

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

**FILED**  
DEC 09 2009

MARIANO V. FAVAZZA  
CLERK, CIRCUIT COURT  
BY \_\_\_\_\_ DEPUTY

BONZILLA SMITH, et al., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
TIF COMMISSIONERS (CITY OF ST. LOUIS), )  
etc., et al., )  
 )  
Defendants. )

No. 0922-CC09379  
Div. 18

**ENTERED**  
DEC 10 2009  
SR

**MEMORANDUM AND ORDER**

We must not overlook the fact that the market has, on the whole, guided the evolution of cities more successfully, though imperfectly, than is commonly realized and that most of the proposals to improve upon this, not by making it work better, but by superimposing a system of central direction, show little awareness of what such a system would have to accomplish, even to equal the market in effectiveness.

F. Hayek, *The Constitution of Liberty* 342 (Chicago 1978).

The Gateway Mall, Mercantile Center, St. Louis Center, Ballpark Village, and now, Northside Regeneration, perhaps the most ambitious of all. The "City of Plans" adopts yet another. How much can or will become reality? Is there more of Burnham or of Barnum in one Paul McKee? Plaintiffs assert that he is the latter, and that this latest plan should be strangled by the Court at birth. If the Court sat as a super-legislature, it might perhaps do so. But the role of the Court is not to second-guess the judgment of the legislative branch of government. The Court is concerned not with wisdom but with legality. If St. Louis ordinances 68484 and 68485 are within the scope of the authority conferred on the City's Board of Aldermen by relevant statutes, the Court has no further role to play.

In legal terms, plaintiffs seek a preliminary injunction to prevent implementation of ordinance 68484 and 68485 (Def.Ex. A and B), based on their amended petition. In that petition, plaintiffs seek declaratory and injunctive relief concerning those ordinances, which adopt a redevelopment plan with "tax increment financing" or "TIF" affecting a substantial portion of the north side of the City of St. Louis. The ordinances incorporate a redevelopment plan and a redevelopment agreement to be executed between the City and defendant Northside Regeneration, LLC. Plaintiffs assert that a preliminary injunction is needed to protect them from likely irreparable that they will suffer if the ordinances go into full force and effect. The following findings are based on the preliminary injunction record and so are subject to revision and reconsideration after trial; similarly, the Court's conclusions of law are subject to revision and reconsideration prior to entry of final judgment. Because the ordinances at issue take effect today, the Court has considered itself obliged to expedite its ruling on the motion for preliminary injunction, and so the Court's haste may have left gaps in its research.

Plaintiffs are citizens of the City of St. Louis, taxpayers, and residents of the redevelopment area defined by ordinance 68484. They claim that the ordinances in question, which include a declaration that the redevelopment area is blighted, will harm them by devaluing their property and dissipating City tax revenues. There is no serious question about plaintiffs' standing.

Defendants include the City's Tax Increment Financing Commission, its Board of Aldermen, the Mayor, the Comptroller, the City itself, and the redeveloper, Northside Regeneration. The ownership and capitalization of Northside Regeneration is rather hazy on the record to date. Indeed, no evidence of Northside's ownership or its finances was presented at the preliminary injunction hearing. The witnesses uniformly assumed that one Paul McKee was and is the principal of Northside Regeneration and various affiliated entities, but the only direct evidence of Mr. McKee's role is presented by certain deeds of trust executed by Paul McKee on behalf of other entities. The redevelopment plan submitted to the TIF Commission was executed by a William Laskowsky as manager of Northside Regeneration. Pl.Ex. 10.

The evidence of record includes various representations made to the TIF Commission and the City in the redevelopment plan, concerning financing. These representations consist of statements about property owned or controlled by Northside Regeneration in the redevelopment area, expectations concerning equity contributions by Northside, and a letter from the Bank of Washington, located in Washington, Missouri, indicating that the Bank is "excited" to provide financing for parts of the redevelopment plan, *"should the City of St. Louis adopt the necessary tax increment financing for the redevelopment project areas."* Pl.Ex. 10, appendix B.

The statutory scheme under which the defendants have proceeded is found in §§ 99.800 et seq., RSMo 2000 & Supp., the "Real Property Tax Increment Allocation Redevelopment Act." In brief, the statute requires that adoption of an ordinance approving redevelopment plans

and redevelopment projects be preceded by review and recommendation of a TIF Commission. The review and recommendation process requires advance notice to property taxpayers in the proposed redevelopment area, to other affected taxing districts, and to the public at large. The Commission is required to consider public comments, to give notice of any changes in the proposed redevelopment plan to the taxing districts, and to make a recommendation to the Board of Aldermen. Significantly, the Board of Aldermen is not bound by a negative recommendation, and can adopt a redevelopment ordinance by a super-majority in spite of the Commission's adverse recommendation.

As evidenced by the testimony of the chairman of the City's TIF Commission, the Commission's review is rather superficial, and the Commission relies heavily on staff employed by the City or one of its agencies, as well as on the redeveloper, for practically all of its information. The recommendation as to the amount of TIF financing that should be made available is virtually dictated by the Mayor and the Comptroller of the City. In this case, the Commission ultimately resolved to recommend adoption of an ordinance adopting the redevelopment plan as amended as of September 23, 2009. Pl.Ex. 12. However, the Commission recommended that the ordinance "[a]dopt tax increment financing with respect to RPAA and RPAB" only. The references to RPAA and RPAB refer to subdivisions of the redevelopment area specified by the redevelopment plan as "redevelopment projects" within the redevelopment area. These projects A and B are defined geographically in the plan and illustrated at page 1 of appendix A to the plan as approved by ordinance 68484.

Following the Commission's recommendations, the Board of Aldermen adopted the two ordinances mentioned above. Ordinance 68484 finds that the redevelopment area defined in the plan (including four "project areas" A, B, C and D) is blighted. See § 99.805(1), RSMo Supp. The ordinance makes further findings in accordance with § 99.810, and adopts tax increment allocation financing within "Redevelopment Project Area A and Redevelopment Project Area B." Ordinance, §5.

Ordinance 68484 and the incorporated redevelopment plan do not contemplate the immediate use of eminent domain to acquire private property within the redevelopment area, but it is clear that §12 of the ordinance contemplates the use of eminent domain if the Board of Aldermen approves. Ordinance 68485 and the redevelopment agreement authorized therein provide that actual site work is to commence by April 1, 2010, subject to possible extensions.

The named plaintiffs at the time of the preliminary injunction hearing all resided in project areas A and B. There is no evidence that defendants have threatened them with condemnation or otherwise taken any action that would directly impair the use and enjoyment of their property at this time. Nevertheless, plaintiff Nelson testified credibly that the value of her property has been injured by the adoption of the ordinances at issue, given the declaration or finding of blight and the uncertainty surrounding the precise nature of redevelopment activity expected to take place in her vicinity.

For purposes of the pending motion for preliminary injunction, the Court is guided by standard principles: plaintiffs must show a

probability of success on the merits, a likelihood of irreparable harm in the absence of relief, a balance of hardships tipping in their favor, and absence of harm to the public interest. E.g., *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo.banc 1996). Grant of injunctive relief is discretionary. *J.H. Fichman Co. v. City of Kansas City*, 800 S.W.2d 24 (Mo.App.W.D. 1990).

Plaintiffs' arguments at this stage of the proceedings appear to focus on the following areas: procedural defects in the hearing and approval process by the TIF Commission prior to adoption of its resolution approving the redevelopment plan, including failure of proper notice, failure to consider proffered public comments, failure to identify the principals of Northside Regeneration and failure to investigate possible conflicts of interest, and consideration of a draft plan at the hearing, rather than a final plan; failure of the plan to include adequate financing commitments in general and failure to provide for financing of Redevelopment Project Areas C and D altogether; subdivision of the redevelopment area into four redevelopment project areas with conflicting allocations of TIF financing.

In substance, plaintiffs contend that ordinances 68484 and 68485 are invalid for failure to comply with the governing statutes. The procedural deficiencies of the Commission hearing process are relevant only to the extent that such deficiencies invalidate the subsequent ordinance approvals. In this context, it must be borne in mind that legislation is usually presumed valid, and that the Court does not enjoy the authority to second-guess the judgment of the Board of

Aldermen. Absent evidence of bad faith, fraud or collusion, the burden on plaintiffs in seeking to invalidate the ordinances is a heavy one. E.g., *Spradlin v. City of Fulton*, 924 S.W.2d 259 (Mo.banc 1996); *Meramec Valley R-III Sch. Dist. v. City of Eureka*, 281 S.W.3d 827 (Mo.App.E.D. 2009).

Although the courts tend to be rather cavalier about the rights of property owners when it comes to redevelopment of "blighted" areas, cf. *Kelo v. City of New London*, 545 U.S. 469 (2005), this Court considers that, because TIF redevelopment plans involve diversion of tax revenue to private persons, the potential interference with the use and enjoyment of property (a constitutional right), and a threat, however remote, of condemnation, the procedural requirements of the statute are mandatory and must be observed strictly.

The Court finds that the Commission conformed to the statute in regard to the giving of notice and the conduct of the hearing. Notices were sent by certified mail to taxpayers, and other notices were sent to taxing districts. The notices were timely. In particular, the Court finds that the notices of amendment to the redevelopment plan were served on the relevant taxing districts in a timely manner. The statute requires that such notices be "given" at least seven days prior to the conclusion of the hearing. Notices were mailed on September 16, 2009, and the hearing was concluded on September 23. Even construing the statutory requirement strictly, "given" does not mean "received."

The TIF Commission's rather perfunctory consideration of objections and protests presents a closer question. Section 99.825.1

provides that the Commission "shall hear and consider" all evidence presented at the hearing. The Commission Chairman seemed indifferent to any objections that were presented. Nevertheless, the Court is reluctant to read the statute as authorizing or requiring the Court to investigate the state of mind of the commissioners. On this record, it appears that the evidence was considered, and it does not appear that any proffered evidence was excluded. The record of the hearing (apparently tape-recorded) was not put into evidence, and so the Court will not infer dereliction of duty by the Commission.

Plaintiffs rightly aver that the Commission and the Board of Aldermen seemed lackadaisical in regard to the identity of the redeveloper and the existence of any conflicts of interest. Section 99.820.1(13) enacts a fairly strict prohibition on participation in TIF-related redevelopment approvals by persons having an interest in the redevelopment. The evidence is clear that little, if anything, was done to ensure compliance with that statute. On the other hand, there is no evidence in the record that any member of the Commission, any member of the Board of Aldermen, or any other person employed by or consulting with the City of St. Louis had any interest in property in the redevelopment area, which was not disclosed, or that any person failing to disclose such an interest in fact participated in the approval of the redevelopment plan or ordinances. Despite the breadth of the redevelopment plan, the Court cannot assume that someone in the City had a disqualifying interest.

The Court also rejects the plaintiffs' contention that the Commission was obliged to consider only a "final" plan at its hearing,

and not a draft. In this respect, the statute clearly contemplates that the plan can be amended, prior to the conclusion of the hearing. §99.825.1. There is no evidence that the plan was altered after the Commission adopted its resolution of approval on September 23.

The Court concludes that plaintiffs have established a probability of success on the merits with regard to two aspects of their claims: the adequacy of the evidence of financing commitments, and the subdivision of the redevelopment area into project areas, while simultaneously declaring the entire redevelopment area as blighted.

Section 99.810.1 provides, "Each redevelopment plan shall set forth in writing . . . evidence of the commitments to finance the project costs" and "the anticipated type and term of the sources of funds to pay costs." However, the same statute further provides, "No redevelopment plan shall be adopted by a municipality" without certain findings. None of the mandatory findings refers to the evidence of financing commitments or their adequacy.

In construing the statutory requirements, the Court is mindful that words used in statutes are to be given their plain and ordinary meaning, and that the goal is to give effect to the intention of the legislature. Here, the Court considers that "commitments" means more than mere empty promises, but the statute seems not to mandate any findings by the Commission or the Board of Aldermen concerning such commitments.

In *Allright Missouri, Inc. v. Civic Plaza Redev. Corp.*, 528 S.W.2d 320 (Mo.banc 1976), the evidence of financial commitment to the

redevelopment project was substantially greater than presented here. On the other hand, there is evidence that Northside Regeneration controls substantial acreage in the redevelopment area, which could provide both a financial buttress to the project as well as an incentive to Northside to carry it through. On this record, and in light of the ambiguous statute, the Court considers that plaintiffs could well prevail on their theory that the financing commitments here are so flimsy as to invalidate approval of the ordinance. Cf. *Maryland Plaza Redev. Corp. v. Greenberg*, 594 S.W.2d 284 (Mo.App.E.D. 1979).

A more serious issue, in the Court's view, is the subdivision of the redevelopment plan and the Commission's TIF approval into four project areas. Under §99.805(12), a "redevelopment area" means a "blighted" area or other specified areas or a combination thereof, "which area includes only those parcels of real property directly and substantially benefited by the proposed redevelopment project." Section 99.805(14) defines "redevelopment project" as "any development within a redevelopment area."

In this case, the redevelopment plan defines a "redevelopment area" that extends well beyond the "redevelopment project areas" that were approved for TIF financing by the TIF Commission. Because a redevelopment area is not to exceed in scope "those parcels of real property directly and substantially benefited by the proposed redevelopment project" (emphasis added), the Court considers that the authority to approve a redevelopment plan, and the concomitant authority to find or declare an area "blighted," is limited to areas that are subject to redevelopment projects defined within the plan.

Therefore, the TIF Commission's recommendation of approval of financing only for Redevelopment Project Areas A and B, and the ordinances' contemplation of financing of those project areas only, means that the Board of Alderman was without power to enact an ordinance prescribing a redevelopment area that included parcels outside of the approved redevelopment projects. In other words, the Court has grave doubts about the subdivision of the redevelopment area as reflected in ordinances 68484 and 68485.

Although the Court finds that plaintiffs have established a probability of success on the merits, at least in part, the Court is also conscious that ordinance 68484, at §11, and ordinance 68485, at §6, provide very explicitly that the various sections of the ordinances are severable, and so the issue of subdividing the redevelopment area may not render the ordinance invalid in their entirety.

With regard to the remaining factors in determining the propriety of preliminary relief, the Court finds that, notwithstanding the potential partial invalidity of the ordinances at issue, plaintiffs have failed to persuade the Court that there is a likelihood that they will suffer irreparable harm absent relief.

In the Court's view, plaintiffs' claims can be adequately remedied after trial on the merits, if they establish a right to relief. As far as the Court can tell from the record to date, no public funds are likely to be transferred to defendant Northside prior to commencement of actual site work, nor is the City likely to obligate any substantial amount of public funds to the redevelopment

projects before the case can be tried. Plaintiffs' property may have suffered a diminution in value, but there is no evidence that they have attempted to sell any property without success or that defendants have intruded in any way on their use and enjoyment of their property.

As to the balance of hardships, a preliminary injunction is likely to do more harm to defendants than benefit to plaintiffs. And the Court simply cannot ignore the findings of the Board of Aldermen that the redevelopment plan is in the public interest. Those findings are not to be lightly disregarded by the Court.

Injunctive relief is discretionary, and this Court is not persuaded that it should exercise its discretion to enjoin implementation of the ordinances in question at this time. Trial on the merits can and will occur on an expedited basis, and the plaintiffs are always free to renew their motion if they become aware of an significantly deleterious alteration in the status quo.

ORDER

For the foregoing reasons, it is

ORDERED that plaintiffs' motion for preliminary injunction be and the same is hereby denied; and it is

FURTHER ORDERED that this cause is set for trial on the merits on all issues as to all parties, including intervenor plaintiff, on Tuesday, February 16, 2010, commencing at 11:00 a.m., in Division 18; and it is

FURTHER ORDERED that the parties hereto shall file all written discovery requests within 7 days of the date hereof, and responses to such requests shall be filed within 10 days after

receipt; thereafter no additional written discovery requests will be filed without leave of court; the parties shall exchange lists of witnesses and exhibits not later than the close of business on February 12 (such lists need not be filed with the Court until the date of trial); and it is

FURTHER ORDERED that defendants' motion to dismiss plaintiffs' petition is denied as moot, but the individual members of the Board of Aldermen and members of the Tax Increment Financing Commission are dropped as parties defendant on the Court's own motion pursuant to Rule 52.06, Mo.R.Civ.P.

SO ORDERED:



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Robert H. Dierker  
Circuit Judge

Dated: 12/9, 2009  
cc: Counsel/Parties pro se