MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)

State of Missouri ex rel. BONZELLA SMITH, et al.,	)	
Petitioners/Plaintiffs,	)	
and	)	
Elke McIntosh,	)	No. 0922-CC09379 Div. 18
Plaintiff Intervenor,	)	
v.	)	
TIF COMMISSIONERS, etc., et al.,	)	
Respondents/Defendants.	)	

MEMORANDUM, ORDER AND JUDGMENT

When anybody comes in and they make great promises about how things are gonna change, until it actually occurs you never know. And [Paul McKee] had a plan of how he was gonna revitalize all of North St. Louis. It may have happened. Again, it ain't. But no one else had a plan. * * * The pipe dream means that maybe, maybe not. Let's take a chance on it. Nobody's gonna get hurt. Let's try it.
Testimony of Alderman Freeman Bosley, Sr.

If you build it, they will come.
Field of Dreams.

Plaintiffs and intervenors seek a writ of mandamus, and declaratory and injunctive relief, to prevent implementation of certain ordinances of the City of St. Louis contemplating a massive redevelopment on the north side of the City. Plaintiffs think that somebody *is* "gonna get hurt." Defendants, including the redeveloper, rely on an unprecedented plan that includes, in the words of a distinguished economist, "pie in the sky," and economic projections

seemingly manufactured out of thin air. Counsel for the parties, in arguing their respective positions, have outdone themselves with citations to Dostoyevsky, Teddy Roosevelt, and Shakespeare.

The question before the Court, fundamentally, is whether the City's Board of Aldermen had the discretion to say, in Alderman Bosley's words, "Let's try it." The Court concludes that the answer must be, "No."

Procedural History and Evidentiary Issues

Bonzella Smith, the original plaintiff (sometimes referred to in the record as petitioner, due to the claim for mandamus), commenced this action to enjoin the adoption of ordinances pursuant to a resolution of the Tax Increment Financing Commission ("TIF") of the City of St. Louis, approving the Northside Redevelopment Plan, and recommending adoption of the implementing ordinances. The resolution and ordinances at issue, of course, relate to the Northside Redevelopment Plan proposed by defendant Northside Regeneration, LLC. Plaintiff Smith also sought mandamus to compel the TIF Commission to reconsider the redevelopment plan. Plaintiff's action was initiated before the proposed ordinances had been enacted, on the theory that the Court could intervene due to the deficiencies of the TIF Commission's procedures. The Court declined to grant an alternative writ of mandamus or a temporary restraining order, for lack of ripeness. Instead, the Court scheduled a preliminary injunction hearing for a date subsequent to the anticipated date of approval of the ordinances. An amended petition was then filed, adding Cheryl Nelson and Isaiah Hair as additional plaintiffs. Defendants-

respondents included the City of St. Louis, the members of the City's Tax Increment Financing Commission, the Mayor, and all members of the Board of Aldermen, as well as Northside Regeneration, LLC, the proponent of the Northside Redevelopment Plan.

As foreseen, the implementing ordinances, Nos. 68484 and 68485 (Def.Ex. A & B; Int.Ex. 1 & 2), were ultimately approved, and the Court heard plaintiffs' motion for a preliminary injunction, focusing on the TIF Commission's procedures but addressing certain alleged deficiencies in the ordinances themselves. The Court denied preliminary relief, noting some serious issues indicating a likelihood of success on the merits.

After denial of the preliminary injunction, intervenor McIntosh appeared and plaintiff Nelson aligned herself with the intervenor, so that she is sometimes referred to as an intervenor. The intervenors (including plaintiff Nelson) filed their own petition. All of the plaintiffs seek declaratory and injunctive relief, attacking the validity of Ordinances 68484 and 68485. The Court dropped or dismissed the individual members of the TIF Commission and the individual members of the Board of Aldermen, concluding that a judgment as to the City and the Board of Aldermen collectively would bind the individual commissioners and aldermen.

The case was tried to the Court over several days in February and March, 2010. The original plaintiffs continued to assert procedural deficiencies in regard to the adoption of the TIF Commission resolution. Both the original plaintiffs and the intervenors allege that Ordinances 68484 and 68485 are invalid as in excess of the City's

authority under the Real Property Tax Increment Allocation Act, §§99.800 et seq., RSMo 2000 & Supp. In particular, the plaintiffs' second amended petition at ¶21 alleges that the ordinances are beyond the City's authority because they do not conform to the mandatory minimum statutory requirements. Specific allegations pertain to the TIF Commission's procedures and the invalidity of various statutorily required findings of the Board of Aldermen concerning financing of the redevelopment plan. Plaintiffs pray for declaratory and injunctive relief on the premise that the relevant ordinances are inconsistent with §§99.800 et seq.

Intervenors' petition (filed December 3, 2009) alleges that the ordinances' blighting determination is arbitrary, capricious and unreasonable and unsupported by substantial evidence (count I), that the blighting determination was the product of bad faith due to lack of effort to seek alternative proposals, reliance on "political" rather than economic considerations and factors, and collusion with defendant Northside to mislead the public about the use of eminent domain in connection with the redevelopment plan (count II), that there was no proper finding that redevelopment could not occur without tax increment financing (count III), and that the redevelopment plan does not conform to the City's comprehensive plan as required by statute (count IV). Defendants' answers controvert plaintiffs' and intervenors' claims.

At trial, several motions *in limine* and objections were raised to items of evidence. Defendants' objection to Pl.Ex. 13A is sustained in part; the Court will exclude consideration of all documents

comprising Ex. 13A that are not part of a public record. Defendants' objections to Int.Ex. 12 and 35 are sustained. Defendants' objections to Int.Ex. 16 were sustained at trial; the Court will modify its ruling and admit the exhibit insofar as it shows that defendant Northside in fact applied for state tax credits in connection with its redevelopment plan. All other objections to Intervenors' exhibits are overruled. Plaintiffs' or Intervenors' objections to Def.Ex. F and L are overruled. To the extent not otherwise specified, all other evidentiary objections are overruled, with the Court giving consideration to the exhibits to the extent permitted by law. The evidence adduced at the preliminary injunction hearing is, of course, part of the record.

The Court notes the plaintiffs' motions or objections to any references to a redevelopment *project* and to the City's "comprehensive plan." The Court considers these motions or objections as injecting specific claims of invalidity of the ordinances, and not as mere evidentiary objections. These issues will be discussed at length below.

Facts

The Court did not have the pleasure of meeting Paul McKee at trial. Nevertheless, the record is clear that McKee is the guiding force behind defendant Northside Regeneration, LLC. On May 27, 2009, Northside, described as an "affiliate" of McEagle Properties, LLC, applied for tax increment financing assistance in support of an ambitious and perhaps unprecedented plan to redevelop a substantial portion of what is commonly called the north side of the City of St.

Louis. Prior to the filing of the TIF application, acting through a web of limited liability companies, led by McEagle Properties, McKee had acquired some 882 parcels of land, comprising approximately 116 acres in the proposed redevelopment area. The TIF application noted that McEagle had developed a suburban area known as Wing Haven, involving 1200 acres of land and an investment of $750 million. The TIF application represented that it was Northside Regeneration's goal to create a "LifeWorks Community" in the redevelopment area. The application indicated that Northside anticipated receipt of $250 million in state tax credits and desired TIF assistance in the sum of $409 million for the entire redevelopment plan. Pl.Ex. 7, pp. 12, 17, *passim.*

Upon receipt of Northside's TIF application, the City's bureaucracy swung into action. The TIF Commission has no independent staff of its own, but relies on the City's land use apparatus, including primarily the St. Louis Development Corp. The usual suspects (i.e., lawyers, aldermen, planners, architects, accountants) were rounded up and eventually a formal redevelopment plan, the Northside Regeneration Tax Increment Financing (TIF) Redevelopment Plan, was submitted to the TIF Commission on or about September 8, 2009. Pl.Ex. 10. The TIF Commission then gave various notices of a public hearing, including specific notices to the various taxing jurisdictions (e.g., the Board of Education) that join in mulcting the citizenry within the proposed redevelopment area. Notice of the plan proposal and public hearing was also given to identifiable property

owners in the redevelopment area by certified mail. These notices were provided and mailed by Northside's counsel. Pl.Ex. 6B, 18.

The TIF Commission conducted a public hearing on September 23, 2009, after which an amended plan was approved. (Interestingly, during the review and negotiation process, counsel were at pains to recommend that the plan be revised to eliminate the positive "will" and substitute the precatory "may" in describing the actual redevelopment to be undertaken. Int.Ex. 24.) The Commission in fact received comments and testimony at the hearing. Apparently the hearing was not organized to afford maximum opportunity for all attendees to be heard, but there is no doubt that there was a public hearing and that the Commission did receive statements or testimony, written and oral.

In its deliberations, the Commission relied primarily on reports from "staff," i.e., the City's planning and development agency. Neither the Commission nor anyone else undertook to determine there were any conflicts of interest on the part of the commissioners or staff. Instead, the Commission relied on self-reporting. There is no credible evidence that anyone involved in the TIF plan approval process on the part of the Commission, the City's bureaucracy, or the Board of Aldermen had any disqualifying interest in property affected by the proposed plan.

There is little doubt that the TIF Commission gave perfunctory consideration at best to the objections to the proposed plan by the citizenry. The Commission gave notice of the amended plan to the taxing jurisdictions via letter mailed September 16, 2009.

The TIF Commission adopted a resolution on September 23, 2009, recommending that the Board of Aldermen of the City approve the redevelopment plan as amended and authorize a contract with Northside as redeveloper. Pl.Ex. 12. However, the Commission qualified its approval by limiting its recommendation for TIF financing to two subdivisions of the redevelopment area. Northside's plan proposed four "redevelopment project areas" designated areas A, B, C and D. The TIF Commission recommended that the City approve only redevelopment project areas A and B for TIF financing, notwithstanding that the redevelopment plan called for a blighting declaration encompassing the entire redevelopment area.

Subsequent to the recommendation of the TIF Commission, the Board of Aldermen and the Mayor approved Ordinances 68484 and 68485. Ordinance 68484 provides in pertinent part that the redevelopment plan as recommended by the TIF Commission "and the Redevelopment Project described in" the plan are adopted and approved (Section Three); and that the redevelopment area described in the plan is designated as a redevelopment area as defined by statute (Section Two). The ordinance further creates a "Northside Regeneration Special Allocation Fund" and "such sub-accounts as are necessary to administer the Redevelopment Project," pledging the funds in the special allocation fund for the payment of redevelopment project costs (Section Four). Ordinance 68484 also sets out at Section One the various findings required by statute as prerequisite to the approval of a TIF plan. These findings include a finding that the redevelopment area "on the whole" is blighted, that the redevelopment plan conforms to the City's

comprehensive plan for the redevelopment of the City as a whole, that a cost-benefit analysis has been filed, and that the redevelopment of the "Redevelopment Project" is not financially feasible without TIF assistance. Subsection I of Section Two also finds that "Redevelopment Project Area A" and "Redevelopment Project Area B" include only parcels of real property directly benefited by those redevelopment project areas. Nowhere in the ordinance or the redevelopment plan incorporated therein is any specific redevelopment project defined or approved. This appears to correspond to a deliberate decision of the defendants, as set out in a memorandum of defendant Northside's counsel to the Mayor's principal assistant for economic issues, Barbara Geisman: "After further discussion and given the complexity of the issues with the individual redevelopment agreements, we are proceeding with a general redevelopment agreement. After the approval of the general redevelopment agreement and the redevelopment plan, we would deal with the individual redevelopment agreements." Int.Ex. 20.

Ordinance 68485 approves and authorizes the execution of a development agreement between the City and Northside. Although the authorized contract refers to "redevelopment projects" and the commencement of site work, see, e.g., §3.4, the contract nowhere sets out any specific redevelopment projects, i.e., specific infrastructure renovations, building rehabilitations, or new construction, involving identifiable parcels of real estate in the redevelopment area or the redevelopment project areas. The contract as authorized by the ordinance was executed by the parties in December 2009, shortly after

the Court denied the motion for a preliminary injunction. The record does not reflect if Northside has commenced any significant site work. The contract with the City provides liberal deadline extensions on Northside's request. The contract limits, but does not foreclose, use of eminent domain to procure land in furtherance of the redevelopment plan.

In furtherance of the redevelopment plan, defendant Northside has applied for state tax credits. Int.Ex. 16. As noted above, Northside anticipates the receipt of some $250 million of such credits. As of the time of trial, the evidence was that such credits would be or had been approved. Under Ordinance 68484, all real property tax revenues payable by taxpayers within the redevelopment area will be funneled to the special allocation fund. Revenues computed as of the time of the adoption of the redevelopment plan must be distributed at that level to the relevant taxing jurisdictions; revenues exceeding 2009 levels will be made available for TIF assistance to defendant Northside. As of the time of trial, as a matter of fact, there were no specific redevelopment projects in progress that would be eligible for the assistance. Thus, any inflationary increase in revenue or increases attributable to increases in private economic activity unrelated to defendant Northside's redevelopment plan would be captured by the special allocation fund and not distributed to taxing jurisdictions, subject to some ability of the City to declare certain revenues as "surplus."

Plaintiffs and intervenors are individual taxpayers and homeowners residing within the redevelopment area. Plaintiff Nelson

testified credibly that the market value of her property has been adversely affected by the blighting designation approved in Ordinance 68484. It has been stipulated that intervenor McIntosh would also testify to diminution of market value. All of the plaintiffs and intervenors pay real estate taxes to various taxing authorities in the City. The Court infers from the entire record that the diversion of incremental tax revenues to the special allocation fund could reduce revenues otherwise available to taxing jurisdictions within the redevelopment area, thereby depriving such jurisdictions of revenue increases in the future.

The record reflects that the last comprehensive plan approved by ordinance of the City of St. Louis was adopted in 1947. That plan is not in evidence. Similarly, there is no evidence that the Northside redevelopment plan was formally approved by the City plan commission, as required by Ordinance 64687, Int.Ex. 35.

In 2005, the City adopted something called a “strategic land use plan.” Def.Ex. K. This plan was apparently approved by the City plan commission but not by the Board of Aldermen. The “strategic plan” consists of a large color-coded map of the City setting out the existing land uses in the City by various categories, including “opportunity areas” and “neighborhood development areas,” both of which by definition are designated for renewal, rehabilitation or reconstruction, but the "strategic plan" does not really set out any specific plan for developing even these areas. The "strategic plan" does not in fact prescribe a comprehensive plan for the development of the City as a whole, but merely memorializes existing land uses in the

City as of the time of its adoption. To the extent that it contemplates development of the City as a whole, it appears to do no more than to recommend continuation of most existing predominant uses. However, a gross comparison of the Northside redevelopment plan with the “strategic plan” reveals no glaring asymmetry between the anticipated uses of the land in the redevelopment area and the uses generically designated in the "strategic plan."

The City’s fifth ward, all of which is included in the Northside redevelopment area, has been the beneficiary of a comprehensive plan for the ward itself. Int.Ex. 9, see also Ex. 10. Here, too, the fifth ward redevelopment plan does not appear to be wildly at variance with the Northside redevelopment plan, at least to the Court’s relatively untutored eye.

The evidence at trial was conflicting as to the conformity of the Northside redevelopment plan to the City’s “comprehensive plan,” and, indeed, it is arguable that the City has no comprehensive plan. However, defendants’ evidence was that the redevelopment plan conforms at least in large measure to the 2005 “strategic plan” and to the fifth ward plan, and Court’s review tends to confirm defendants’ evidence. There seems to be no doubt that the redevelopment plan has little in common with the 1947 master plan.

As approved by the City, the redevelopment plan embraces an irregularly-shaped land mass of 1100 acres (including rights of way) lying mostly northwest of the downtown area. The Court will not expend effort to describe the boundaries; suffice it to say that the redevelopment area includes a narrow strip protruding southwardly to

Highway 64/40 (referred to as a "panhandle" in Intervenor Ex. 6, p. 8) and another section protruding easterly to the approaches to a new Mississippi River bridge. The southern protrusion or panhandle is designated as Redevelopment Project Area A and the eastern protrusion is designated as Redevelopment Project Area B, the only areas approved for TIF assistance at this time. The existing land uses in these two redevelopment project areas are predominantly commercial and industrial, with few single family dwellings.

The blighting study undertaken by Northside assessed every parcel of privately-owned real estate in the redevelopment area, amounting to over 4,000 parcels. There is no dispute that there is an abundance of vacant land in the redevelopment area. Northside represents that the vacant land amounts to 38% of the total acreage, with an additional 6% of the remaining land occupied by vacant buildings. There was evidence that the platting of the areas in the redevelopment area has led to a profusion of small lots, not very popular in the current market. The redevelopment area also suffers from declining population, higher than average crime rates, low owner occupancy of residential premises, and a fairly high percentage of dilapidated housing, although the parties differ as to how to characterize buildings that were rated in "fair" condition by Northside's surveyors.

There was substantial evidence of private redevelopment in the Northside redevelopment area, and the parties proffered competing and conflicting photographs and videos of actual conditions in selected parts of the redevelopment area. Compare Int.Ex. 32 with Int.Ex. 6,

appendix C. There was also evidence that parts of the Northside redevelopment area have been redeveloped previously with the aid of public subsidies or tax abatement. Def.Ex. F.

As approved to date, defendant Northside is eligible for up to $198.6 million in TIF reimbursement for costs of studies and professional services, property acquisition and relocation, public infrastructure, and building rehabilitation in Redevelopment Project Areas A and B. All parties expect that Northside will seek an additional $193 million for Redevelopment Project Areas C and D. The contract between the City and Northside, and the redevelopment plan, provide for completion up to 20 years into the future. Int.Ex. 3, p. 11.

All of the studies undertaken as part of the redevelopment plan addressed conditions in the entire redevelopment area, not just areas A and B. Defendants' experts were unable to opine on whether areas A and B individually were economic or social liabilities or suffered from conditions indicative of such liabilities. (Testimony of Larry Marks.) To the extent that plaintiffs presented any evidence focused on areas A and B, that evidence suggested that they were not economic liabilities in and of themselves. (Testimony of Dr. Michele Boldrin.)

Defendant Northside's estimated cost for the implementation of the entire redevelopment plan is in excess of $8 billion. As of the time of trial, Northside had assembled about 10% of the acreage under its control, expected state tax credits of perhaps $250 million, and had an expression of interest (the Court finds that it is not a commitment in any real sense of the term) from Bank of Washington to

continue and perhaps increase a line of credit which in the past has amounted to $27 million. There is no dispute that the Bank of Washington could not itself finance an $8 billion program. There was no evidence of the net worth of Northside, McEagle Properties, or any other principal thereof, although there is some evidence that McEagle has had success in raising very significant sums in connection with other developments.

Northside has projected revenues accruing from implementation of the redevelopment plan amounting to $8.3 billion. Pl.Ex. 7, p. 16. These projections are based almost entirely on a "cost-benefit analysis" conducted for Northside by an entity known as Development Strategies. Int.Ex. 8. Contrary to the Court's first impression, it appears that the cost-benefit analysis employs recognized methods of projecting economic activity in a given area for real estate development purposes. However, the Court notes that the analysis concedes that the "projections are for a concept that is not yet constructed or leased and for a use that is new to this market." Int.Ex. 8, "Overview." It appears that the cost-benefit analysis relies in some measure on the "market study" which was also presented by Northside as part of the basis for the blight finding. Def.Ex. M. The market study includes data from surrounding markets against which the Northside redevelopment will compete, as well as data from urban redevelopment projects such as Denver's Stapleton Airport redevelopment.

At trial, defendants presented the testimony of Development Strategies' principal, Larry Marks, a qualified urban planner to the

effect that the revenue projections and the "return on cost" estimates were reasonable and valid methods of evaluating the economic impact of the redevelopment. The cost-benefit analysis concludes that the redevelopment plan will not generate sufficient returns to entice private enterprise to build it.

Intervenors presented the testimony of Dr. Michele Boldrin, chairman of the economics department of a local university, who harshly criticized Northside's revenue and economic activity projections. He observed that the projections were merely "pie in the sky," having no relationship to experience with redevelopment projects in the real world. He questioned the reasonableness of assuming that Northside could construct and sell hundreds of single family residences valued in excess of $450,000 in the redevelopment area, given the absence of any comparable experience in any other urban redevelopment environment. He also questioned the defendants' hypotheses concerning the City's ability to attract new, relatively high-income residents, given the history of the City's population losses. The Court finds Dr. Boldrin's opinions to be both credible and persuasive. The record is bereft of evidence that anyone, anywhere has accomplished the feat of attracting new residents to core urban areas on a scale envisaged by defendants. One of defendants' own witnesses indirectly acknowledged that comparisons between the Denver Stapleton project and the Chicago South Loop project on the one hand and the Northside plan on the other are flawed, due to significant differences in the size and scope of the respective projects. (Caplin testimony.)

Dr. Boldrin was likewise critical of defendant Northside’s “cost-benefit” analysis, projecting the effect on tax revenues in the City if the redevelopment plan were fully implemented or not. Northside’s study hypothesizes increases in revenues that seem utterly incredible. For example, Northside projects that Redevelopment Area C would generate an increase in assessed valuation on the order of 2400% over the life of the development plan with consequent massive increases in tax revenue. See Int.Ex. 4, p. 34; Int.Ex. 8.

Finally, defendant Northside’s TIF application projected a “return on cost” from its redevelopment plan on the order of 3% without TIF assistance and 8% with such assistance. The same analysis projects a net profit over the life of the redevelopment plan of $251 million without TIF assistance and almost $661 million with such assistance. See Pl.Ex. 7, p. 16. As set out in the "pro forma" appendix B to the cost-benefit analysis, Northside projects very slim profits for redevelopment areas A and B, but very large returns for C and D. Int.Ex. 8. The Court shares Dr. Boldrin’s skepticism about all of Northside's financial or economic projections, but cannot find as a matter of fact that they are mere fictions--or, more precisely, that they are not proper subjects for expert opinion.

Issues

Plaintiffs and intervenors contend in their pleadings and arguments to the Court that Ordinances 68484 and 68485 are invalid because (1) the blighting designation is arbitrary and unsupported by substantial evidence; (2) the City cannot lawfully subdivide the redevelopment area and at the same time rely on the blighting

designation of the whole; (3) the cost-benefit analysis is arbitrary and unsupported by substantial evidence; (4) the redevelopment plan does not conform to the City's comprehensive development plan; (5) the redevelopment plan lacks a sufficient showing of the type and terms of funding to pay the development costs; (6) the TIF Commission and the City have exceeded their authority by committing TIF funds for the entire redevelopment area while only approving a contract for areas A and B; (7) there is no evidence that private enterprise could not redevelop the plan area without TIF assistance; (8) Northside's fiscal impact study is inadequate; and (9) the City has exceeded its authority in approving a redevelopment plan, a redevelopment area, and redevelopment project areas without also approving an actual redevelopment project. Plaintiffs also renew their contentions at the preliminary injunction hearing that the TIF Commission recommendation is procedurally defective.

Defendants (the City has simply adopted Northside's arguments) contend that subdivision of the redevelopment area is perfectly proper because the statute contemplates phased implementation of redevelopment projects, which can be approved up to ten years after approval of the redevelopment plan. Defendants further argue that, because not all projects within redevelopment areas must be TIF-eligible in order to qualify as redevelopment projects justifying TIF assistance in the area, there is no requirement that there be any specific redevelopment project approved for TIF assistance prior to or at the time of approval of the redevelopment plan. Defendants further argue that §99.810 prescribes separate requirements for the

redevelopment plan’s contents as distinguished from its approval. Thus, there is no need for firm financing commitments prior to approval of the redevelopment plan.

Defendants counter plaintiffs’ complaints about the blighting designation by noting that the statutory standard applies to the redevelopment area “on the whole,” and there need only be a predominance of blighting factors, which can occur even if some factors are insignificant. As for conformity to the City’s plan, the defendants argue that the comprehensive plan need not consist of a single document, and point to testimony of several witnesses, including aldermen and the Mayor’s economic development director, that the Northside plan conforms to the “strategic plan,” which, in the absence of any other comprehensive plan must be regarded as the only plan. Finally, defendants contend that their cost-benefit analysis is sufficient, and that they need not demonstrate the source of funds as a prerequisite to approval of the redevelopment plan.

The Limited Judicial Role

This is not a condemnation case. The standards of Ch. 99 and Ch. 523 are significantly different, and the exercise of eminent domain is subject to express constitutional commands. Were the Court confronted with a claim involving a condemnation action, it could very likely reach different conclusions. However, the issues before the Court raise only the validity of the redevelopment ordinances in light of the requirements of Ch. 99. Given that framework, the Court's role is narrowly circumscribed.

As the Court intimated in its prior order denying the preliminary injunction, the scope of the Court's review of Ordinances 68484 and 68485 is limited, and does not include the authority to second-guess the elected legislators of the City. In general, the Court must confine itself to determining if procedural mandates have been observed, necessary findings have been made, and whether the City's ordinances are arbitrary, capricious, the product of fraud, collusion or bad faith, or otherwise beyond the City's powers. If the City's legislative findings are "fairly debatable" or "reasonably doubtful" (the Court is not quite sure what that means, but takes it to mean that reasonable minds could differ), the Court has no authority to invalidate the ordinances. See, e.g., *Tierney v. Planned Indus. Exp. Auth.,* 742 S.W.2d 146 (Mo.banc 1987); *Meramec Valley R-III Sch. Dist. V. City of Eureka,* 281 S.W.3d 827 (Mo.App.E.D. 2009); *JG St. Louis West, LLC v. City of Des Peres,* 41 S.W.3d 513 (Mo.App.E.D. 2001). Evidence supporting the findings of the legislative body need not have been before that body at the time of approval of the ordinances, nor need the evidence available to the legislative body be demonstrated to have been accurate. The question is whether, on the evidence available, the legislative determination is fairly debatable. *LCRA v. Inserra,* 284 S.W.3d 641 (Mo.App.E.D. 2009).

At the same time, it is well to bear in mind that TIF ordinances often lay the foundation for the exercise of the mighty power of eminent domain, and authorize diversion of substantial sums of tax revenue to private parties. Under those circumstances, it is essential that the legislative body act in strict conformity to

procedural prerequisites. Furthermore, the statutes frequently employ the mandatory “shall” in prescribing the requirements for a valid TIF approval. The use of the word “shall” means that the requirement is mandatory and cannot easily be evaded. See, e.g., *Neske v. City of St. Louis,* 218 S.W.3d 417 (Mo.banc 2007); *Maryland Plaza Redev. Corp. v. Greenberg,* 594 S.W.2d 284 (Mo.App.E.D. 1979). Withal, the burden of proof in attacking TIF ordinances rests on the complaining party, and the ordinances are presumed valid.

The Court rejects defendants’ contention that the findings required for the approval of a redevelopment plan under §99.810.1 do not necessarily impose substantive requirements for the contents of the plan. To be sure, the statute lacks precision, tending to mix declarative and imperative moods and being very careless with its verbs. However, there is no doubt that, to properly authorize TIF, a city is required to make certain legislative findings, and the findings must be fairly debatable, i.e., supported by substantial evidence and not merely arbitrary or capricious. To the extent that those findings pertain to the contents of the redevelopment plan, they must be construed as imposing requirements on the contents of the plan. Indeed, §99.805(13) expressly requires that “[e]ach redevelopment plan shall conform to the requirements of section 99.810.” See also *Great Rivers Habitat Alliance v. City of St. Peters,* 246 S.W.3d 556 (Mo.App.W.D. 2008).

Standing

There does not seem to be any dispute concerning plaintiffs' standing as taxpayers and residents of the redevelopment area to

prosecute this action. Standing, of course, is a prerequisite to declaratory and injunctive relief. Clearly, however, plaintiffs have a concrete stake in the outcome of this action, and the validity of the ordinances at issue is a ripe and justiciable question. See, e.g., *Harrison v. Monroe County,* 716 S.W.2d 263, 266 (Mo.banc 1986); see also *Missouri Alliance v. Dept. of Labor & Indus. Rel.,* 277 S.W.3d 670 (Mo.banc 2009).

Compliance with Statutory Standards—Procedural

The original plaintiffs in this action focused their attack on alleged procedural deficiencies in the review by the TIF Commission, which, they contend, infected the validity of the redevelopment ordinances. The Court addressed these claims to some extent when it denied the motion for a preliminary injunction.

Briefly, § 99.820 requires that the City observe certain procedures in adopting TIF ordinances: an application must be filed, setting forth certain specified information; the TIF commission must fix a time and place for a public hearing on the proposed plan, and must give notice of the hearing; the TIF commission must give notice of the TIF hearing to each taxing jurisdiction within the boundaries of the redevelopment area, plan or project. Any "interested person" may file written objections or comments and "may" be heard orally at the public hearing. Prior to the conclusion of the TIF commission hearing, the redevelopment plan, project or area may be changed, but taxing districts must be given seven days' notice of the changes before final approval. The notice of hearing must be sent by

certified mail to each owner shown on the tax rolls at least ten days prior to the hearing. §§99.825.1, 99.830.1.

In the case at bar, the Court found at the preliminary injunction stage (and now reiterates those findings) that the City's TIF Commission conformed to statutory procedural commands. A hearing was held; notice was given to the relevant taxing jurisdictions and property owners; persons appearing at the hearing were given an opportunity to express their views orally or in writing. The perfunctory consideration given citizens' comments by the TIF Commission does not invalidate the ordinances. The statute does not mandate any particular level of consideration, nor does it authorize a court to look behind the TIF Commission's asseveration that it gave consideration to citizen comments. Similarly, the amendments to the redevelopment plan were proper. They were made prior to approval of the redevelopment plan at the conclusion of the hearing. §99.825.1(g). Finally, the statute does not prescribe any minimum standards for the hearing. That some members of the public may have been excluded does not mean that the hearing was invalid.

On this record, the Court concludes that Ordinances 68484 and 68485 are not invalid due to procedural irregularities in the TIF Commission process.

Compliance with Statutory Standards--Substance

The gravamen of plaintiffs' and intervenors' complaints about the Northside redevelopment ordinances is that they do not conform to statutory standards and are arbitrary insofar as they declared the redevelopment area to be blighted and insofar as they find the

redevelopment plan to be financially feasible. Plaintiffs have raised the additional argument that no redevelopment project was approved prior to or coincident with the adoption of the ordinances.

In analyzing plaintiffs' claims, the Court finds it convenient to address each statutory prerequisite in turn, bearing in mind that the contents of the plan and the requisite findings are mandatory and must be fairly debatable. See *Great Rivers Habitat Alliance v. City of St. Peters,* 246 S.W.3d 556, 560-61 (Mo.App.W.D. 2008).

> *Each redevelopment plan shall set forth in writing a general description of the program to be undertaken to accomplish the objectives and shall include, but need not be limited to, the estimated redevelopment project costs, the anticipated sources of funds to pay the costs, evidence of the commitments to finance the project costs, the anticipated type and term of the sources of funds to pay costs, the anticipated type and terms of the obligations to be issued, the most recent equalized assessed valuation of the property within the redevelopment area which is to be subjected to payments in lieu of taxes and economic activity taxes pursuant to section 99.845, an estimate as to the equalized assessed valuation after redevelopment, and the general land uses to apply in the redevelopment area.* [§ 99.810.1.]

The contents of the redevelopment plan are not in dispute. Plaintiffs and intervenors take issue with the adequacy of the evidence of sources of funds and commitments to finance project costs.

The Court has delineated the redevelopment plan’s financial aspects *ante* and will not repeat that description here. Suffice it to say that the “commitment” of the Bank of Washington is little more than a general expression of willingness to consider additional financing to Northside and its affiliates, if the City comes through with the TIF commitment. Northside has not seen fit to provide evidence of its assets or those of its affiliates. The only “sure things” on the financial side appear to be state tax credits and

Northside's representation of its control of a substantial portion of the redevelopment area's land already.

In *Maryland Plaza Redev. Corp. v. Greenberg,* 594 S.W.2d at 291-92, Judge Gunn commented about the necessity of strict compliance with statutory prerequisites when the "awesome" power of eminent domain is to be deployed. That case involved an urban redevelopment corporation itself invested with the power of eminent domain. The redeveloper was required by the City's general procedural ordinance to provide a "detailed" statement of the proposed method of financing the development. The Board of Aldermen, in approving the redevelopment ordinance, found that a detailed statement had been provided, but the "statement" was little more than the developer's promise to find the money. The trial court and the Court of Appeals held that the legislative finding was arbitrary and without factual foundation, nullifying the ordinance.

Maryland Plaza stands alone among reported cases on the sufficiency of financing statements for redevelopment plans, whether in the context of eminent domain or of TIF plans. In *State ex rel. Devanssay v. McGuire,* 622 S.W.2d 323 (Mo.App.E.D. 1981), the Court of Appeals distinguished *Maryland Plaza* and held that the requirement for a detailed statement of financing did not necessarily limit the Board of Aldermen or the courts to a consideration of statements in the redevelopment plan itself; rather, the courts and the Board of Aldermen could "look behind" the plan. Further, a description of the "method of financing" did not require actual loan or capital commitments or even identified financiers. 622 S.W.2d at 327. All

that was required was enough information to permit the Board of Aldermen to determine the plan's feasibility, and the courts "must presume" a certain expertise in the Board and the bureaucracy in evaluating such feasibility. *Devanssay's* reasoning is closely in accord with the Supreme Court's views in *Parking Systems, Inc. v. Kansas City Downtown Redev. Corp.,* 518 S.W.2d 11 (Mo. 1974).

The Court concludes that the Northside redevelopment plan meets the minimum requirements prescribed by §99.810.1. The statute does not demand any level of detail, as did the governing ordinance in *Maryland Plaza.* The Court cannot demand, "Show me the money!" The Court can only consider whether Northside showed the City enough hypothetical money to permit the City to evaluate Northside's prospects for raising the necessary capital. As long as the plan itself, and extrinsic evidence, provides anything approaching the information set out in *Devanssay* and *Parking Systems,* the Board of Aldermen acts within its discretion in approving the redevelopment plan. See also *Annbar Assoc. v. West Side Redev. Corp.,* 397 S.W.2d 635 (Mo.banc 1965)(Court deferred to judgment of legislature on how "detailed" financing plan had to be).

The multibillion-dollar scale of the redevelopment plan perhaps should counsel a more demanding approach to the evaluation of the financing behind the plan, particularly given the extensive land area subject to the plan. However, given that there are no specific projects identified in the plan and given that the use of eminent domain is not immediately in prospect, the Court concludes that it must defer to the legislative judgment as to the sufficiency of the

financial aspects of the redevelopment plan, at least in the context of this action.

> *No redevelopment plan shall be adopted by a municipality without findings that: (1) The redevelopment area on the whole is a blighted area, a conservation area, or an economic development area, and has not been subject to growth and development through investment by private enterprise and would not reasonably be anticipated to be developed without the adoption of tax increment financing.* [§ 99.810.1(1).]

Plaintiffs and intervenors vigorously dispute the Board of Aldermen's finding that this statutory requirement is fulfilled by Northside's redevelopment plan. They contest each element of the statutory finding.

The blighting determination under the definition in §99.805(1) turns on whether there is a "predominance" of blighting factors affecting the redevelopment area as a whole, such that the area is an economic or social liability. These factors pertain to street layout, unsanitary or unsafe conditions, improper subdivision or obsolete platting, conditions endangering life or property by fire or other causes, or any combination of the enumerated factors. See §99.805(1); *Meramec Valley R-III Sch. Dist. v. City of Eureka,* 281 S.W.3d at 835-36. The predominance of one or more of these blighting factors must then be found to produce an impediment to the provision of housing, an economic or social liability, or a threat to the public health, safety or welfare in order to lead to the blighting finding. *Great Rivers Habitat Alliance v. City of St. Peters,* 246 S.W.3d 562-63.

Legislative blighting declarations have been the subject of frequent and unsuccessful attacks in both the TIF and eminent domain contexts. In the eminent domain cases, there is a significant

difference in the statutory definitions of blight, as §523.261 requires that the redevelopment area be both an economic and a social liability. However, the blighting factors and the determination of their predominance is identical for purposes of both eminent domain and TIF redevelopment. Here, again, the limited judicial role operates to severely restrict review of the legislative determination. See, e.g., *Centene Plaza Redev. Corp. v. Mint Properties,* 225 S.W.3d 431 (Mo.banc 2007)(eminent domain; statutory definition required finding economic *and* social liability; legislative determination invalidated for lack of evidence of social liability); *Tierney v. Planned Indus. Exp. Auth.*, supra (Court deferred to legislative finding); *LCRA v. Inserra,* 284 S.W.3d 641 (Mo.App.E.D. 2009); *JG St. Louis West, LLC v. City of Des Peres,* supra (court deferred to legislative finding); see also *City of Kansas City v. Ku,* 282 S.W.3d 23 (Mo.App.W.D. 2009). Indeed, *JG St. Louis* represents one of the more extreme examples of judicial deference to legislative findings. The Court of Appeals in that case upheld a determination that the West County shopping mall in St. Louis County was blighted, holding that the question was fairly debatable despite the fact that the mall was the city's greatest economic asset. 41 S.W.3d at 519.

Here, the evidence outlined above supports the legislative finding of blight of the redevelopment area "on the whole," in light of incontestable evidence of obsolete platting, deterioration of site improvements, and higher than average crime rates. There was also evidence before the Board of Aldermen of environmental hazards associated with the age of most buildings in the area. While

plaintiffs point to credible evidence that there was exaggeration of some of the conditions, and also accurately note that the evidence of environmental hazards was secondhand, the problem is that the Court may not re-weigh the evidence and come to an independent determination. The housing stock may not be quite so dilapidated as Northside portrayed it, but the predominance of blighting factors producing an economic liability is certainly a fairly debatable question. Indeed, plaintiff Nelson's own property had been the subject of a blighting declaration in years past.

The validity of the blight finding as to the redevelopment area as a whole does not end the matter, however, as there is still the question of whether the blighting finding is vitiated by the subdivision of the redevelopment area. Certainly it seems inconsistent to find that Northside's entire proposed redevelopment area is blighted, but that TIF assistance is appropriate only for redevelopment areas A and B. There certainly is no substantial evidence that areas A and B are themselves blighted.

It is elementary that all of the property within a redevelopment area need not be blighted in order for a legislative body to find that the redevelopment area as a whole is blighted. E.g., *Meramec Valley R-III Sch. Dist. v. City of Eureka,* supra; cf. *Tierney v. Planned Indus. Exp. Auth.*, supra. If the subdivision of the redevelopment area is permissible, then it does not matter if areas A and B are not themselves blighted. So the question is not whether the subdivision of the redevelopment area invalidates the blight finding, but whether the subdivision is itself impermissible.

The Court agrees with defendants that the statute contemplates phases or stages in implementing redevelopment plans, and expressly authorizes the designation of redevelopment project areas. §99.820.1(1). In *Meramec Valley R-III Sch. Dist. v. City of Eureka,* supra, the redevelopment plan called for three phases of development and the plaintiff attacked selected phases, but the Court of Appeals rejected such a "piecemeal" analysis of the blight finding. Thus, the subdivision of the Northside redevelopment plan into four redevelopment project areas subject to differing redevelopment schedules does not invalidate the blight finding.

Plaintiffs' remaining challenge is to the Board of Aldermen's findings that the redevelopment area has not been subject to growth and development through private means and would not reasonably be anticipated to be developed without TIF assistance: the "but for" test, i.e., but for TIF, the area will not redevelop. Here, again, the finding pertains to the redevelopment area as a whole and the question is whether the record shows that such findings are fairly debatable. Some private redevelopment has unquestionably taken place in the redevelopment area without public subsidy, but plaintiffs' evidence leads to a paradox: if some private redevelopment has occurred, does that merely make the "but for" question fairly debatable? *JG St. Louis West* seemingly indicates that the answer is yes. Thus, the *evidence* in this case which shows some private redevelopment activity, and some subsidized activity, and a generally low level of activity overall forces the Court to conclude that the Board's finding of the statutory criterion is fairly debatable.

Good Faith

The cases speak rather loosely of legislative findings that are induced by "fraud, collusion or bad faith." E.g., *Annbar Assoc. v. West Side Redev. Corp.,* 297 S.W.2d at 646. Plaintiffs point to various aspects of the Northside plan and its approval that, to them, suggest bad faith or collusion. The Court considers that something more than "politics" is required to nullify an ordinance on such grounds. There is nothing in the record to suggest that the Board of Aldermen or the TIF Commission are in the pay of Northside or its principals, or that Northside is seeking to manipulate the legislative process to take unfair advantage of plaintiffs or any other specific persons or group of persons. Accordingly, the Court will elaborate no further on the issue of good faith, fraud or collusion.

Such a finding shall include, but not be limited to, a detailed description of the factors that qualify the redevelopment area or project pursuant to this subdivision and an affidavit, signed by the developer or developers and submitted with the redevelopment plan, attesting that the provisions of this subdivision have been met. [§ 99.810.1(1).

The record in this case does not show any material issue in regard to this statutory criterion. The redevelopment plan, incorporated in Ordinance 68484 amply recounts the presence of blighting factors. The mere description of the factors does not, however, foreclose further inquiry.

*No redevelopment plan shall be adopted by a municipality without findings that: * * * (2) The redevelopment plan conforms to the comprehensive plan for the development of the municipality as a whole.* [§ 99.810.1(2).]

At first blush, it would seem that the Board of Aldermen's finding in regard to conformity of Northside's redevelopment plan to the City's "comprehensive plan" is fictitious. Everyone concedes that the last comprehensive plan adopted by ordinance dates to 1947 and the Northside plan did not even refer to the 1947 plan. The City's own ordinance governing comprehensive plans expressly provides:

Any blighting study and redevelopment plan under Chapters 99, 100 and 353 RSMO shall be submitted to the Planning Commission for its recommendation as to its conformity with the Comprehensive Plan. No ordinance adopting any such blighting study or redevelopment plan shall be adopted over the negative recommendation of the Planning Commission unless it receives the affirmative vote of the majority of all the members of the Board of Aldermen." [Ordinance 64687, Int.Ex. 35.]

No effort was made in this case to comply with that ordinance. The City plan commission never formally passed on the Northside redevelopment plan.[1] Thus, plaintiffs' objection that there is no evidence of conformity to a comprehensive plan, still less that there *is* a comprehensive plan, has considerable merit.

There can be no question that the finding of conformity to the City's comprehensive plan is essential to the validity of a TIF redevelopment ordinance, and that the finding must be supported by substantial evidence. See *City of St. Charles v. DeVault Management,* 959 S.W.2d 815 (Mo.App.E.D. 1997); see also *Great Rivers Habitat Alliance v. City of St. Peters,* 246 S.W.3d at 561. The difficult question in this case is, can the Board of Aldermen find conformity to

[1] The Court does not construe Ordinance 64687 as forbidding the enactment of a redevelopment plan or a blight finding without approval of the plan commission, but the Court takes evidence of failure to comply with the ordinance as some evidence that the redevelopment plan does not conform to the City's comprehensive plan.

a comprehensive plan based largely on the proposition that the City's comprehensive plan is whatever the City's bureaucracy says it is?

Defendants rely on *State ex rel. Westside Dev. Co. v. Weatherby Lake,* 935 S.W.2d 634 (Mo.App.W.D. 1996), for the proposition that a city's comprehensive plan need not be found in a single document and that the plan can be shown on a case-by-case basis. *Westside* was a subdivision platting case, and the issue was whether the city had complied with the requirements of §89.340 in creating a general plan to control and direct the use and development of property in the city as a predicate for zoning and subdivision regulations. The court found a comprehensive plan to exist on the basis of evidence of the city's recorded "official map," plus the city's zoning ordinance itself. See also *Strandberg v. Kansas City,* 415 S.W.2d 737 (Mo.banc 1967); *State ex rel. Chiavola v. Village of Oakwood,* 886 S.W.2d 74 (Mo.App.W.D. 1994)(zoning ordinance itself can constitute comprehensive plan). In the TIF context, *City of St. Charles v. DeVault Management,* supra, declares that there is no statutory definition of "comprehensive plan," and the comprehensive plan mentioned in §99.810.1(2) could be a zoning ordinance, but not if a city has formally adopted a prior plan and subsequent ordinances evince no intention to modify the prior plan. 959 S.W.2d at 823. In *DeVault*, the court simply ignored §89.340.

Here, there was evidence that the 1947 plan was adopted by ordinance, but that ordinance was not put into evidence. More importantly, there was no evidence that Northside's redevelopment plan even attempted conformity to the 1947 ordinance. Rather, defendants

appear to concede that the only evidence of conformity to a comprehensive plan for the City as a whole is supplied by the evidence of conformity to Def.Ex. K, the "strategic land use plan" of 2005, which has not been adopted by ordinance but apparently was approved by the City plan commission. Intervenors put in evidence of yet another plan, pertaining only to the fifth ward, Int.Ex. 9, but no one contends that the fifth ward plan, standing alone, amounts to the comprehensive plan referenced in the statute.

If the term "comprehensive plan" as used in §99.810.1(2) does not mean the comprehensive plan described in §89.340, as *DeVault* appears to hold, the Court is left with no choice but to defer to the judgment of the Board of Aldermen as to what the redevelopment plan was supposed to conform to. In other words, the comprehensive plan referred to in §99.810.1(2) is whatever the City says it is, unless the City's position is groundless. If there is evidence of any sort of comprehensive plan in place, to which the redevelopment plan in fact conforms, then the Court must defer to the judgment of the Board of Aldermen. This seems to the Court to be an abdication of the courts' duty to construe legislation for themselves as a matter of law, without deferring to constructions by other branches of government. Nevertheless, this conclusion seems to the Court to be compelled by *DeVault* and also by *Tierney v. Planned Indus. Exp. Auth.*, supra. In *Tierney*, redevelopment plans under the planned industrial expansion statutes were required to conform to a "general plan" adopted by the city. Confronted with a redevelopment plan approved long after adoption of a 1947 master plan, and which clearly did not

conform to the 1947 plan, Judge Blackmar dismissed the contention that the statutory condition had not been fulfilled : "To the extent that there are differences [between the general plan and the redevelopment plan], we must assume that the duly constituted authorities concluded that the preexisting plans should be modified." 742 S.W.2d at 152-53.

Plaintiffs cite *State ex rel. Casey's Gen. Stores, Inc. v. City Council of Salem,* 699 S.W.2d 775 (Mo.App.S.D. 1985), for the proposition that the defendants cannot rely on something not enacted by ordinance to substitute for the absence of a comprehensive plan of defendant City. The Court considers that *Casey's* is inapposite. The question in that case turned on the absence of a definition from an ordinance imposing a regulation. The Court of Appeals simply held that the definition could not be supplied by the city's comprehensive plan, which had not been adopted by ordinance. In other words, an administrative action could not amend an ordinance. In this case, however, the question is whether the Board of Aldermen could legitimately make the questioned statutory finding of conformity to the City's comprehensive plan by relying on a planning document not approved by ordinance.

In this case, the TIF Commission and the Board of Aldermen found conformity to the 2005 "strategic plan," treating the 2005 plan as the comprehensive plan for the development of the City as a whole. Because the Court cannot hold as a matter of law that the 2005 plan is *not* the comprehensive plan, and because the evidence is in conflict as to what the comprehensive plan is, the Court simply has no choice but to defer to the Board's finding as "fairly debatable."

*No redevelopment plan shall be adopted by a municipality without findings that: * * * (3) The estimated dates, which shall not be more than twenty-three years from the adoption of the ordinance approving a redevelopment project within a redevelopment area, of completion of any redevelopment project and retirement of obligations incurred to finance redevelopment project costs have been stated, provided that no ordinance approving a redevelopment project shall be adopted later than ten years from the adoption of the ordinance approving the redevelopment plan under which such project is authorized and provided that no property for a redevelopment project shall be acquired by eminent domain later than five years from the adoption of the ordinance approving such redevelopment project.* [§ 99.810.1(3).]

The grammar of this clause of the statute is questionable, but its import is clear: the redevelopment plan must provide estimated dates of completion of all redevelopment projects, which cannot exceed 23 years from the date of the adoption of an ordinance approving the redevelopment project. Defendants rely in part on the language of this clause as justifying the subdivision of the redevelopment area and the phasing of the redevelopment project areas. The real significance of §99.810.1(3), however, lies in its unequivocal reference to *redevelopment projects,* not plans, areas, or project areas.

As will be discussed below, this clause of the statute, in combination with other provisions, renders the City's Northside redevelopment ordinances fatally defective. Defendants point to the language authorizing approval of redevelopment projects up to ten years after adoption of the ordinance approving the redevelopment plan as affording defendants *carte blanche* to approve blight findings and redevelopment plans without concurrent or prior approval of any redevelopment projects. In other words, defendants seek to use the terms "plan" and "project" interchangeably. The Court disagrees with

defendants' construction of the statute. True, the statute permits approval of projects for up to ten years; that is, in effect, a statute of limitations. The statute does not mean that a city has up to ten years following adoption of a redevelopment plan to approve any redevelopment projects. On the contrary, the TIF act as a whole contemplates the confluence of redevelopment plan, redevelopment area, and redevelopment project. To conform to the statute, the legislative body must adopt a plan defining a redevelopment area, together with or subsequent to approval of a redevelopment project or projects, and no plan can be adopted unless it contains a defined project or projects. See *Ste. Genevieve Sch. Dist. v. Board of Aldermen,* 66 S.W.3d 6 (Mo.banc 2002); *City of Shelbina v. Shelby County,* 245 S.W.3d 249 (Mo.App.E.D. 2008).

If defendants' construction of §99.810.1(3) were correct, a city could simply adopt a redevelopment plan and proceed to create special allocation funds to capture any incremental tax revenue increases within the redevelopment area, and no redevelopment project would ever have to be approved. The city could declare the revenue as "surplus" and allocate it to itself, or could simply retain the revenue for up to ten years in the hope that someone would devise an actual project. *City of Shelbina v. Shelby County* makes it clear that the TIF act does not authorize such legerdemain.

Section 99.805 defines "redevelopment project" as "any development project within a redevelopment area in furtherance of the objectives of the redevelopment plan." The statute does not define "project," leaving all and sundry to refer to the dictionary

definition. That definition of project is "a specific plan or design," or "an undertaking devised to effect the reclamation or improvement of a particular area of land." *Webster's Third New International Dictionary.* A redevelopment project, therefore, must be a specific task or undertaking in furtherance of the objectives of the redevelopment plan, pertaining to a particular area of land. Defendants argue, in effect, that the redevelopment plan's description of what the redeveloper may do in the future is a sufficient definition of a "project" to support the Board of Aldermen's finding of compliance with the statute. If that were so, the difference between a redevelopment plan and a redevelopment project would be nil. The Court cannot read language out of the statute, but must give effect to all of the General Assembly's language. *City of Shelbina v. Shelby County,* 245 S.W.3d at 252.

Northside's redevelopment plan sets forth estimated dates of completion of objectives, but without reference to any specific projects as that term must be understood. The plan is not the project. Concepts are not projects. Projects are concrete, not hypothetical or abstract: 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 redevelopment plan's blanket statement of completion dates without reference to specific *projects* renders the finding of compliance with §99.810.1(3) arbitrary.

In keeping with the Court's construction of the statute adumbrated above, it is not critical that the redevelopment plan define each and every redevelopment project and set out a completion

date. The statute refers to "any" redevelopment project. It is sufficient if the plan or a redevelopment agreement specifies one or more projects with completion dates. Other projects can be approved within the ten year period following approval of the redevelopment plan, but there must be at least one defined project approved at or before the approval of the plan.

The Court will elaborate on its construction of the statute in regard to redevelopment projects at greater length below.

*No redevelopment plan shall be adopted by a municipality without findings that: * * * (4) A plan has been developed for relocation assistance for businesses and residences.* [§ 99.810.1(4).]

Plaintiffs do not seriously contest that the redevelopment plan as approved by the City contains a plan for relocation assistance for businesses and residences. Such relocation plans seemingly are pertinent only when eminent domain power is to be exercised. As noted above, the redevelopment ordinances do not authorize the use of eminent domain, at least initially. Contrary to the testimony of several witnesses, however, the ordinances do not forbid the use of eminent domain against residential or religious owners, but merely condition its exercise on subsequent legislative approval. Ordinance 68484, Section Twelve. In any event, § 99.810 does not mandate that redevelopment plans forswear the use of eminent domain.

*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. [§ 99.810.1(5).]

Again, the grammar of the statute leaves something to be desired, but the intention is clear: the Board of Aldermen must find that a proposed redevelopment plan contains a cost-benefit analysis of the impact of the plan on each relevant taxing district. The analysis must also show the impact if "the project" is built compared to the impact if it is not built. (Here again the statute uses the word "project" as distinct from the plan, and here again the defendants have presented a plan without projects, unless one accepts concepts as the same thing as projects.) Finally, the cost-benefit analysis must provide sufficient information for the TIF Commission to evaluate whether the project is financially feasible.

As with the statutory requirement of a statement of completion dates, Northside's redevelopment plan contains a cost-benefit analysis which does not involve any defined project, but addresses the plan's objectives as though they were the projects.

There is no doubt that the cost-benefit analysis does indeed show (as a matter of opinion) the impact of "the plan" on each taxing district in the redevelopment area. The analysis then proceeds to a build/no build comparison, but not on the basis of projects, but on the basis of the plan's objectives. Assuming that the statute's use of the word project was intended to require financial data concerning defined projects, and not objectives, it is apparent that the cost-benefit analysis does not provide any information about the impact of a defined project. Assuming, however, that the use of the word

project in the second and third sentences of §99.810.1(5) was inadvertent, the Court will proceed to assess the sufficiency of the cost-benefit analysis on that basis.

Like the plan's statement of financing sources or commitments, the cost-benefit analysis utilizes assumptions that put the idea of rosy scenarios to shame. But the issue, once again, is whether the Board of Aldermen's findings regarding the sufficiency of the cost-benefit analysis are fairly debatable.

The Court has found that Dr. Boldrin's criticisms of Northside's economic assumptions are well-taken. All that does, however, is create an issue of fact, because defendants put in competing evidence which, if accepted, supports the Board's finding that the cost-benefit analysis is sufficient to determine financial feasibility. *J.G. St. Louis West, LLC v. City of Des Peres,* supra.

Are the assumptions of the Northside cost-benefit analysis so faulty that the TIF Commission and the Board of Aldermen could not evaluate the "project's" feasibility? Stated another way, is the cost-benefit analysis substantial evidence? The Court must conclude that it is--but only if the Court's construction of the statute in the matter of juxtaposing plan and project is erroneous. If the Court is correct in its statutory construction, the cost-benefit analysis is inadequate and the Board of Aldermen's contrary finding is unsupported by substantial evidence. If the Court is wrong, then regardless of the merits of Dr. Boldrin's testimony, the Board of Aldermen was at liberty to consider voodoo economics, so long as the voodoo doctor was qualified to utter his incantations.

Northside’s cost-benefit analysis was prepared by qualified urban planners employed by Development Strategies, relying in large measure on financial “pro formas” prepared by Russell Caplin, an employee of McEagle Properties. Caplin holds degrees in finance and business administration and has had extensive experience in preparing “pro formas” for real estate acquisition and development transactions and who was himself a principal in a venture capital entity dealing in large real estate projects. Although Caplin is employed by one of the gray eminence McKee’s entities, which could undermine his credibility, that fact does not render his evidence insubstantial. As the cases make clear, the TIF Commission and the Board are at liberty to select what evidence they wish to rely on, so long as that evidence is substantial and not the product of fraud, collusion or bad faith. The Court cannot find that Caplin constructed his cost-benefit analysis in a fraudulent manner or in bad faith. In essence, he was doing something for which he has training and experience. That his credentials and credibility are less than those of Dr. Boldrin in the eyes of the Court is not decisive. He is unquestionably qualified as an expert in real estate finance. Consequently, his cost-benefit analysis and its supporting “pro formas” must be regarded as within the realm of the fairly debatable.

The Board of Aldermen’s finding of compliance with §99.810.1(5) is unsupported by substantial evidence, given the Court's construction of the statute as requiring some analysis of specific projects. Otherwise, the Board's finding would suffice.

The Fatal Flaw

The sometimes Delphic quality of the draftsmanship of the TIF act makes judicial construction a challenging enterprise. Applying standard principles of statutory construction, however, it is apparent that the statute was not adopted with massive redevelopment plans in mind. By defining redevelopment area, redevelopment plan, and redevelopment project, and then proceeding to use the terms imprecisely, the General Assembly obscured the fact that the statutory scheme envisions three essential elements: a redevelopment area, a redevelopment plan, and a redevelopment project or projects. The statutory requirements are littered throughout the various sections of the TIF act, but they are perceptible. Unless an area, a plan and a project or projects coincide, a city may not approve a tax increment allocation financing. *City of Shelbina v. Shelby County,* supra; see also *Tax Increment Financing Comm. V. J.E. Dunn Const. Co.,* 781 S.W.2d 70 (Mo.banc 1989)(summarizing TIF statutory scheme, entailing an area, a plan and a project); *Ste. Genevieve Sch. Dist. v. Board of Aldermen,* supra. Yet that is precisely what the defendant City has chosen to do in this case, with the concurrence of defendant Northside.

The evidence shows that the defendants in this case deliberately chose to omit defined projects from the redevelopment plan and from the redevelopment contract approved by ordinance in this case. Int.Ex. 24 demonstrates that the parties intentionally substituted "less specific language" and "may" for "will" throughout the redevelopment plan. Int.Ex. 20 demonstrates that the defendants elected to postpone any real project agreements. See also Int.Ex. 23, a response by the Mayor's deputy to perceptive questions from Alderman

Kacie Triplett: "Will there be a new redevelopment agreement for each RPA? IT IS BEST TO LEAVE THIS GENERAL IN THE PLAN. I ANTICIPATE (BUT OTHERS MAY ANTICIPATE DIFFERENTLY!) THAT THERE WILL BE ONE GENERAL 'MASTER' REDEVELOPMENT AGREEMENT, PLUS ONE OR TWO DETAILED REDEVELOPMENT AGREEMENTS FOR RPAs A & B, PLUS FUTURE DETAILED REDEVELOPMENT AGREEMENTS FOR RPAS C & D." [Capitalization in original.]

In *City of Shelbina v. Shelby County,* supra, the Court of Appeals considered Shelbina's effort to do almost precisely what defendants have attempted to do here: adopt a redevelopment plan, designate a redevelopment area, and create a special allocation TIF fund to capture future incremental tax revenues in the redevelopment area, all without a single, definable redevelopment project (with or without TIF funding). The Court of Appeals affirmed the trial court's holding that §99.845.1 requires the approval of a redevelopment *project* prior to or coincident with enacting TIF ordinances.

The conclusion of the *Shelbina* case is in complete accord with the plain language of §§99.805, .810, .820 and .845. Section 99.805(12) defines "redevelopment area" as a blighted area "which area includes only those parcels of real property directly and substantially benefited by the proposed redevelopment *project.*" [Emphasis supplied.] Section 99.820.1 authorizes the designation of redevelopment project areas, but further provides that no redevelopment *project* can be approved unless a redevelopment plan is also approved and reiterates that the area selected for a redevelopment *project* shall include only the parcels directly

benefited. Lastly, §99.845.1 plainly provides that "in the event a municipality has undertaken acts establishing a redevelopment plan *and redevelopment project* and has designated a redevelopment area . . . which acts are in conformance with the procedures of sections 99.800 to 99.865," the municipality may adopt tax increment allocation financing by ordinance to capture incremental real property and other taxes *in the redevelopment project.*

Defendants wish to elide the distinction between plans and projects, but *Shelbina* makes clear that defendants are not free to do so. The Court has agreed that the statutes do not forbid phasing in redevelopment projects, nor do the statutes require that TIF-eligible projects be undertaken in a redevelopment area before approval of a redevelopment plan and designation of a redevelopment area. What the statutes require, however, is a defined redevelopment project to be undertaken prior to or coincident with approval of ordinances approving a plan, an area and TIF funding. Defendants have combined designation of the redevelopment area, approval of the redevelopment plan, and creation of a TIF special allocation fund, all in the same ordinances, but without a single, concrete project.

While the statutes permit phasing and permit designation of redevelopment project areas, they do not equate redevelopment project *areas* with redevelopment projects themselves. To borrow a term of recent vogue, the TIF act requires that a redeveloper present "shovel-ready" redevelopment projects as part of the process of securing approval of a plan and designation of an area, and especially as prerequisite to creation of a special allocation account.

The only difference between the ordinances at issue here and the *Shelbina* ordinances is that, in this case, the City has identified and contracted with a developer. Nevertheless, this distinction does not render *Shelbina* inapplicable. The parties still lack approval of an identifiable redevelopment project.

It seems clear from the reported cases and the record in this case that cities and redevelopers have undertaken to push the limits of the envelope created by the TIF act. Most of the cases appear to have involved discrete, definable projects, such as the shopping center upgrade in *JG St. Louis West,* supra. Of late, however, the TIF redevelopment plans have grown in grandeur and scope, as in *Meramec Valley R-III Sch. District,* supra. The problem is, however, that without a defined project, the TIF redevelopment process allows cities to expand redevelopment area designations *ad infinitum*. If defendants' approach in this case is valid, the City might as well designate its entire corporate boundaries as a redevelopment area, and proceed to capture incremental tax revenue to dispense to favored redevelopers whenever the City feels like it. The statutes demand more. Indeed, the only reason why defendant Northside's approach of subdividing the redevelopment area is sustainable is that the statutes permit it, but only if it is in conjunction with approved redevelopment projects. In other words, it would be insupportable to permit Northside to obtain TIF assistance for redevelopment areas A and B, which are not separately blighted, if the overall designation of the redevelopment area is not supported by approved redevelopment projects at least in redevelopment areas A and B.

There 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. *City of St. Joseph v. St. Joseph Riverboat Partners,* 141 S.W.3d 513 (Mo.App.W.D. 2004). As noted above, however, the original plaintiffs clearly alleged failure of the ordinances to conform to the requirements of §§99.800 *et seq.* At trial, plaintiffs' counsel astutely raised an objection to the lack of evidence of any redevelopment projects. While he did so via a motion *in limine*, the Court considers that this was sufficient, coupled with the general allegations of the pleading and the fact that the ordinances incorporating the redevelopment plan and redevelopment agreement were in evidence, to raise the issue of the absence of approved redevelopment projects from the ordinances herein.

In sum, most of the findings of the Board of Aldermen in this case are fairly debatable. The blight finding is supportable, the financial findings are not arbitrary or in bad faith (to the extent they are relevant to the plan's contents and do not involve the issue of defined projects), the conformity of the redevelopment plan to the City's comprehensive plan is at least "reasonably doubtful," and the phased approach is permissible. However, there is no evidence whatever of any discrete, definable redevelopment project included in either ordinance at issue or explicitly required by the contract between the City and Northside. As a result, both ordinances are arbitrary and beyond the powers of defendant City under the TIF act.

Attorney's fees

Plaintiffs and intervenors have pleaded an entitlement to attorney's fees. The Court declined to consider evidence on the issue at trial, postponing its consideration. However, the Court concludes, as a matter of law, that plaintiffs cannot recover attorney's fees in this action. Attorney's fees are not "costs" under §527.100, RSMo 2000 & Supp. Fees can be awarded only if an exception to the "American rule" is available. The Court does not perceive that plaintiffs or intervenors can avail themselves of any exception to that rule. See *Johnston v. Sweany,* 68 S.W.3d 398 (Mo.banc 2002); *Washington University v. Royal Crown Bottling Co.,* 801 S.W.2d 458 (Mo.App.E.D. 1990). Fees will not be awarded and so there is no need for further proceedings in this cause.

* * *

Both on and off the bench, the Court has had extensive experience with the perils of urban redevelopment, and the "City of Plans"[2] has had still more. See *Thomas W. Garland, Inc. v. City of St. Louis,* 596 F.2d 784 (8th Cir.), cert. denied, 444 U.S. 899 (1979), on remand, 492 F.Supp. 402 (E.D.Mo. 1980); *QuikTrip Corp. v. City of St. Louis,* 801 S.W.2d 706 (Mo.App.E.D. 1990); *The Conlon Group v. City of St. Louis,* 22nd Cir. No. 994-01675. Quite frankly, the Court considers that a complete implementation of the Northside plan would be nothing short of a miracle. Only the utmost fortitude and perseverance, an unprecedented willingness of the City's land use bureaucracy and aldermen to stay out of the way, and incredible good luck, could accomplish Northside's ambitious goals.

[2] The Court attributes this phrase to columnist Bill McClellan of the *St. Louis Post-Dispatch.*

If St. Louis has found a worthy successor to Daniel Burnham or Rolla Wells in Paul McKee, this Court's judgment will be but a temporary obstacle in his path. The Court does not relish the role of playing naysayer to what could be an inspired vision. The Court has no desire for a return to the era of formalism in American law. But the Court has a job to do, and the Court owes a sworn duty to enforce the law. If the courts will not enforce the statutory requirements for taxpayer-subsidized redevelopment, who will enforce them? And if they are not enforced, what becomes of the rule of law?

Tax increment financing is perhaps the most benign form of public subsidy of urban redevelopment yet devised, and possibly the most ingenious way of enticing the private sector to do well by doing good. It seemingly commits the taxpayer to no money down, and requires the redeveloper to assume most of the risks of failure. If the redeveloper succeeds, he reaps a well-earned reward and the City also benefits. If he fails, no one is hurt except the redeveloper or his investors—perhaps. Nevertheless, a blighting declaration is, after all, no trivial technicality, and to declare 1100 acres blighted in one fell swoop is especially weighty. Plaintiffs, homeowners whose property may be at risk of diminished value or taking by eminent domain, have a right to demand that defendants observe the letter of the law. It is the least the Court can do to insist likewise.[3]

ORDER AND JUDGMENT

For the foregoing reasons, it is

[3] The Court does not decide whether the defects in the ordinances at issue can be cured. Certainly *Adams v. City of Manchester*, 242 S.W.3d 418 (Mo.App.E.D. 2007), strongly implies that cure is possible.

ORDERED that a preliminary order in mandamus be and the same is hereby denied and count II of plaintiffs' second amended petition is dismissed without prejudice; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs and plaintiff intervenors have judgment against defendants City of St. Louis, the Board of Aldermen of the City of St. Louis, and Northside Regeneration, LLC on their claims for declaratory relief, and that it is declared that Ordinances 68484 and 68485 of the City of St. Louis were and are void and of no force or effect as in conflict with §§99.800 et seq., RSMo 2000 & Supp., in the absence of the inclusion of defined redevelopment projects and a cost-benefit analysis of such projects as required by §§99.820.1(3), 99.820.1(5) and 99.845.1; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that defendants, their officers, agents, employees, and all persons acting in concert with them with notice of this Order and Judgment be and they are hereby permanently restrained and enjoined from implementing Ordinances 68484 and 68485 of the City of St. Louis, including but not limited to implementing any special allocation fund pursuant to said ordinances, transferring revenues to or from any such fund, or otherwise taking action under said ordinances; provided, that this judgment shall not be construed to forbid defendant City of St. Louis to amend or supplement said ordinances in accordance with law or to forbid defendant Northside Regeneration, LLC from proceeding with the acquisition or construction of any land, buildings or improvements at its own expense and in pursuance of private agreements; and it is

FURTHER ORDERED that plaintiffs’ and intervenors’ application for attorney’s fees be and the same is hereby denied; costs taxed against defendants.

SO ORDERED:

____
Robert H. Dierker
Circuit Judge

Dated:__________________, 20___
cc: Counsel/Parties pro se