

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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Erling "Curly" Haugland,	SUPREME COURT NO. 20130100
Plaintiff and Appellant,	
vs.	Civil No. 08-10-C-00801
City of Bismarck,	
Defendant and Appellee.	

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ON APPEAL FROM SUMMARY JUDGMENT DATED  
FEBRUARY 1, 2013  
STATE OF NORTH DAKOTA  
SOUTH CENTRAL JUDICIAL DISTRICT

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**Brief of Appellant**

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I. Did the City prove that there were any pending authorized projects to support the continued diversion of property tax funds into the City's TIF fund?
- II. Were the procedural requirements of N.D.C.C. 40-58 met for the 1994 modification of the Urban Renewal Plan?

¶5

STATEMENT OF THE CASE

¶6       **I.       Introduction**

¶7       Plaintiff Curly Haugland initiated this action for declaratory relief against the City of Bismarck raising both statutory and constitutional claims related to the City's creation and operation of a tax increment financing (TIF) district under the Urban Renewal Act (Act). As part of his statutory claims, Haugland requested the Court declare illegal the City's perpetual diversion of property taxes into its Tax Increment Financing Fund; and challenged whether the City could legally use TIF funds to complete a parking ramp in downtown Bismarck and for completing necessary improvements to implement quiet rail.

¶8       As to these issues, the City contended in its initial motion for summary judgment that it was allowed to perpetually divert property tax funds into its TIF Fund as long as the City determined it was necessary to do so to cover costs associated with the City's Urban Renewal Plan, as modified. The City also argued Haugland did not have standing to challenge the parking ramp or quiet rail projects because although both were included in the City's Urban Renewal Plan, neither had been "approved" by the City. The City contended if the District Court decided the legality of either project it impermissibly would be providing an advisory opinion.

¶9       The District Court granted the City summary judgment concluding Haugland did not have standing to challenge the use of TIF funds for the parking ramp or quiet rail because neither project had been "approved" by the City. The Court also concluded the City had not acted illegally in the manner in which it had perpetually been diverting property tax money into its TIF fund.

¶10 Haugland appealed the Court’s decision.

¶11 This Court in Haugland v. City of Bismarck, 2012 ND 123, 818 N.W.2d 660 (“Haugland”), disagreed with the City’s interpretation of the Act as it relates to the City’s ability to perpetually divert tax funds into its TIF Fund:

Under the language of the Act, as a whole, a municipality was not authorized to continue a renewal area after the cost of development or renewal of the area was paid. That language does not contemplate a perpetual renewal plan for the diversion of tax increment funds for a renewal area without any pending authorized renewal projects under the plan. Construing those provisions as a whole, we conclude the Act authorized a municipality to continue a renewal plan for a renewal area with tax increment funding until "the cost of development or renewal of any development or renewal area has been fully paid and all bonds, notes, or other obligations issued by the municipality to pay that cost have been retired, or funds sufficient for the retirement thereof have been received by the municipality." N.D.C.C. § 40-58-20(10).

Haugland at ¶ 23, 818 N.W. 2d at 683.

¶12 This Court remanded this case to the District Court to determine whether the City could show 1) compliance with all statutory requirements for its 1994 modification of its Urban Renewal Plan, and 2) the existence of “pending authorized” renewal projects to support the City’s diversion of property tax money into the TIF Fund.

¶13 On remand, the City contended that although the parking ramp and quiet rail projects were not “approved” so as to give Haugland standing to challenge them, they were “authorized” so as to allow the City to divert property tax money into its TIF Fund to pay for them. The City did not attempt to explain how these project could be “authorized” so to allow the legal diversion of property tax money; but still be immune from citizen challenge and judicial review as to whether that diversion was legal under the Act. Nonetheless, the District Court found that both projects were “authorized”

because they were included in the City's Plan and because the City had expended money on planning activities for both projects.

¶14 Haugland appeals. The Act requires renewal projects be "approved" before TIF can be utilized. The City concedes neither project is an "approved" TIF project. Haugland also appeals because the law cannot allow acts of the City to be beyond judicial review, as claimed by the City and as found by the District Court. If Haugland did not, and does not, have standing to challenge the appropriateness of using TIF funds on these projects then those projects cannot, as a matter of law, be "authorized" projects justifying the diversion of property tax money.

¶15 **II. The Proceedings**

¶16 Haugland initiated this action for declaratory relief on April 5, 2010. (Appendix (A) at 7.) Haugland contended the City was acting illegally in violation of the United States and North Dakota Constitution, and in violation of the Act. Haugland requested the Court order the City to discontinue violating the law and return to the Burleigh County Auditor the money in its TIF Fund so it can be distributed to the rightful recipients. (*Id.*)

¶17 The City removed this matter to Federal District Court and filed its Answer on April 23, 2010. (A at 23.) The Federal District Court, on its own motion, refused to exercise jurisdiction and remanded this case back to the District Court on June 14, 2010. (Register of Actions (RA) at 11.)

¶18 On October 12, 2010, the City moved for summary judgment. (RA at 15.)

¶19 The District Court held an oral argument on the motions on January 5, 2011.

¶20 On January 12, 2011, the Court granted the City summary judgment. (A at 100.)

¶21 Judgment was entered on January 24, 2011 and Notice of Entry was served on January 26, 2011. (A at 106.)

¶22 Haugland appealed on March 17, 2011. (A at 107.)

¶23 This Court denied most of Haugland's appeal, but it did agree that 1) any substantial change to a previously approved renewal plan is subject to the requirements of N.D.C.C. § 40-58-06, including the requirements of a public hearing; and 2) the City is not authorized to perpetually divert property tax money into its TIF Fund. This Court concluded the diversion of property tax money must stop unless the City has "pending authorized renewal projects under its renewal plan." *Id.* at ¶ 23; 818 N.W.2d at 683. The Court remanded the case to determine whether there was an appropriate public hearing and resolution in 1994 to add six city blocks to the City's renewal area; and to determine whether there were any pending authorized renewal projects to support the City's continued diversion of property tax funds, and if not, for allocation of the diverted funds to the proper recipients in accordance with N.D.C.C. § 40-58-20(10). *Id.* at ¶¶ 55 and 64; 818 N.W.2d at 680 and 683-684.

¶24 On remand, the City again moved for summary judgment, relying on affidavits from City Administrator William Wocken and other records. (A at 145-237.) As to the 1994 amendment to the City's Urban Renewal Plan, the City was unable to produce a complete resolution as required by this Court's order on remand. Instead the City relied on a partial copy of a resolution and an affidavit from Wocken. (A at 146 and 153.)

¶25 As to whether the City had any pending authorized projects to support its diversion of property tax money into its TIF Fund, the City claimed that its diversion was justified based on the inclusion of a quiet rail project and a parking ramp project in its

Plan, even though neither project had been “approved”; and based on its past expenditures on planning activities associated with these proposed projects.

¶26 Haugland opposed the City’s motion and cross-moved for summary judgment claiming 1) the City failed to prove that it had passed a resolution to support its 1994 amendment to its Plan and 2) the District Court had already concluded at the request of the City that quiet rail and the parking ramp projects were not approved and therefore neither were “pending authorized projects” which could support the diversion of property tax money into the City’s TIF Fund.

¶27 On November 26, 2012, the District Court again granted the City summary judgment. (A at 237.) The Court concluded the City proved it passed an appropriate resolution to support the 1994 amendment based on Wocken’s affidavit and that it need not produce the actual resolution (A at 240-241) and 2) the Court concluded that as long as unfinished proposed projects are listed in the City’s Plan, the City is entitled to divert as much property tax money as it wants into its TIF Fund. (“ . . . Plaintiff’s argument that the simple approval of a plan is not enough to authorize the diversion of property tax revenue into a TIF fund is incorrect.”) (A at 242-243.) In the Court’s order granting the City’s second motion for summary judgment, the Court concluded, as to quiet rail and the parking ramp: “. . . these projects are ongoing, as this pending litigation has hampered progress on them.” (A at 244.) In its order granting the City’s first motion for summary judgment, however, the Court found the opposite when it concluded Haugland’s challenge to the parking ramp and quiet rail was premature, because the City “has not approved any tax increment financing for those projects.” (A at 101.)

¶28 Judgment was entered on February 1, 2013. Notice of Entry of Judgment was completed on February 5, 2013. (A at 246-247.)

¶29 Haugland filed his appeal on April 4, 2013. (A at 248.)

¶30 **STATEMENT OF THE FACTS**

¶31 The Act authorizes a city to designate land within the city as a “development or renewal area” which is defined as the blighted or slum properties that the city has “designated as appropriate for a development or renewal project.” N.D.C.C. § 40-58-01.1(7).

¶32 As to the property within the development or renewal area, the Act allows a city to approve a “development or renewal project,” which “may include authorized undertakings or activities of a municipality in a development or renewal area for the development of commercial or industrial property for the elimination and prevention of the development or spread of slums and blight.” N.D.C.C. §40-58-01(9).

¶33 As part of adopting a development or renewal project, a city is required to approve a “development or renewal plan” which is defined as “a plan for a development or renewal project” which 1) conforms to a city’s “general plan” for development as described in N.D.C.C. § 40-58-06(1); and 2) which also is “sufficiently complete to indicate any land acquisition, development, demolition and removal of structures, redevelopment, improvements, or rehabilitation as may be proposed to be carried out in the development or renewal area . . .” N.D.C.C. § 40-58-01.1(8).

¶34 Before a city can “approve” a development or renewal plan for a development or renewal area, or before a city can substantially modify a development or renewal plan, it must abide by certain procedural steps and make certain findings as set forth in the Act. N.D.C.C. §40-58-06. A city or any other person or agency, public or private, may

prepare a development or renewal plan for consideration. Id. A city may not “approve” a development or renewal plan for a project “until a general plan for the municipality is prepared.” N.D.C.C. §40-58-06(1). A city must also comply with the notice and hearing requirements of the Act; and make enumerated findings. Id.

¶35 When these sections are read together, the plain language of the Act contemplates that a city will 1) designate a “development or renewal area” that could benefit from a development or renewal project; 2) a city will develop a “general” redevelopment plan for the all or part of the city; and 3) a city will prepare, or it may receive from others, a “development or renewal plan” that sets forth the details for how a “development or renewal project” consistent with the “general plan” will be completed. After public notice and a hearing, the City must “approve” the redevelopment or renewal plan, which results in the City authorizing the redevelopment or renewal project to be completed.

¶36 The Act sets forth two funding sources for paying for the development or renewal project. A city can use tax increment financing N.D.C.C. § 40-58-20.<sup>1</sup> Second, a city can grant a total or partial tax exemption. N.D.C.C. § 40-58-20(11).

¶37 If a city intends to use tax increment financing, the Act requires the city give notice to the Auditor to certify and remit tax increments to the city from the development or renewal area “in accordance with the plan.”<sup>2</sup> N.D.C.C. § 40-58-20(1). The Auditor is

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<sup>1</sup> Although the Act appears to contemplate that TIF financing will only be used in tandem with a city issuing bonds, N.D.C.C. § 40-58-10, this Court appears to have ruled a city has sufficient discretion to use TIF financing even if bonds are not issued.

<sup>2</sup> The Act contemplates that the “plan” will be the approved method for completing the renewal project. The Act, when read as a whole, contemplates that as part of the communication with the Auditor a city will have “approved” the project and

to remit to the city the tax increments “until the cost of development or renewal of the area has been reimbursed to the municipality as provided in this section.” N.D.C.C. § 40-58-20(7). “The cost of development or renewal subject to reimbursement from the tax increment fund for each development or renewal area must include all expenditures incident to carrying out the development or renewal plan for the area . . .” not otherwise reimbursed from other sources listed in the statute. N.D.C.C. § 40-58-20(8). “When the cost of development or renewal of any development or renewal area has been fully paid and all bonds, notes, or other obligations issued by the municipality to pay that cost have been retired, or funds sufficient for the retirement thereof have been received by the municipality, the governing body shall cause this to be reported to the county auditor, who shall thereafter compute the mill rates of all taxes upon the total taxable value of the development or renewal area. Any balance then on hand in the tax increment fund must be distributed by the county treasurer to the state and all political subdivisions having power to tax property in the area, in amounts proportionate to the amounts of the tax losses previously reimbursed to them.” N.D.C.C. § 40-58-20(10).<sup>3</sup>

¶38 The plain language of the Act as it relates to TIF contemplates property tax revenue will not be diverted to a city until the city has “approved” a project and a plan for completing the project under N.D.C.C. §40-58-06.

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“approved” TIF financing. Because approval of the project should happen first, the Act contemplates that a city will be “reimbursed” a known amount of money.

<sup>3</sup> N.D.C.C. § 40-58-20 was amended in 2011 to provide explicit time limits for the duration of tax increment financing and to authorize the release of surplus tax increment funds to the state and appropriate political subdivisions. Haugland, at ¶ 60, 818 N.W.2d at 683. As this Court noted, these amendments do not apply to the analysis of Haugland’s claims regarding termination of the City’s Urban Renewal Plan prior to the effective date of the 2011 legislation. Id.

¶39 The City has adopted an Official Urban Renewal Plan (Plan) creating a Downtown Tax Increment District (District), which is more or less all property in downtown Bismarck. The District is a “development or renewal area” under the Act. (RA at 13, Exhibit X to the Affidavit of Shawn A. Grinolds.)

¶40 The City’s Plan, however, does not meet the definition of a “development or renewal plan” under the Act. As noted above, a development or renewal plan under the Act is a detailed description of actions to be taken tied to a specific development or renewal project which has been “approved” under the Act so as to cause TIF money to flow to the City. The City’s Plan, however, is a list of objectives and proposed but not approved actions contemplated by the City.<sup>4</sup> (Id.)

¶41 The City admits neither the quiet rail or the parking ramp projects have been approved by the City. The City contends because neither project has been approved neither is subject to judicial review as to whether either is a proper project under the Act. In the City’s Answer, the City admits: “Plaintiff’s claims pertaining to the parking ramp and quiet rail are premature and not ripe for the Court’s review as the City of Bismarck has not taken any official action in either approving or rejecting the projects.” (A at 32.)

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<sup>4</sup>The primary issue on appeal is whether a “proposed” but not “approved” project, added to a list of possible projects included in a plan satisfies this Court’s prior ruling that only “pending authorized projects” will support a diversion property tax money into the City’s Fund. If all the City needs to do to support a diversion of property tax money is create a “wish list” of proposed, but not “approved,” future projects, which may or may not be TIF-financed then based on the number of Projects listed in the City’s Plan the City’s diversion is perpetual.

¶42 As a part of its first motion for summary judgment, the City asserted:

In the present case, the city has not provided final approval of any financing method relative to the 6<sup>th</sup> Street Parking Ramp project, and no final decision has yet been made by City to proceed with a proposed Quiet Rail project. Whether the City will ultimately approve tax increment financing for either proposed project is purely speculative. These issues are simply not yet ripe for review as they depend on future contingencies which, although they might occur, necessarily might not, thus making adjudication on these issues premature.

(RA at 20, Defendant’s Brief in Support of Motion for Judgment on the Pleadings at 20 (emphasis added).)

¶43 In its reply brief in support of its first motion for summary judgment, the City again asserted Haugland’s claims concerning the parking ramp and quiet rail were not ripe, stating “Haugland’s claims only become ripe once City approves tax increment financing to fund construction of the project. No such tax increment financing has yet been approved by City for construction of the proposed quiet rail or 6<sup>th</sup> Street parking ramp projects.” (RA at 45, Defendant’s Reply Brief in Support of Motion for Judgment on the Pleadings at 2 (emphasis added).)

¶44 During the oral argument on the City’s first motion for summary judgment the City argued:

[I]n regard to quiet rail and the parking ramp, [Haugland’s] requests are premature in regards to those two projects. There has been no construction of the parking ramp. There have been no funds allocated for construction of the parking ramp. There have been no funds allocated for the quiet rail project, and so really they’re asking this Court for an advisory opinion.

(A at 46; Transcript of January 5, 2011 Oral Argument.)

¶45 The City’s contentions were adopted by the District Court as the law of the case. On January 14, 2011, the District Court issued its order granting summary judgment. With regard to the quiet rail and parking ramp projects, the Court held Haugland’s challenge was premature, finding the City “has not approved any tax increment financing for those projects.” (A at 101.)

¶46 Haugland did not appeal the Court’s decision concerning quiet rail and the parking ramp projects.

¶47 In its opinion issued July 6, 2012, this Court affirmed dismissal of Haugland’s constitutional challenges. Haugland. As to Haugland’s statutory arguments, this Court first addressed Haugland’s claim that the City’s Plan violates N.D.C.C. Ch. 40-58 by failing to comply with procedural requirements for the modification of its Plan.

¶48 This Court held there were insufficient facts in the record to determine if the City made the requisite finding the property to be added to the urban renewal district in 1994 consisted of slum or blight areas. Haugland at ¶ 60; 818 N.W.2d at 682. Although the Court was able to review the City’s meeting minutes, the Court held those minutes did not establish the City passed an appropriate resolution for its modification of the Plan in 1994. Id. This Court concluded a remand was necessary to determine whether a proper resolution was passed as part of the 1994 modification, and, if not, the City is precluded from diverting TIF funds for the property added to the urban renewal district pursuant to that modification for the period from the 1994 modification to the 2006 modification. Id.

¶49 Haugland also contended the inclusion of non-blighted, non-slum and non-redeveloped property within the renewal district violated the Act. This Court held the

Act authorizes the City to use an “area wide” approach for renewal projects and it does not require the City to remove property from a renewal area or to recalculate the taxable value of property within the area when individual projects within the area are completed or the plan is modified. *Id.* at ¶ 62, 818 N.W.2d at 683. However, once the cost of development or renewal for all approved projects within the area have been paid and no pending authorized projects remain, the diversion of funds must cease.

¶50 Haugland contended, in a motion to this Court, that based on the lower Court’s findings concerning quiet rail and the parking ramp that there were no pending approved projects to support the diversion of property tax funds into the City’s TIF fund. The City claimed that these large projects were under consideration. *Id.* at ¶ 64, 818 N.W.2d at 683. This Court, however, found the record did not reflect whether there were any “authorized renewal projects in the renewal area” and remanded for further findings on this issue. *Id.* The Court explained that if no pending authorized renewal projects were in place all diverted tax increment funds or any excess funds must be returned to the proper recipients under N.D.C.C. § 40-58-20(10). *Id.* at ¶ 64, 818 N.W.2d at 683-684.<sup>5</sup>

¶51 Pursuant to the decision of this Court there were two issues before the District Court on remand. The first issue is whether the City complied with the procedural requirements of N.D.C.C. Ch. 40-58 for the modification of its Plan in 1994. Specifically the City was to prove on remand 1) a proper public hearing was held after proper public

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<sup>5</sup> Haugland believes that this Court erred when it framed the issue as to whether there were “pending authorized” projects. The Act requires that projects be supported by a plan and that a plan be “approved” based on the requirements of the Act. The issue should be whether the City had any “approved” TIF projects. The City admits that neither quiet rail or the parking ramp are “approved” projects.

notice was given, and 2) a proper resolution was passed finding the newly added property consisted of slum or blighted areas.

¶52 The second issue on remand was for the City to prove that at all times in which the City has been diverting property tax revenue into its TIF fund, the City has had one or more “pending authorized” renewal TIF projects in place to support the diversion of tax funds for urban renewal purposes.

¶53 With regard to the issue of whether the City complied with the statutory requirements for amending its Plan in 1994, on remand the City introduced a public notice published in the Bismarck Tribune on August 25, 1994 for the meeting at which the City intended to modify its Plan to include the additional six block area. (A at 207.) As to the requirement that the City pass a resolution determining the additional six blocks included slum or blighted areas, the City provided the following evidence: 1) the first page of a document entitled *Resolution Relating to the Modification of a Downtown Urban Renewal Plan for the City of Bismarck* and purported that it was a resolution, without a full property description or proof of its execution; 2) the affidavit of William C. Woken testifying that he believed a finding of slum or blight was made and the necessary resolution was passed and duly executed; 3) a memorandum from Attorney Robert Wefald noting the effect that a modification of the then existing Urban Renewal Plan would have but making no reference to a specific finding of blight by the Commission; and 4) a memorandum from William Wocken noting that a public hearing was held and action was taken by the Commission but making no reference to the Commission making a finding of slum or blight. (A at 146; A at 151-53.) The City argued these exhibits established sufficient circumstantial evidence to show statutory compliance.

¶54 The District Court found the City presented sufficient evidence to show that the notice requirements of the statute were met. (A at 240.) With regard to a finding of blight, the District Court held that N.D.C.C. § 31-09-10 (providing that official documents may be proven by showing an official record of the act) provides only one method of proving official documents and that the City was not precluded from using other means to prove the passage of a resolution. *Id.* The District Court held the circumstantial evidence presented by the City was sufficient to show that a properly noticed public hearing was held and that a resolution was adopted by the Commission on November 8, 1994 finding the revised area consisted of slum or blight. (A at 241.)

¶55 With regard to the second issue on remand, this Court found the record was insufficient to determine whether there were any pending authorized projects in place when this case was decided by the District Court. *Haugland*, at ¶ 64, 818 N.W.2d at 684. The City introduced the following new evidence on remand to show the parking ramp project was a pending authorized project: 1) documents establishing negotiations between the Bismarck Parking Authority and MedCenter for acquisition of the property; 2) documents showing authorization to request a design proposal and communications with an engineering firm for probable costs and a service agreement; 3) agendas and advertisements evidencing promotional meetings held for public information; 4) documents and meeting minutes showing the receipt of cost estimates, building proposals and testing results; and 5) agendas from the 6<sup>th</sup> Street Ramp Steering Committee meetings suggesting the committee would be waiting to advertise the project for bids until after the TIF financing lawsuit was determined. (A at 155-86.) The City

additionally submitted a Project Transaction Report showing a list of payments made for engineering and environmental testing services for the proposed project. (A at 210.)

¶56 As relates to quiet rail, the City introduced meeting minutes, newspaper articles and memoranda from the City Planner to show the City took steps to determine the feasibility of the project and implemented and made modifications to a preliminary study regarding quiet rail. (A at 187-95.) The City also introduced evidence of a failed ballot measure, which presented the issue of quiet rail to the public, and email correspondence and meeting minutes showing the Commission received public comment on the issue. (A at 196-204.) As final support the City introduced the City of Bismarck Detail General Ledger Report showing payments made to a consulting firm to conduct a feasibility study for the project. (A at 211-12.)

¶57 Finally the City presented the affidavit testimony of Wocken regarding the City's CORE Incentive Program, claiming there was at least one CORE project still in progress as of January 12, 2011 and that the City intends to continue the program into the future. (A at 208.)

¶58 The District Court held that inclusion of these projects in the City's Plan was sufficient to constitute pending authorized projects. (A at 223.)

¶59 **LAW AND ARGUMENT**

¶60 **I. Standard of Review**

¶61 In Witzke v. City of Bismarck, 2006 ND 160, ¶¶ 5-7, 718 N.W.2d 586, this Court outlined the standard of review of a summary judgment, which is de novo.

¶62           **II.     The City Failed to Prove that There Were Any Pending Authorized Projects to Support the Continued Diversion of Property Tax Funds Into the City’s TIF Fund**

¶63           The District Court erred when it concluded the City had pending authorized TIF projects to support the continued diversion of property tax money into its TIF fund under N.D.C.C. § 40-58-20 based on the “proposed” projects included in the City’s Plan.

¶64           In analyzing N.D.C.C. § 40-58-20 this Court held a municipality is authorized to continue diverting tax funds until the cost associated with pending authorized development and renewal projects under the renewal plan have been fully paid. As noted above, Haugland contends that a “pending authorized” project is one that has been “approved” as a tax increment-financed project based on the approval of the project’s plan under N.D.C.C. § 40-58-06. Accordingly, the City’s diversion of property tax money must come to an end as soon as sufficient funds have been collected to pay for all approved projects. The City admits that it has no “approved” projects and that it only has “proposed” projects. A proposed project, however, is not sufficient to justify the diversion of TIF funds under the Act.

¶65                           **A.     The Act creates a two-step process for the diversion of TIF funds for financing of urban renewal projects**

¶66           This Court held the City must show the existence of one or more pending authorized renewal projects to support the diversion of property tax funds. This approval process necessarily includes two steps which a city must follow before it is legally authorized to divert TIF funds for the financing renewal projects.

¶67           The first step is the official adoption of a specific renewal project and its plan under the Act.

¶68 The second step is for the city to determine the manner in which the approved project will be funded. Because a project under the Act can be funded in two different ways, a city must determine whether it will use TIF money for the project or provide tax breaks to the developer for completing the project.

¶69 With regard to those projects the City claims were “authorized renewal projects” justifying the continued diversion of property tax funds, the City is unable to show the first and second steps of this process were taken. The City has not and cannot show the purported projects were approved by the City (the City admits they were not), and the City has not and cannot show it approved tax increment financing for any project as opposed to financing the projects through tax exemptions. In fact, the City concedes that it has never approved tax increment financing for either project. (See City’s Brief in Support of Motion for Summary Judgment on Remand at 23-24 (RA at 94); Defendant’s Brief in Support of Motion for Judgment on the Pleadings at 20 (RA at 14).)

¶70 **B. Manner of adopting a renewal project for purposes of the Act**

¶71 The Act’s requirement a project and its plan be approved by the city necessitates more than informal discussions by the city’s governing body regarding the potential for implementing a project at some point in the future. N.D.C.C. § 40-58-01.1(9) defines development or renewal projects, for purposes of the Act, as including “authorized undertakings or activities of a municipality in a development or renewal area for the development of commercial or industrial property or for the elimination and prevention of the development or spread of slums and blight.”

¶72 The Act is properly interpreted to require that authorization must occur through an official action of a city approving the project and designating the manner in which the

project will be funded. Other provisions in the Act requiring authorization by a city specify such action be taken by passing a resolution or ordinance. For example, a city may not exercise any powers under the Act unless the city adopts a resolution finding slum or blight within the community. N.D.C.C. § 40-58-05. Similarly, a city may not approve or modify a renewal plan without a resolution finding slum or blight within the specified area. N.D.C.C. § 40-58-06. Finally, N.D.C.C. § 40-58-10 provides any bond issued under the Act be authorized by resolution or ordinance.

¶73 For a project to be TIF funded, it must be “approved” and the approval must specify the improvements and designate the amount of TIF funds to be used in financing the project. The City cannot show such actions have been taken with regard to either quiet the rail project or the parking ramp project.

¶74 **C. The Quiet Rail Project is not an authorized project**

¶75 This Court remanded this case for a determination of whether the City had in place one or more pending authorized renewal projects. The *proposed* quiet rail project does not meet this standard. No official action has ever been taken by the City to approve this project or to commit TIF funds for the financing of the project. The City points to several facts showing the quiet rail project had been *contemplated* by the City and that the City spent money on preliminary work in support of this project. However, none of these facts establish official approval or authorization of the project.

¶76 The City relies on the December 22, 2009 meeting in which the Commission approved a request to move forward with a specific improvement plan for quiet rail. A request was made at that meeting to prepare a specific improvement plan for the potential quiet rail project. (RA at 13, Exhibit Z to the Affidavit of Shawn A. Grinolds.) The minutes from the meeting note, however, that the plans “will need Renaissance Zone

hearings and City Commission approval before they can proceed.” (Id.) Even more importantly, these minutes specifically include a statement that “[t]his does not make a final decision on [this project], it simply authorizes us to prepare the materials to get to the Renaissance Zone Committee so the hearings can be held and the final projects brought back in front of this Commission.” (Id.)

¶77 Similarly, the inclusion of the construction of quiet rail facilities in a list of “Proposed Renewal Actions” in the most recent Plan is insufficient to show this project was approved. This information was a part of the record in front of this Court when this issue was first analyzed. If including the proposed actions in the Plan was sufficient to meet this Court’s standard, a remand would not have been necessary. However, this Court found the record did not reflect whether there were any authorized renewal projects at the relevant time.

¶78 As part of the first motion for summary judgment the City admitted that quiet rail was not an authorized TIF-funded project. That admission is conclusive. The City now seems to believe there is no difference between an aspiration for a future project by including it in the Plan and an officially approved project. This new assumption does not comport with the City’s admission or this Court’s interpretation of the Act. Inclusion in the Plan is not the same as an authorized project which commits TIF funds. Therefore, this Court must find the quiet rail project does not meet the standard imposed to support diversion of property tax money into the City’s TIF fund.

¶79 **D. The Parking Ramp Project is not an authorized project**

¶80 In support of its new contention that the parking ramp project was properly adopted, the City presented the District Court with a great deal of information demonstrating the Commission has been *considering* construction of a parking ramp for

several years. The City, even on remand, however, had to admit that it “. . . has not yet . . . finally committed to any financing package for the project.” (A at 147.) Contemplating the possibility of a project is simply not sufficient to establish the existence of an authorized renewal project. None of the steps taken by the City prior to 2010 provide any support for a finding that this project was officially approved and authorized by the City as a renewal project to be funded with TIF funds.

¶81 Similar to its argument regarding the quiet rail project, the City also relies on inclusion of the parking ramp in a list of “Proposed Renewal Actions” in the Plan. The fact that the Commission considered this a “proposed” project contradicts the City’s assertion this project was a pending authorized renewal project which authorized the expenditure of TIF funds. Moreover, as explained above, this evidence was before this Court when it determined the record did not clearly reflect the presence of any pending authorized renewal projects under the Plan.

¶82 Finally, the City placed great emphasis on the Commission’s approval of the 6<sup>th</sup> Street Parking Ramp Specific Improvements Plan (“Specific Improvements Plan”). The Specific Improvements Plan explains the proposed actions to be taken with regard to the construction of an automobile parking ramp within the City’s District. (RA at 13, Exhibit Y to the Affidavit of Shawn A. Grinolds.) This document explains the proposed location and estimated size and includes a preliminary description of possible architectural features. (Id.) The Specific Improvements Plan also includes an estimated cost, but notes this estimate is dependent upon “bids received and the alternates chosen” and that a “complete financial package for the project will need to be completed after bids are received.” (Id.) The City has admitted these steps have not yet been taken.

¶83 This plan, too, was in front of this Court when it held that a remand was necessary to determine if any authorized projects were in place.

¶84 The proposed parking ramp project also must fail as an “authorized renewal project” as the Commission did not approve the project or officially determine the manner in which the parking ramp would be funded.

¶85 The City previously admitted that “[w]hether the City will ultimately approve tax increment financing for either proposed project [quiet rail or the parking ramp] is purely speculative.” (RA at 14, Defendant’s Brief in Support of Motion for Judgment on the Pleadings at 20.) The City cannot now argue the Commission has provided final approval for the parking ramp.

¶86 The City is unable to show the proposed parking ramp project has been approved in a manner sufficient to create a pending authorized renewal project for purposes of the continuation of the City’s diversion of property tax revenue. The Commission has not officially authorized the construction of a parking ramp and has not designated the manner in which such project would be funded. As such, Haugland is entitled to judgment in his favor.

¶87 **E. The CORE Incentive Programs contain no authorized projects**

¶88 In 2006 the City created its CORE Incentive Programs to encourage redevelopment and improvements to property within the City’s renewal area. Specifically, the City provides TIF funds to property owners through façade and signage incentive grants, housing incentive grants, revolving loans and sidewalk subsurface infill projects. Haugland, at ¶ 57, 818 N.W.2d at 680.

¶89 The City uses the CORE Program to avoid the approval process under the Act. The City “allocates” TIF funds to CORE and then allows CORE administrators to decide which renewal items will be funded. Those renewal projects, however, are never included in the City’s “Plan” and they are not approved as required by the Act. The CORE program relies on the City’s ability to “bank” TIF funds. For example, the City’s “2010 TIF Expenditure Plans” lists “CORE Projects” but does not list any dollar amount. (A at 233.)

¶90 The City is unable to show the CORE Incentive Programs contain any pending authorized projects sufficient to support the continued diversion of TIF funds.

¶91 As support for its contention that the CORE Program includes authorized projects, the City notes the Program is included in the Plan. As with quiet rail and the parking ramp, the Plan does not constitute official authorization for any specific project. If the City is correct, nothing would prevent it from diverting all TIF funds into CORE, which would 1) eliminate the need to ever “approve” any future project and 2) would make the TIF District perpetual.

¶92 The City has failed to show any authorized renewal projects with regard to CORE. The City did not present on remand any new evidentiary support for its contention the CORE Program constitutes an “authorized” project.

¶93

**F. If the Quiet Rail and Parking Ramp Projects are authorized remand is necessary**

¶94 In his Complaint, Haugland alleged the use of TIF funds for financing of the proposed quiet rail and parking ramp projects was illegal, as these projects are not “public improvements” put in place to address slum or blight conditions, as required by the Act. The City responded to Haugland’s contention by arguing that Haugland had no

standing to challenge these projects. The District Court agreed and dismissed Haugland's claim with regard to these projects, without reaching the merits of Haugland's arguments.

¶95 On remand, Haugland argued that if the District Court determined the quiet rail and parking ramp have been approved in a manner sufficient to create authorized renewal projects as required by this Court, the District Court must then allow Haugland to present arguments regarding the legality of these projects. The District Court, however, did not allow Haugland to present his substantive arguments. If this Court affirms the District Court, all or in part, then remand is appropriate so Haugland can present his substantive challenge, which he has not been allowed to do.

¶96 **III. The Procedural Requirements of N.D.C.C. 40-58 were not met for the 1994 Modification of the Urban Renewal Plan**

¶97 N.D.C.C. § 40-58-06 imposes procedural requirements for the modification of a previously approved renewal plan. Specifically, this statutory provision requires a municipality give proper notice of and hold a public hearing prior to adoption of any substantial modification to a renewal plan. *Id.* In addition, the municipality is required to pass a resolution determining the renewal area is a slum or blighted area. *Id.*

¶98 As an initial matter, as a part of its first motion for summary judgment the City asserted it was not obligated to comply with these procedural requirements for the November 8, 1994 amendment to the Plan. (RA at 14, Defendant's Brief in Support of Motion for Judgment on the Pleadings at 24-25.) The City argued this modification did not "substantially modify" the already existing plan. (*Id.*) The City presented the same argument to this Court. This Court, however, rejected this argument, finding the 1994 addition of approximately six city blocks to the renewal area constituted a substantial change to the Plan. *Haugland*, at ¶ 55, 818 N.W.2d at 680.

¶99 The City’s prior assertions it was not obligated to comply with Chapter 40-58’s procedural requirements suggest it did not, in fact, do so. The City claimed several modifications, including the 1994 modification, did not require a specific finding of slum or blight. The City noted that “although not required to do so”, a finding of slum or blighted areas was made with regard to certain past modifications. (RA at 14, Defendant’s Brief in Support of Motion for Judgment on the Pleadings at 24-25.) However, the City did not include the 1994 modification in this list of dates on which a finding of slum or blight was made. (*Id.*) In fact, in its prior summary judgment brief, the City admitted no specific finding of blight was made with regard to the 1994 modification:

Although City did not make additional specific findings that additional property added to the Urban Renewal Plan’s Renewal Area constituted slum or blighted areas with Plan modifications implemented on [...] November 8, 1994 [...], such additions did not constitute substantial modifications to the Urban Renewal Plan.

(RA at 14, Defendant’s Brief in Support of Motion for Judgment on the Pleadings at 28.)

These admissions should now preclude the City from arguing it complied with Chapter 40-58 with regard to the 1994 modification.

¶100 On remand, however, the City contradicted its prior admissions and claimed it provided proper notice, held a public hearing and passed the necessary resolution determining the additional six blocks included slum or blighted areas. This evidence is insufficient to prove as a matter of law that these procedural requirements were satisfied.

¶101 **A. The City has failed to prove the notice requirements pursuant to N.D. C.C. § 40-58-06(3) were met**

¶102 N.D.C.C. § 40-58-06(3) requires a municipality to hold a public hearing on any proposed substantial modification of a previously approved urban renewal plan.

Prior to holding such hearing, the municipality is required to publish a public notice describing the time, date, place and purpose of the hearing, generally identifying the development or renewal area covered by the plan and outlining the general scope of the development or renewal project. Id. While the City has established a public hearing was held on November 8, 1994, it has failed to show proper notice of this meeting was given.

¶103 According to the documents provided by the City, a public hearing was held in front of the Commission on August 30, 1994. The minutes from this meeting briefly reference publication of the hearing notice. However, a final decision on the modification of the Urban Renewal Plan was not made at this meeting. (RA at 13, Exhibit K to the Affidavit of Shawn A. Grinolds.) The decision to modify the Urban Renewal Plan was not actually made until November 8, 1994. (RA at 13, Exhibit N to the Affidavit of Shawn A. Grinolds.) The minutes from the November meeting when the official action was allegedly taken are silent regarding publication of a public hearing notice. (Id.)

¶104 The City has not established as a matter of law that the proper notice was provided.

¶105 **B. The City has failed to prove a finding of slum or blight was made by official resolution as required by N.D.C.C. § 40-58-06**

¶106 Upon substantial modification of an existing renewal plan, a city is subject to all of the requirements of N.D.C.C. § 40-58-06. Specifically, a city must pass a resolution finding that the affected property contains slum or blighted areas. N.D.C.C. § 40-58-06(1). To establish an official resolution was passed, the City must provide a copy of the official record. Under N.D.C.C. § 31-09-10(4), the acts of a municipal corporation are proven “by a copy of the official record of such acts, certified by the legal keeper

thereof, or by a printed book purporting to be published by the authority of such corporation and to contain a record of such acts.” The City admits it cannot meet this requirement.

¶107 The City has presented the Court with an incomplete copy of a document entitled “Resolution Relating to the Modification of a Downtown Urban Renewal Plan for the City of Bismarck.” (A at 153.) The City claims this is a partial copy of a resolution passed by the Commission in November 1994. The City has admitted the second page to this document is missing. However, what the City fails to address is that the second page of the purported “resolution” is essential to this Court’s determination on this issue. The document, as provided to the Court, makes no showing that this “resolution” was ever officially adopted by the Commission.

¶108 In addition, while this document includes language about slum and blighted areas, the legal description of the area to which this finding allegedly applies is incomplete. It is impossible for the Court to know with any degree of certainty what was included in the remainder of the property description because the second page of the document is missing. It is impossible to know if the second page excludes any portions of previously described parcel which would affect the area added to the urban renewal district in 1994. It is also impossible to know if the Commission amended any portions of this resolution if it was indeed adopted.

¶109 Again attempting to compensate for its lack of official records, the City has submitted another affidavit of Woken in which he testifies as to his “belief” of what occurred in November 1994. Woken claims he “recalls” the specific meeting held 18 years ago and testifies it is his “belief” that a finding of slum or blight was made and the

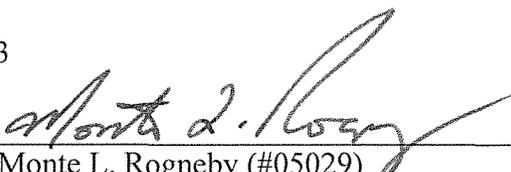
necessary resolution was passed and duly executed. (A at 146.) The Woken affidavit is legally insufficient to prove as a matter of law that the City duly executed an official resolution, making a finding of slum or blight. The memory of a City Planner cannot be the source of official government action.

¶110 The City is unable to show that a resolution was passed as required by this Court. The City is precluded from retaining any tax funds diverted for those six city blocks for the period from the 1994 modification to the 2006 modification.

¶111 **CONCLUSION**

¶112 Haugland requests this Court reverse the District Court's summary judgment and 1) hold that the City has failed to make the factual showings required to justify retention of the tax increment funds diverted to finance quiet rail, the parking ramp and the CORE Program; and 2) hold that the City has failed to show as a matter of law that it properly modified its Plan.

¶113 Dated this 21st day of May, 2013

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