



**In the Missouri Court of Appeals  
Eastern District**

**DIVISION THREE**

BONZELLA SMITH and ISAIAH HAIR,	)	No. ED95733
	)	
Respondents/Cross-Appellants,	)	
	)	
and	)	Appeal from the Circuit Court
	)	of the City of St. Louis
CHERYL NELSON and	)	
ELKE MCINTOSH,	)	
	)	
Intervenors-Respondents/ Cross-Appellants,	)	
	)	
vs.	)	0922-CC09379
	)	
CITY OF ST. LOUIS, BOARD OF ALDERMEN FOR THE CITY OF ST. LOUIS, TIF COMMISSION FOR THE CITY OF ST. LOUIS, and NORTHSIDE REGENERATION, LLC,	)	Honorable Robert H. Dierker
	)	
Defendants/Appellants.	)	
	)	FILED: June 19, 2012

Before Robert G. Dowd, Jr., P.J., Mary K. Hoff, J., and Sherri B. Sullivan, J.

PER CURIAM

OPINION

The City of St. Louis (the City), the Board of Aldermen for the City of St. Louis (the Board of Aldermen), the TIF Commission for the City of St. Louis (the Commission), and Northside Regeneration, LLC, (Northside) (collectively referred to as Appellants) appeal from

the trial court's judgment granting a petition for declaratory judgment, temporary restraining order, preliminary injunction, and permanent injunction filed by Bonzella Smith (Smith) and Isaiah Hair (Hair) (Smith and Hair are collectively referred to as Plaintiffs) and intervened by Cheryl Nelson (Nelson)<sup>1</sup> and Elke McIntosh (McIntosh) (Nelson and McIntosh are collectively referred to as Intervenors). We would affirm the trial court's judgment; however, due to the general interest or importance of questions involved, we transfer the case to the Supreme Court pursuant to Rule 83.02.

### Factual and Procedural History

In September 2009, Northside proposed the redevelopment of 1,500 acres in an area immediately north of downtown in the City of St. Louis (the Redevelopment Plan). Northside sought tax increment financing from the City to assist in paying for the costs of redevelopment. Northside asserted that the area it planned to redevelop (the Redevelopment Area) had long been ignored by residential and commercial developers; thus, the City could not expect meaningful economic progress without tax increment financing assistance and large scale planning.

Northside submitted its Redevelopment Plan to the Commission. Following a public hearing, the Commission adopted a resolution approving the Redevelopment Plan. The Redevelopment Plan divided the Redevelopment Area into four smaller areas generally referred to as Redevelopment Project Areas (RPA) A, B, C, and D. The Redevelopment Plan proposed land uses and development concepts for each of the RPAs. The Redevelopment Plan estimated the costs for all the Redevelopment Area would total “approximately \$8.1 billion, over the anticipated 20-year development period.” The Redevelopment Plan did not set forth any specific or enumerated redevelopment projects.

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<sup>1</sup> Nelson was originally named as a plaintiff but later joined McIntosh as an intervenor.

The Commission recommended that the Board of Aldermen adopt tax increment financing with respect to two areas within the Redevelopment Area, RPA A and RPA B, by passage of an ordinance in the form required by Missouri's Real Property Tax Increment Allocation Redevelopment Act (the TIF Act), Sections 99.800 to 99.865. The Board of Aldermen subsequently enacted Ordinance 68484 and Ordinance 68485 (collectively referred to as the Redevelopment Ordinances) based upon the Commission's recommendation.

Ordinance 68484 provided for the City's adoption and approval of the Redevelopment Plan pursuant to the TIF Act, the designation of the Redevelopment Area as described in the plan, the approval of the Redevelopment Area and RPA A and RPA B, and the creation of a special fund for the allocation and administration of payment of redevelopment costs. Ordinance 68484 also provided findings that the Redevelopment Area "on the whole" was blighted, that the Redevelopment Plan conformed to the City's comprehensive plan for the redevelopment of the City, that a cost-benefit analysis had been filed, and that the redevelopment would not be financially feasible without tax increment financing assistance. However, Ordinance 68484 did not define or approve any specific redevelopment project.

Ordinance 68485 affirmed the City's designation of the Redevelopment Area and approval of the Redevelopment Area, proposed the preparation of RPA A and RPA B for "the development of new commercial, residential, institutional and industrial uses," and authorized the City to enter into an agreement with Northside. The City thereafter entered into an agreement with Northside to execute the Redevelopment Plan.

Meanwhile, in October 2009, Plaintiffs filed their initial petition requesting a preliminary injunction restraining and enjoining the City and Northside from "moving forward" on any proceedings or approvals of the Redevelopment Plan. Plaintiffs subsequently filed their First

Amended Petition requesting a temporary restraining order, a preliminary injunction, and a permanent injunction against Respondents. Plaintiffs later filed their Second Amended Petition for Declaratory Judgment requesting a temporary restraining order, preliminary injunction, and permanent injunction against Respondents. The trial court denied Plaintiffs' request for a preliminary injunction and set the case for trial.

Intervenors subsequently filed their motion to intervene, which was granted, and their Petition for Declaratory Judgment expressly pleading "Additional Counts" to Plaintiffs' Second Amended Petition. Intervenors' Petition for Declaratory Judgment alleged that Appellants lacked authority and jurisdiction to approve and pass any ordinance or legislation granting any rights pursuant to the Redevelopment Plan because the Redevelopment Plan and the Redevelopment Ordinances did not conform to state legislative requirements and did not satisfy the minimum statutory requirements. Intervenors' Petition for Declaratory Judgment further alleged that the Redevelopment Ordinances were enacted "in direct violation of and contrary to conditions set forth in [Section] 99.820, et seq."

Appellants thereafter filed their Answer and Affirmative Defenses to Plaintiffs' and Intervenors' pleadings, alleging, *inter alia*, that Plaintiffs' and Intervenors' claims failed to prove a likelihood of establishing that Northside's Redevelopment Plan did not satisfy the requirements of the TIF Act. Appellants requested the trial court to dismiss Plaintiffs' and Intervenors' claims. The trial court did not dismiss their claims, and the case proceeded through discovery.

In February 2010, counsel for Plaintiffs filed a motion *in limine*<sup>2</sup> and a memorandum of

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<sup>2</sup> The Supplemental Legal File contains a *nunc pro tunc* order issued by the trial court finding that counsel for Smith and Hair had filed the motion *in limine* and a memorandum in support on February 16, 2010, but, due to clerical error, had not been recorded that day. The trial court corrected this error to reflect these documents were filed on February 16, 2010.

law in support of the motion asking the court to exclude evidence at trial mentioning or identifying a “redevelopment project” as existing or made a part of the Redevelopment Plan. Plaintiffs’ motion alleged that the Redevelopment Plan did not include a “redevelopment project” as required by the TIF Act at the time the Commission recommended the Board of Aldermen to approve the Redevelopment Plan. Plaintiffs’ motion further alleged that Appellants had attempted to identify RPA A and RPA B as “redevelopment project areas” and that these “redevelopment project areas” were distinguishable from a “redevelopment project” under Section 99.805.1. Plaintiffs’ motion also alleged that the Commission had never recommended to the Board of Aldermen a “redevelopment project,” the Redevelopment Plan did not propose or describe a “redevelopment project,” and that a “redevelopment project area” was “statutorily distinct” from a “redevelopment project.” In the memorandum of law supporting the motion *in limine*, Plaintiffs argued that the Redevelopment Plan did not identify a specific “redevelopment project” and that “RPA A combined with RPA B [did] not together make a redevelopment project.” Plaintiffs requested the trial court to exclude any testimony, exhibits, or evidence of a redevelopment project without laying a foundation for the existence of said “redevelopment project’ as being specific and identifiable.” Appellants did not respond to Plaintiffs’ motion *in limine*, and the trial court did not immediately rule on the motion *in limine*.

On February 16, 2010, just prior to trial before the court, counsel for Plaintiffs requested and received a continuing objection based on the motion *in limine* to any evidence showing whether or not a redevelopment project actually existed. The court took the motion *in limine* with the case.

During the four-day trial, the parties presented evidence, which included the Redevelopment Ordinances, exhibits showing the scope of the Redevelopment Area and the

testimony of residents, financial experts, and City officials. At the end of trial, the court requested post-trial briefs from each party.

In July 2010, after reviewing the post-trial briefs, the trial court entered its judgment (July 2010 Judgment) in favor of Plaintiffs and Intervenors. In the July 2010 Judgment, the trial court specifically found that Plaintiffs' motion *in limine* and objections at trial to "any references to a redevelopment project and to the City's 'comprehensive plan'" injected "specific claims of invalidity of the ordinances" into the action and were not "mere evidentiary objections." The July 2010 Judgment declared the Redevelopment Ordinances "void and of no force or effect as in conflict with [the TIF Act]" because the Redevelopment Plan lacked "the inclusion of defined redevelopment projects and a cost-benefit analysis of such projects as required by [Sections] 99.820.1(3), 99.820.1(5), and 99.845.1." The trial court ordered that Appellants and "their officers, agents, employees, and all persons acting in concert with them" were permanently restrained and enjoined from implementing the Redevelopment Ordinances, implementing any special allocation fund pursuant to the ordinances, transferring revenues to or from any such fund, or otherwise taking action under the Redevelopment Ordinances. However, the July 2010 Judgment specifically provided that the City of St. Louis was not prohibited from amending or supplementing the Redevelopment Ordinances in accordance with the law and that Northside was not prohibited from proceeding with the acquisition or construction of any land, buildings, or improvements at its own expense and in pursuit of private agreements. The trial court denied Plaintiffs and Intervenors' request for attorneys' fees.

Northside subsequently filed its motion for new trial alleging that the trial court should set aside the July 2010 Judgment or grant Appellants a partial new trial to allow Appellants to present evidence of specific redevelopment projects purportedly previously considered and

approved by the Board of Aldermen. Northside further alleged that neither Plaintiffs nor Intervenor had filed any pre-trial pleading questioning whether the Redevelopment Plan specifically set forth redevelopment projects as that term was defined by Section 99.805(14). Northside complained that it “had no idea that the specificity of the redevelopment projects was at issue in the trial until the [trial court’s judgment].” Northside further alleged that the trial court should amend its judgment in their favor because the Redevelopment Plan described a redevelopment project falling within the meaning of Section 99.805(14) given that the statutory definition “redevelopment project” was broad and required only the legal description for the redevelopment project area. Northside argued that Section 99.810 only required a cost-benefit analysis for the Redevelopment Plan as a whole and not as a prerequisite to the adoption of a “redevelopment project.” The City also filed a motion for new trial and memorandum in support adopting and incorporating by reference all arguments and requests for relief set out in Northside’s motion for new trial. Plaintiffs and Intervenor filed responses opposing Appellants’ motions for new trial and also a motion for new trial requesting attorneys’ fees.

In October 2010, the trial court denied Appellants’ motion for new trial and specifically found that, although Plaintiffs’ and Intervenor’s pleadings were “somewhat sparse and did not expressly raise the precise issue” of whether a specific project existed, the issue had been “fairly raised by the pleadings and directly injected by [Plaintiffs’] objections to the lack of evidence of a ‘project.’” The trial court reasoned that, even though Appellants’ motion for new trial referred to evidence outside the record of an infrastructure “project” that would be built in the Redevelopment Area, such a “project” did not satisfy the TIF Act because it was not part of a contract or ordinance specifying what would be built, when it would be built, and how much it

would cost to build. Also, the trial court denied Plaintiffs' and Intervenors' motions for new trial requesting attorneys' fees.

This appeal followed.<sup>3</sup>

### Appellants' Case

Appellants challenge the trial court's July 2010 Judgment and request this Court to reverse that judgment.

#### I. Standard of Review

"The standard of review in a declaratory judgment case is the same as in any other court-tried case." Levinson v. State, 104 S.W.3d 409, 411 (Mo. banc 2003). "The judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." Id. However, in this case we are asked to determine whether municipal ordinances fall within the meaning of a statute, which is a question of law that we review *de novo*. JG St. Louis West Ltd. Liability Co. v. City of Des Peres, 41 S.W.3d 513, 522 (Mo. App. E.D. 2001).

#### II. Appellants' First Point

In their first point on appeal, Appellants claim that the trial court erred in ruling that the Redevelopment Ordinances lacked a redevelopment project and did not satisfy the TIF Act because Respondents<sup>4</sup> failed to raise any legal or factual challenge to the Redevelopment Ordinances based upon a lack or sufficiency of the redevelopment project in their pleadings or at trial; thus, they waived any such challenge. Appellants contend that Respondents' failure to raise such a challenge renders the trial court's judgment void.

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<sup>3</sup> Appellants filed a motion requesting the appeal be dismissed without prejudice because the judgment was not final and because it is moot. The motion is denied.

Respondents counter argue that the question of the existence or non-existence of a “redevelopment project” was tried by the doctrine of implied consent because Respondents, through Smith and Hair, raised this question in their motion *in limine* and memorandum in support and requested a continuing objection based on the motion *in limine* prior to trial.

“Generally, relief granted by a judgment is limited to that sought in the pleadings.” McCord v. Gates, 159 S.W.3d 369, 375 (Mo.App. W.D. 2004). “To the extent a judgment goes beyond the issues presented and raised by the pleadings, it is void.” McCord, 159 S.W.3d at 375. “The purpose of a pleading is to limit and define the issues to be tried in a case and put the adversary on notice thereof.” City of St. Joseph, Mo., v. St. Joseph Riverboat Partners, 141 S.W.3d 513, 516 (Mo. App. W.D. 2004). However, according to the doctrine of implied consent, issues not raised by the pleadings but tried by either express or implied consent of the parties are treated as having been properly pleaded. Rule 55.33(b). The “doctrine of trial by implied consent provides that issues not raised by the pleadings may be determined by the trial court when evidence is offered, without objection by any other party, bearing solely on that [unpleaded] issue.” St. Joseph Riverboat Partners, 141 S.W.3d at 516. “Failure to timely and specifically object to evidence beyond the scope of the pleadings constitutes implied consent for determination of the issues raised.” McCord, 159 S.W.3d at 375. “Upon admission of such evidence, without objection, the pleadings are deemed amended.” St. Joseph Riverboat Partners, 141 S.W.3d at 516. The evidence in question, however, cannot be relevant to any other issue before the trial court; it must bear solely on the new issue. Id.

Although Respondents’ respective pleadings did not specifically allege the lack of a

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<sup>4</sup> For ease of reading and analysis, when referring to Smith, Hair, Nelson, and McIntosh collectively, we will refer to them as Respondents.

redevelopment project, Respondents raised this issue generally in the pleadings through their allegations that Appellants had not complied with the requirements of the TIF Act, and counsel for Smith and Hair specifically raised this issue in their motion *in limine*, which was taken with the case. At the start of trial, counsel for Smith and Hair reminded the trial court that the motion *in limine* was before the court and requested a continuing objection “with respect to the question of whether or not a redevelopment project actually exists or not.” The trial court acknowledged the motion *in limine* and informed the parties that the motion would be taken as a continuing objection.

Later, during trial, Respondents questioned two witnesses regarding whether the Redevelopment Plan included a “redevelopment project” as defined by Section 99.805(14) and whether Northside and the City had entered into individual redevelopment agreements for RPA A and RPA B that described a “redevelopment project.” One witness, who was a member of the Board of Aldermen, testified that “no hard, concrete plan for what the developers sought to do” had been presented and incorporated into the Redevelopment Plan. The witness further testified that the Redevelopment Agreement was a general redevelopment agreement that “had some set, concrete deadlines for the developer to come back to the Board of Aldermen to activate” individual redevelopment agreements for RPA A and RPA B and to determine “what type of projects would go in the set RPA’s.” The other witness, who was the executive director of development for the City, testified that the City and Northside were proceeding with a general redevelopment agreement and that RPA A and RPA B would have their own individual redevelopment agreements that would be discussed and reviewed by the City and Northside at a later time.

The trial transcript reveals that Appellants did not object to Smith and Hair’s motion *in limine*. Appellants did not claim that they had no previous knowledge of Respondents’ allegation that the Redevelopment Plan lacked a “redevelopment project” when Smith and Hair asked for a continuing objection. During trial, Appellants did not object to either witness’ testimony regarding the lack of a “redevelopment project” on the ground that Appellants had no previous knowledge of Respondents’ allegation that the Redevelopment Plan lacked a “redevelopment project.” Upon admission of this testimonial evidence, without objection, the pleadings were deemed amended. See St. Joseph Riverboat Partners, 141 S.W.3d at 516. Given the record before us, the issue of whether the Redevelopment Plan lacked a “redevelopment project” was tried by the implied consent of the parties.<sup>5</sup>

Consequently, the trial court’s July 2010 Judgment, which was based on the ruling that the Redevelopment Ordinances lacked a “redevelopment project” and did not satisfy the requirements of the TIF Act, addressed an issue that was properly before the court and, therefore, was not a void judgment. Point denied.

### III. Appellants’ Second and Third Points

Because Appellants’ second and third points involve similar claims and analyses, we address those points together.

In their second point on appeal, Appellants claim the trial court erred in ruling that the Redevelopment Ordinances lacked a “redevelopment project” and, therefore, did not satisfy the

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<sup>5</sup> Furthermore, Northside’s post-trial brief filed prior to the entry of the July 2010 Judgment also indicates that Appellants had been aware of Respondents’ allegation that the Redevelopment Plan lacked a “redevelopment project.” Smith and Hair argued in their post-trial brief that the Redevelopment Plan did not include a “redevelopment project,” which was required under the TIF Act. Smith and Hair devoted seven-and-a-half pages of analysis to that issue alone. In their subsequently filed post-trial brief, Appellants counter argued that the TIF Act did not require the Redevelopment Plan to include a specific “redevelopment project.”

TIF Act because the trial court’s new definition of a “redevelopment project” as a “specific plan or design” was contrary to the broad definition of “redevelopment project” and to the intent of Section 99.805(14) of the TIF Act in that the TIF Act requires only “any development project” and the Redevelopment Ordinances included a “redevelopment project” within the meaning of the TIF Act.

In their third point on appeal, Appellants claim the trial court erred in ruling that the Redevelopment Ordinances did not satisfy the TIF Act because the ordinances lacked a cost-benefit analysis referable to a specific project in that the TIF Act does not require a cost benefit analysis in connection with individual “redevelopment projects;” rather, Section 99.810.1(5) requires a cost-benefit analysis of the Redevelopment Plan as a whole and the Redevelopment Ordinances satisfied the TIF Act in that they included a cost-benefit analysis of the Redevelopment Plan as a whole.

We must begin our analysis by determining whether the City complied with the requirements of the TIF Act. City of Shelbina v. Shelby County, 245 S.W.3d 249, 252 (Mo. App. E.D. 2008). “Statutory interpretation is purely a question of law.” City of Shelbina, 245 S.W.3d at 252. When interpreting a statute, we must determine the legislature’s intent, give the statutory language its plain and ordinary meaning, and give effect to that intent, if possible. Id. “We presume the legislature intended every word, clause, sentence, and provision of a statute to have effect and did not insert superfluous language into the statute.” Id.

Under Missouri law, any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters, and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some

special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject. Section 71.010.

*A municipality, either at the time a redevelopment project is approved or, in the event a municipality has undertaken acts establishing a redevelopment plan and redevelopment project and has designated a redevelopment area after the passage and approval of Sections 99.800 to 99.865 . . . which acts are in conformance with the procedures of Sections 99.800 to 99.865, may adopt tax increment allocation financing by passing an ordinance . . . . Section 99.845 (emphasis added). “The very nature of TIF financing is that it funds the redevelopment of a particular parcel of property by abating increases in the property taxes on that particular parcel for a period of time determined by the costs of the redevelopment project.” Ste. Genevieve Sch. Dist. v. Bd. of Aldermen of the City of Ste. Genevieve, 66 S.W.3d 6, 10 (Mo. banc 2002).*

A “redevelopment area” is defined as an area designated by a municipality, in respect to which the municipality has made a finding that there exist conditions which cause the area to be classified as a blighted area, an enterprise zone pursuant to Sections 135.200 to 135.256, 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(12).

A “redevelopment plan” is defined as the comprehensive program of a municipality for redevelopment intended by the payment of redevelopment costs to reduce or eliminate those conditions, the existence of which qualified the redevelopment area as a blighted area, conservation area, economic development area, or combination thereof, and to thereby enhance the tax bases of the taxing districts which extend into the redevelopment area. Section 99.805(13). Each redevelopment plan shall conform to the requirements of Section 99.810. Id.

A “redevelopment project” is defined as any development project within a redevelopment area in furtherance of the objectives of the redevelopment plan; any such redevelopment project shall include a legal description of the area selected for the redevelopment project. Section 99.810(14). Section 99.810.1 provides:

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 subject 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. 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 though investment by private enterprise and would not reasonably be anticipated to be developed without the adoption of tax increment financing. 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;

...

(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;

...

(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 . . . .

The trial court rendered a judgment of fifty-one pages on July 2, 2010. In its Judgment, the trial court found that the Redevelopment Ordinances were void because they violated the TIF Act in that they were based generally upon the Redevelopment Plan, which did not include any “redevelopment projects” as the term was defined by the TIF Act:

[T]he 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. [Appellants] 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 [Section] 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. [Appellants] 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, [Appellants] seek to use the terms ‘plan’ and ‘project’ interchangeably. The [trial court] disagrees with [Appellants’] 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 [Appellants’] construction of Section 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* [245 S.W.3d 249] 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 (*sic*) 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. [Appellants] 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 [trial 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 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 [Section] 99.810.1(3) arbitrary.

In keeping with the [trial 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.

...

Applying standard principles of statutory construction, however, it is apparent that the statute was not adopted with massive redevelopment plans in mind. . . . [T]he 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. Shelbina 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 City] has chosen to do in this case, with the concurrence of [Northside].

The evidence shows that [Appellants] in this case deliberately chose to omit defined projects from the redevelopment plan and from the redevelopment

contract approved by ordinance in this case. . . . the parties intentionally substituted “less specific language” and “may” for “will” throughout the redevelopment plan. . . . [Appellants] elected to postpone any real project agreements. . . .

The trial court further elaborated on the July 2010 Judgment in its eight-page Memorandum and Order denying all parties’ motions for new trial or to amend the judgment:

The Court is perfectly willing to accept as true the representations of [Appellants] that there was extensive discussion of specific projects in connection with defendant Northside’s redevelopment plan. The Court is further willing to assume as true that additional information was provided to the Board of Aldermen to demonstrate specific projects that would be undertaken upon approval of the redevelopment ordinances at issue. Even if such evidence had been presented at trial, however, the problem remains that, to date, there is no redevelopment project agreement executed and approved by the City. Again, in the Court’s view, as a matter of law, the City must approve a redevelopment area, a redevelopment plan, and one or more redevelopment projects in order to comply with the statutory prerequisites for tax increment financing. All anticipated redevelopment projects need not be approved coincidentally with the approval of the redevelopment area and plan, but an ordinance which purports to approve a redevelopment plan without a project is unenforceable.

In reasoning that the Redevelopment Plan lacked a “redevelopment project,” the trial court’s July 2010 Judgment and subsequent order denying the motions for new trial or to amend the judgment referred to this Court’s opinion in City of Shelbina v. Shelby County, 245 S.W.3d 249 (Mo. App. E.D. 2008). We find that case instructive here.

In City of Shelbina, a municipal government enacted TIF ordinances designating part of the city as a redevelopment area and approving a general redevelopment plan. 245 S.W.3d at 251. After a dispute with the county government over the refusal to pay monies collected under the TIF ordinances, the city filed a petition for writ of mandamus, declaratory judgment, and damages against the county. Id. at 252. After an extensive hearing, the trial court determined that the pivotal issue was whether the city had any redevelopment projects at the time it adopted the TIF ordinances. Id. The trial court construed Section 99.845.1 to require the approval of a

redevelopment project prior to enacting TIF ordinances. Id. The trial court found that the city's redevelopment plan showed that the city had proposed no identifiable projects but had put forth only concepts, which, in time, could have become actual projects. Id. The trial court concluded that the city's TIF ordinances were void *ab initio* because they did not comply with Section 99.845.1. Id. The city appealed to this Court, which upheld the trial court's decision. This Court reasoned that the plain language of Section 99.845.1 clearly stated the legislature intended for a municipality to either (1) approve a redevelopment project or (2) undertake acts establishing a redevelopment plan and a redevelopment project prior to enacting TIF ordinances. Id. This Court further reasoned that the city's redevelopment plan "lacked any specific redevelopment project prior to enacting the ordinances" at issue and that the "redevelopment plan [was] replete with references to aspirational goals and conceptual frameworks that may be implemented in an effort to redevelop the City, but no specific projects [were] discussed, nor [was] any identifiable financial structure set forth." Id.

Here, giving the relevant sections of the TIF Act their plain and ordinary meaning, we conclude that the statutory language indicates that a "redevelopment project" was required to be approved prior to or in conjunction with the City's adoption of the Redevelopment Ordinances. The evidence at trial clearly established that no "redevelopment project" had been included in the Redevelopment Ordinances or in the Redevelopment Plan. Significantly, two witnesses, a member of the Board of Aldermen and the City's executive director of development, testified that no describable, concrete "redevelopment project" had been included in the Redevelopment Plan because the Redevelopment Plan was general in nature and that specific projects would be decided at a later time.

Furthermore, like the redevelopment plan in City of Shelbina, the Redevelopment Plan here referred to “aspirational goals and conceptual frameworks,” but it did not provide any actual data regarding particular projects. For example, in describing the proposed uses for the land and RPAs, the Redevelopment Plan stated that “[i]t is contemplated that office buildings may be built,” “a potential signature office building may be located between Market and Chestnut Streets,” and Northside “envisioned” a street “designated to attract commercial office space and retailers and restaurants.” The Redevelopment Plan did not provide any specifics detailing impending redevelopment projects; rather, the Redevelopment Plan generally described Northside’s ideas for land use that were couched in terms of “anticipated,” “may be,” “contemplated,” and “depending on market demand.” We find these “proposals” are not sufficient to be considered a project under City of Shelbina, 245 S.W.3d at 251. Because the Appellants’ evidence at trial did not include any specific redevelopment project adopted prior to or along with the Redevelopment Ordinances as required under Section 99.845.1, we find that the trial court did not err in concluding Ordinance 68484 and Ordinance 68485 void *ab initio*. Appellants’ second point is denied.

Consequently, because we find that the trial court did not err in ruling that the Redevelopment Ordinances did not satisfy the TIF Act, we need not address Appellants’ third point regarding the necessity of a cost-benefit analysis of a specific project.

#### IV. Appellants’ Fourth Point

In their fourth point on appeal, Appellants claim the trial court abused its discretion and erred in denying Northside’s motion for new trial because, even assuming the trial court’s definition of “redevelopment project” was correct and even assuming the Redevelopment Ordinances did not otherwise contain a “redevelopment project,” the court should have allowed

Northside to present evidence of redevelopment projects approved by the Board of Aldermen in that the court is allowed to consider matters outside the Redevelopment Ordinances and such evidence would have demonstrated that the City had approved a viable “redevelopment project” under the court’s definition.

We will not disturb a trial court’s ruling on a motion for a new trial unless the trial court abused its discretion. Bean v. Superior Bowen Asphalt Co., LLC, 340 S.W.3d 275, 278 (Mo. App. W.D. 2011). An abuse of discretion occurs when the trial court’s ruling is clearly against the logic of the circumstances before the court at the time and is so unreasonable and arbitrary that it shocks one’s sense of justice and indicates a lack of careful consideration. Kline v. City of Kansas City, 334 S.W.3d 632, 638 (Mo. App. W.D. 2011). In ruling on new trial motions, the trial court is vested with substantial discretion over matters of fact. Pijanowski v. Pijanowski, 272 S.W.3d 321, 324 (Mo. App. W.D. 2008). “This is particularly true in cases tried without a jury.” Pijanowski, 272 S.W.3d at 324 (quotation omitted). Rule 78.01 provides

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

The party who seeks a new trial on the basis of new evidence must show that (1) the evidence became known to the party since the trial; (2) the failure of the evidence to come to the party’s knowledge sooner was not the result of a lack of due diligence; (3) the evidence is so material to the action that it would probably produce a different result if a new trial were granted; (4) the evidence is not merely cumulative; (5) the parties’ affidavit should be produced or its absence accounted for; and (6) the object of the evidence is not meant to merely impeach the character or credibility of a witness. Pijanowski, 272 S.W.3d at 324. “Furthermore, new trial

motions on the ground of newly discovered evidence ‘are viewed with disfavor and courts grant them as an exception and refuse them as a rule.’” Id., quoting Williams v. McCoy, 854 S.W.2d 545, 554 (Mo. App. S.D. 1993).

In its motion for new trial, Northside alleged that the trial court had misinterpreted various sections of Chapter 99. Section 99.825 states that, prior to the adoption of an ordinance proposing the designation of a redevelopment area, or approving a redevelopment plan or redevelopment project, the commission shall fix a time and place for a public hearing as required by Section 99.820.4 and notify each taxing district located wholly or partially within the boundaries of the proposed redevelopment area, plan, or project. Section 99.825. Prior to the conclusion of the hearing, changes may be made in the redevelopment area, redevelopment plan, or redevelopment project, provided that each affected taxing district is given written notice of such changes at least seven days prior to the conclusion of the hearing. Id. After the public hearing but prior to the adoption of an ordinance approving a redevelopment plan or redevelopment project, or designating a redevelopment area, changes may be made to the redevelopment plan, redevelopment projects, or redevelopment areas without a further hearing if such changes do not enlarge the exterior boundaries of the redevelopment area or areas and do not substantially affect the general land uses established in the redevelopment plan or substantially change the nature of the redevelopment projects, provided that notice of such changes shall be given by mail to each affected taxing district and by publication in a newspaper of general circulation in the area of the proposed redevelopment not less than ten days prior to the adoption of the changes by ordinance. Id. *After the adoption of an ordinance approving a redevelopment plan or redevelopment project or designating a redevelopment area, no ordinance shall be adopted altering the exterior boundaries, affecting the general land uses*

*established pursuant to the redevelopment plan, or changing the nature of the redevelopment project without complying with the procedures provided in this section pertaining to the initial approval of a redevelopment plan or redevelopment project and designation of a redevelopment area.* Id. (emphasis added) TIF projects within an economic development area shall apply to and fund only highways, roads, streets, bridges, sewers, traffic control systems and devices, water distribution and supply systems, curbing, sidewalks, and any other similar public improvements but in no case shall they include buildings. Section 99.825.3.

An amendment to a redevelopment plan changes the nature of the initial plan and requires the TIF commission to reconvene, hold public hearings, and issue recommendations before the amendment can be implemented. See Ste. Genevieve Sch. Dist., 66 S.W.3d at 11.

In its motion for new trial, Northside alleged that a new trial should be granted to allow Appellants to present evidence that Northside had “provided the [City] with detailed information underlying the infrastructure redevelopment projects mentioned in the [Redevelopment Plan] and [Redevelopment Agreement], including the replacement and rehabilitation of sanitary sewers by street block; the identification of dilapidated streets targeted for replacement with new streets, curbing and guttering, sidewalks, handicap ramps, sidewalks, tree lawns, street trees, streetlights, pedestrian lights, signage, signals, and fire hydrants; the replacement and rehabilitation of water systems by street block; demolition and environmental abatement by street block; and the development of new parks by specific location.” Northside further alleged that it did not present this evidence at the first trial because Appellants “had no idea that the specificity of the redevelopment projects was at issue in the trial until the [July 2010 Judgment].”

In denying Northside’s motion, the trial court found that Appellants had sufficient notice that “the issue of the necessity of an approved project, as that term must be construed in Section

99.810.1(3) and (5), was fairly raised by the pleadings and directly injected by Smith and Hair's objections to the lack of evidence of a 'project.'" The trial court reasoned that Northside's proffered evidence of an infrastructure "project" did not meet the TIF Act's requirements for specificity because the infrastructure "project" described in the motion for new trial was not "part of a contract or ordinance specifying precisely what will be built, when, and at what cost." The trial court further reasoned that its "construction of the TIF statute would remain unchanged even if [Northside's] additional evidence were part of the record;" thus, the trial court found no reason to grant Appellants a new trial to present such evidence.

We find that the trial court did not abuse its discretion in denying Northside's motion for new trial. Whether or not Northside possessed evidence that it had proposed infrastructure "projects" to the City, at the time of the July 2010 Judgment, no ordinance existed that included any such "projects." Moreover, in its motion for new trial, Northside did not allege that it had obtained *newly discovered* evidence; rather, Northside claimed that it had been unaware of any need to present evidence establishing that specific redevelopment projects had been proposed to the City. Point denied.

#### Respondents' Cross-Appeal

In their sole point on cross-appeal, Respondents claim the trial court abused its discretion by failing to award their request for attorneys' fees. At the end of trial, Respondents requested an award attorneys' fees. In its July 2010 Judgment, the trial court denied Respondents' request.

The decision to award or to deny attorneys' fees is left to the broad discretion of the trial court and will not be overturned unless the court abused that discretion. Washington University v. Royal Crown Bottling Co. of St. Louis, 801 S.W.2d 458, 468 (Mo. App. E.D. 1990).

Generally, Missouri courts follow the “American Rule,” which states that each litigant must bear the expense of his own attorney’s fees unless an exception, statutory authorization, or a contractual agreement applies. Washington University, 801 S.W.2d at 468.

In any proceeding for declaratory judgment under Sections 527.010 and 527.130, the trial court may make such award of costs as may seem equitable and just. Section 527.100.

“However, ‘costs’ do not automatically include attorney’s fees.” Goellner v. Goellner Printing, 226 S.W.3d 176, 179 (Mo. App. E.D. 2007); Washington University, 801 S.W.2d at 470. In declaratory actions, “costs” may include attorney’s fees when there are special circumstances, but this “special circumstances exception to the American Rule is narrow and must be strictly applied.” Id. at 468-69 (internal quotations omitted); see also Goellner, 226 S.W.3d at 179.

“Another exception to the ‘American Rule’ is that attorney’s fees may, on rare occasions, be recovered where a court of equity finds it necessary to award them in order to balance benefits, but this occurs only if ‘very unusual circumstances’ can be shown.” Washington University, 801 S.W.2d at 469. On the contrary, the “taking of inconsistent positions by parties to litigation is a common if not tolerated, practice and hardly makes this a ‘very unusual’ case or amounts to a ‘special circumstance.’” Id.

Here, the trial court did not abuse its discretion in denying Respondents’ request for attorneys’ fees. Appellants and Respondents merely took inconsistent positions over whether the Redevelopment Ordinances were void. The record lacks any evidence establishing very unusual or special circumstances to support a finding that Respondents were entitled to attorneys’ fees. Point denied.

### Conclusion

We would affirm the July 2010 Judgment; however, due to the general interest or importance of questions involved, we transfer the case to the Supreme Court pursuant to Rule 83.02.