defendant Northside" (Petition filed 12/3/09 ¶7; emphasis added). The parties

litigated, and the Plaintiffs and Intervenors lost, every issue properly and affirmatively raised by the Plaintiff's and Intervenors' pleadings.

Defendants had no idea that the specificity of the redevelopment projects was at issue in the trial until the Court's Judgment. The Court acknowledges that "[t]here may be an argument that the defect in Ordinances 68484 and 86485 detected by the Court was not fairly embraced by the pleadings in this case" (Judgment at 47). The Court nevertheless invalidated the City's Ordinances based solely on this issue, drawing comfort from the fact that Attorney Amon had made a general allegation that the redevelopment plan "failed to conform to the requirements of §§99.800 *et seq.,*" had filed a motion *in limine* and thereafter offered the Northside Ordinances into evidence (Judgment at 47).

The Court's position that any of these circumstances put defendants on notice that the definition of "redevelopment project" was at issue puts defendants in an untenable position. If this scant record is enough to raise a new issue not embraced by the operative pleadings, Northside would be required to guess and respond to every conceivable issue that *might be* raised regardless of whether it was raised, and regardless of the fact that Plaintiffs, not Northside, bore the burden of proof at trial.

Attorney Amon's general allegation that the redevelopment plan violated the TIF Act is, first of all, contrary to Intervenors' allegation that the Ordinances provided for a redevelopment project. Moreover, a bare allegation that an ordinance may violate a particular statute, without saying how, does not preserve anything and should have been disregarded by the Court. *Henkel v. Pevely,* 488 S.W.2d 949, 951 (Mo.App. E.D. 1972)("general allegations of illegality, voidness, impropriety and unconstitutionality, supported by 'reasons' which are mere conclusions of the pleader...cannot be taken as true and must be disregarded"). The issuance of

a judgment "beyond the allegations of the pleadings and the prayer for relief" is void and open to collateral attack. *In re: the Marriage of Hendrix*, 183 S.W.3d 582, 588-89 (Mo. 2006) quoting *Charles v. White*, 112 S.W. 545, 549 (Mo. 1908). *See also, Allen Quarries, Inc. v. Auge*, 244 S.W.3d 781, 783 (Mo. App. 2008)("judgment is void to the extent it is based upon issues not raised by the pleadings") and cases cited therein.

On the morning of trial, Attorney Amon did file a motion *in limine* asking the Court to exclude evidence "mentioning or identifying" a redevelopment project. Attorneys Vickers, Shock and Schottel did not join in the motion.[2] Amon's Motion did not question whether Northside's redevelopment projects required further specificity based upon the statutory definition of "redevelopment project." Attorney Amon seemed to be arguing that the redevelopment project had to be a separate document from the redevelopment plan. In any event, a motion *in limine* is not a substantive pleading—it "preserves nothing for appeal." *Hancock v. Shook,* 100 S.W.3d 786, 802 (Mo. 2003)(citations omitted). A motion *in limine* is designed to prevent the disclosure of inadmissible evidence to the jury. It serves no purpose in a bench trial because, obviously, the Court must decide whether or not the evidence is admissible when it is offered. Asking a Judge *in limine* not to consider evidence (or objections to it) when it is later offered makes no procedural sense.

The fact that Plaintiffs and Intervenors thereafter introduced into evidence the Ordinances incorporating the redevelopment plan and redevelopment agreement is of no legal consequence either. "To fairly say a party implicitly consented to try a new issue, such evidence should warn that a new issue is being injected. Thus the evidence in question *cannot be relevant to any other issue before the trial court; it must bear solely on the new issue.*" *Allen Quarries,*

[2] Intervenors' counsel did not file any motion, present any evidence, argue or brief any issue directed to the sufficiency of the redevelopment projects described in the redevelopment plan.

244 S.W.3d at 784 (emphasis added). Obviously, the redevelopment plan and redevelopment agreement were relevant to many issues before this Court and "arguments of counsel are not evidence." *City of St. Joseph v. St. Joseph Riverboat Partners,* 141 S.W.3d 513, 516 (Mo.App. W.D. 2004).

Had Plaintiffs properly pleaded or questioned whether Northside had proposed that "sanitary sewers will be constructed in City Block 1000, commencing on such and such a date, at an estimated cost of so many dollars," the Court would have already received an answer to the issue "detected by the Court" (Judgment at 38, 47). These post trial proceedings could have been avoided and the Northside public infrastructure projects could be underway.

Northside provided the Aldermen and their City staff with detailed information underlying the infrastructure redevelopment projects mentioned in the redevelopment plan and redevelopment agreement. The information itemized, phased and provided costs estimates for, among other things:

- The replacement and rehabilitation of sanitary sewers by street block;
- The identification of dilapidated streets targeted for replacement with "new streets, including curb and gutter, sidewalks, handicap ramps, sidewalks, tree lawns, street trees, streetlights, pedestrian lights, signage, signals & fire hydrants";
- The replacement and rehabilitation of water systems by street block;
- Demolition and environmental abatement by street block; and
- The development of new parks by specific location.

The detailed information assured the Aldermen that Northside would spend—and how it would spend—the $345,500,000 earmarked in the plan for infrastructure redevelopment projects

eligible for TIF reimbursement. *See, e.g., Cortex West Devel. Corp. v. Station Investments #10 Redev. Corp.*, 2008 Mo.App. LEXIS 852 at 5-7 (Mo.App. E.D. 2008).

Northside did not believe that either the TIF Act or the properly pleaded claims raised by the Plaintiffs and Intervenors (all of which were ruled in Northside's favor) required the introduction of this further detail supporting the projects identified in Northside's plan. Northside respectfully requests that it be allowed an opportunity to respond to the Court's concern.

III. THE COURT SHOULD AMEND ITS JUDGMENT AND ENTER JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE THE NORTHSIDE REDEVELOPMENT PLAN DESCRIBED A REDEVELOPMENT PROJECT WITHIN THE MEANING OF CHAPTER 99 OF THE MISSOURI REVISED STATUTES AND THE COST-BENEFIT ANALYSIS NEED ONLY ADDRESS THE PLAN AS A WHOLE

The Court's restrictive definition of "redevelopment project" is contrary to the letter and spirit of Chapter 99.

A. Northside Identified A Redevelopment Project Within The Meaning of RSMo §99.805(14)

As indicated, §99.805(14) provides a broad definition of "redevelopment project":

> (14) "Redevelopment project", any development project within a redevelopment area in furtherance of the objectives of the redevelopment plan; any such redevelopment project shall include a legal description of the area selected for the redevelopment project;

The legislature could have, but obviously did not provide a more restrictive definition or a detailed list of requirements for redevelopment projects. *See, e.g.,* RSMo §99.810 (providing a detailed listing of requirements for redevelopment plans). Instead, the legislature mandated only one explicit requirement--the inclusion of the legal description for the redevelopment project area. It is a longstanding principle of statutory construction that "where a statute contains general words only, such general words are to receive a general construction."

State v. Lancaster, 506 S.W.2d 403, 404 (Mo. 1974); *DeMere v. Mo. State Hwy. & Transp. Comm'n,* 876 S.W.2d 652, 657 (Mo.App. W.D. 1994). The Court "may not add provisions to a statute under the guise of construction…." *Jordan v. State,* 841 S.W.2d 688, 690 (Mo.App. E.D. 1992).

The Court looked past the general language and intent of the statute and added its own language, narrowing the broad definition of a redevelopment project set forth in the statute. "Redevelopment projects" are no longer "any development project within a redevelopment area in furtherance of the objectives of the redevelopment plan." They now must identify "*a specific task or undertaking* in furtherance of the objectives of the redevelopment plan" (Judgment at 38; emphasis added).

The principle problem with the Court's new definition, apart from Northside's belief that it is contrary to the language and intent of the statute, is that only the Court knows what level of specificity will satisfy its definition. How many sewers must be accounted for, using the Court's example? Is it enough, for example, to propose the replacement of a single sewer line, an entire block, or some other increment when the municipality is considering a 1500 acre redevelopment? Historically, as the Court points out in its Judgment, this decision has been left to the discretion of the municipalities, which are afforded substantial leeway and discretion in administering Chapter 99—their decisions must be affirmed if merely "fairly debatable" (Judgment at 20). There is no indication in the statute that the legislature meant to limit a municipality's discretion to determine the level of specificity it would require for redevelopment projects. Presumably, the legislature understood that municipalities might want or require different levels of specificity depending upon the scope and duration of different redevelopment plans.

Further, the safeguards written into the NorthSide Redevelopment Plan ensure that no incremental tax revenues will be spent without *the actual implementation* of the infrastructure redevelopment projects. The developer must construct the public improvements—he must lay the streets, install the sewers, etc.—at his own expense. Thus, even if the infrastructure projects are stated more generally than the Court would like in the plan, the developer must clear at least two hurdles before asking the City to issue TIF notes. First, the developer must apply for City planning and zoning approvals of the work. Second, the developer must provide the City with the finished work product. Then and only then can the developer ask the City to issue TIF notes under the Redevelopment Agreement:

> In order to seek reimbursement for any Reimbursable Redevelopment Project Costs, the Developer shall provide to the City (a) itemized invoices, receipts or other information evidencing such costs; and (b) a Certificate of Reimbursable Redevelopment Project Costs constituting certification by the Developer that such cost is eligible for reimbursement under the TIF Act....

(P.Ex. 3 at 16, ¶4.2). The City is thus guaranteed *more* than the specificity that the Court would now write into the statute; however, Chapter 99 allows the City some initial flexibility to attract redevelopment of its streets, sewers and other public works at the expense of private enterprise.

For these same reasons, there is no danger that the City will turn the Northside redevelopment area into a TIF "slush fund" absent adoption of the Court's definition of project, a concern raised by the Court (Judgment at 37). That would be impossible, because *someone* has to incur reimbursable redevelopment project expenses (*i.e.*, build the roads, etc.) before the City can even issue TIF notes, and the increment, if any, is thereafter <u>tied</u> to repay expenses associated with those improvements in accordance with the terms of the TIF Notes.

The Redevelopment Plan defined Northside's "Redevelopment Projects" as the "redevelopment projects within the Redevelopment Project Areas described below" (I.Ex. 4 at 7)

and laid out the proposed redevelopment projects for Areas A through D in considerable detail (I.Ex. 4 at 19-27). *See also,* Redevelopment Agreement, I.Ex. 3 at 6 ("'Redevelopment Project' or 'Redevelopment Projects' means one or more of Redevelopment Projects in RPA A, Redevelopment Projects in RPA B, Redevelopment Projects in RPA C and Redevelopment Projects in RPA D, as identified in the Redevelopment Plan"). The level of detail was consistent with the historical application of the TIF statute.

B. Chapter 99 Does Not Require A <u>Cost Benefit Analysis For Individual Projects</u>

Chapter 99 provides that no "redevelopment plan" shall be adopted without a cost-benefit analysis of the plan:

> ....No *redevelopment plan* shall be adopted by a municipality without findings that:
>
> *　　*　　*
>
> (5) A cost-benefit analysis showing the economic impact *of the plan* on each taxing district which is at least partially within the boundaries of the redevelopment area. The analysis shall show the impact on the economy if the project is not built, and is built pursuant to the redevelopment plan under consideration. The cost-benefit analysis shall include a fiscal impact study on every affected political subdivision, and sufficient information from the developer for the commission established in section 99.820 to evaluate whether the project as proposed is financially feasible;

RSMo §99.810.1(5)(emphasis added).

There is no statute that lists any prerequisites to the adoption of a redevelopment *project.* In fact, the developer need not present a redevelopment project at the time it requests adoption of a redevelopment *plan.* Chapter 99 explicitly acknowledges that a municipality may approve redevelopment plans prior to the identification of redevelopment projects: "No redevelopment project shall be approved unless a redevelopment plan has been approved and a

redevelopment area has been designated *prior to or* concurrently with the approval of such redevelopment project. RSMo §99.820.1 (emphasis added). Section 99.825.1 also contemplates the approval of redevelopment plans prior to the approval of redevelopment projects and requires a public hearing "[p]rior to the adoption of an ordinance proposing the designation of a redevelopment area, or approving a redevelopment plan ***or*** redevelopment project…." (emphasis added). The redeveloper need only present a "redevelopment project" when it applies for TIF financing under the plan and there is no statutory requirement that the redeveloper re-submit or submit a cost-benefit analysis at that time. RSMo §99.845.

The Court points out that, in the context of the approval of redevelopment *plans,* §99.810.1(5) mentions the word "project" and, from that, concludes that each *redevelopment* project must come with its own cost-benefit analysis (Judgment at 39-42). However, §99.810.1(5) does not refer to *redevelopment* projects. The use of the word "project" can only be meant to refer to the overall project proposed under the plan (whether or not more specific *redevelopment* projects are identified). In many redevelopment plans, especially those encompassing large areas and expanded time frames, there may be many discrete projects that are necessary to facilitate the larger concept, but which provide little, if any, incremental tax revenue. Infrastructure work is a good example. Repairing the sidewalks in the outreaches of the 5th Ward is clearly desirable and necessary but, standing alone, may bring little benefit to the affected taxing jurisdictions. For that very reason, the statute contemplates a cost-benefit analysis which compares the anticipated costs and benefits associated with the entire project. The municipality is and should be concerned whether the redevelopment plan as a whole will result in any benefit, not whether discrete elements of the plan might incidentally result in an incremental gain.

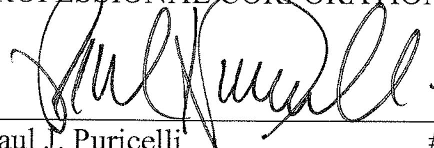
Moreover, by looking at the plan in the aggregate, the statute ensures that the developer and municipality will analyze *all* estimated projects costs at the outset. The costs of the discrete redevelopment projects are the key elements of cost-benefit analysis for the overall redevelopment plan and need not be repeated or re-examined each time the municipality approves a phase of the plan over a twenty-three year period. In short, when Northside prepared the cost-benefit analysis for the Plan, it had to incorporate all of the costs of the anticipated redevelopment projects.

Finally, the Court's reading of the statute would create different rules for redevelopment projects depending upon whether a redeveloper applied for TIF financing when it submitted its redevelopment plan or chose to wait. Those in the former category would be required to submit redevelopment project specific cost-benefit analyses, while those in the latter would not. The legislature could not have intended that the timing of municipal approvals for redevelopment plan and redevelopment projects determine the required submittals.

CONCLUSION

For all the foregoing reasons, Defendant Northside requests that the Court grant it a partial new trial and/or set aside its Judgment and either enter a new Judgment in favor of the City defendants and Northside or grant said defendants a partial new trial.

STONE, LEYTON & GERSHMAN,
A PROFESSIONAL CORPORATION

By: 

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that the foregoing was mailed, postage prepaid on July 27, 2010 to:

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