

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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Erling "Curly" Haugland,

Plaintiff and Appellant,

vs.

City of Bismarck,

Defendant and Appellee.

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**SUPREME COURT NO. 20130100**

Civil No. 08-10-C-00801

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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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**Appellant's Reply Brief**

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Monte L. Rogneby (#05029)

[mrogneby@vogellaw.com](mailto:mrogneby@vogellaw.com)

Amanda E. Peterson (#06943)

[apeterson@vogellaw.com](mailto:apeterson@vogellaw.com)**VOGEL LAW FIRM**

Attorneys for Plaintiff and Appellant

US Bank Building

200 North 3rd Street, Suite 201

Bismarck, ND 58502-2097

Telephone: 701.258.7899

Fax: 701-258-9705

## TABLE OF CONTENTS

	<u>Paragraph</u>
TABLE OF AUTHORITIES .....	III
TABLE OF CASES .....	IV
ARGUMENT AND LAW .....	1
I. 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 .....	1
CONCLUSION.....	16

## TABLE OF AUTHORITIES

### Paragraph

#### North Dakota Century Code

§ 40-58-01.1(8) .....	10
§ 40-58-06 .....	9
§ 40-58-06(1) .....	10
§ 40-58-20 .....	9

## TABLE OF CASES

	<b><u>Paragraph</u></b>
<u>Haugland v. City of Bismarck,</u> 2012 ND 123, 818 N.W.2d 660 .....	8

## ARGUMENT AND LAW

### **I. 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**

[¶1] When Haugland commenced his case against the City on April 5, 2010, the City was diverting and “banking” property tax money under into its TIF Fund. But for the City’s actions, the diverted property tax money would have been distributed to Bismarck School District, Burleigh County, the Bismarck Park Board and the City’s general fund. (Appendix (A) at 7.)

[¶2] The City last modified its Official Urban Renewal Plan (Plan) on March 9, 2010 (Supplemental Appendix (SA) at 86.) The Plan, among other things, lists the following “Proposed Renewal Actions<sup>1</sup>”:

The City of Bismarck will acquire property, remove structures, construct site improvements and dispose of, by either sale or dedication, all property acquired by it for the uses outlined in the Plan and subject to the controls and restrictions contained in the Plan and requirements of applicable laws. Specific items involving City acquisition and construction within the Revised Urban Renewal Area are the following:

1. Public parking to be provided on Block 44, Original Plat.
2. Restoration and acquisition of the Burlington Northern Depot.
3. Overhead walkway between parking facilities and adjacent structures where feasible.

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<sup>1</sup> Space limitations prevent Haugland from reproducing more of the City’s Plan. The Plan is a “wish list” of goals and aspirations for downtown Bismarck, including the goals of adding an addition to the Bismarck Civic Center, adding as much of a skyway system as “financially possible,” adding parking structures and quiet rail improvements. (SA at 90.) If the City is correct, then it is authorized to perpetually direct property tax money until it decides, in its sole discretion, that all of its “wishes” in the Plan have been completed.

4. Addition of two stories to parkade (N1/2 Block 46, Original Plat) (completed).
  5. Rehabilitation and renewal of structures as recommended by the City Building Inspector and approved by the City Commission.
  6. Development of the Bismarck Civic Center in concert with the facility master plan.
  7. Renovation and maintenance of public improvements within the 1DC zoning district.
  8. Construction of a public parking ramp on the E 1/2 of Block 68, Original Plat.
  9. Construction of Quiet Rail facilities at surface crossings within the Urban Renewal Plan area.
- e. Creation of various programs to encourage private investment in the core of the community through the use of the following programs:
1. Purchase and maintenance of Downtown Streetscape Elements
  2. Sidewalk Subsurface Will
  3. Technical Assistance Bank
  4. Facade and Signage Incentive Grant
  5. Housing Incentive Grant
  6. Revolving Loan Fund
  7. Project-related Skyway Development
  8. Quiet Rail Zone
  9. Downtown plans and studies

(SA at 89-91.)

[¶3] The City concedes that as of April 5, 2010, it had not finally approved any of the “Proposed Renewal Actions” listed in its Plan, and had not finally approved the use of any form of financing, including tax increment financing, for any of the proposed projects. The City had not finally approved either a quiet rail project or a parking ramp project and the City had not finally approved tax increment financing for either project. The City did adopt a “Specific Improvement Plan” for a parking ramp project. (SA at 99.) The Specific Improvement Plan, however, does not finally adopt any financing method under the Act. In its Brief, the City represents that it recently has taken steps concerning these projects, but these representations are not based on any evidence in the record.

[¶4] The issue before this Court is simple: do the “Proposed Renewal Actions” listed in City’s Plan meet the Act’s requirements for diverting property tax revenues?

[¶5] The City has kept in place its tax increment financing district since 1979. The practical effect of such a long-standing district is that the base valuation of the District’s property is frozen in time, with the City’s TIF Fund receiving a large amount of tax money based on the incremental increase in value since the property was originally added to the District. As a consequence, the City has “banked” millions of dollars, which it has almost unlimited discretion to spend.

[¶6] If this Court rules against the City, the banked money will be returned to the recipients designated by law to receive it and the City’s District will end. The City, however, is free to immediately start a new district, following the procedures in the Urban Renewal Act (Act).

[¶7] Because the City is seeking to avoid “starting over” it is forced to make legal arguments which place the cart before the horse. In turn, the City is asking this Court to

approve an unworkable legal structure under the Act. These problems are of the City's creation and they are completely avoidable if the City simply follows the provision of the Act.

[¶8] In its decision remanding this matter, this Court uses two different phrases to describe the prerequisites to the diversion of property tax money under the Act. First, the Court indicates: "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." Haugland v. City of Bismarck, 2012 ND 123, ¶63, 818 N.W.2d 660 (emphasis added). Second, the Court indicated: "Although Bismarck claims several large projects were under consideration when Haugland brought this action, the record does not reflect whether there were any authorized renewal projects in the renewal area when the district court decided this case." Id. at ¶64 (emphasis added). The City claims its Plan establishes it had "authorized" projects to justify the diversion of property tax money. Haugland contends that the city is acting illegally because none of the projects under the Plan are "pending" or "authorized" because no final approval has been granted and because no decision to use tax increment financing had been made.

[¶9] The Act, when read as a whole, contemplates that as a prerequisite to using tax increment financing 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 all or part of the city; and 3) a city will approve 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. (See Brief of Appellant at ¶¶ 31-35.) Additionally, because the Act outlines two financing methods -- diversion of property tax revenue and tax exemptions -- the Act contemplates property tax revenue will not be diverted to a city until the city has approved a development or renewal project, a plan for completing the project under N.D.C.C. § 40-58-06, and approved tax increment financing under N.D.C.C. § 40-58-20.

[¶10] Haugland contends the City has illegally diverted property tax revenue into its TIF Fund because the City’s Plan and Specific Improvements Plan do not establish that on April 5, 2010 the City had any “pending authorized renewal projects under the plan.” The City’s Plan is at best the “general plan” required by N.D.C.C. §40-58-06(1). The City’s Plan does meet the specificity requirements of N.D.C.C. § 40-58-01.1(8) which requires that a “development or renewal plan” 1) conform to a city’s “general plan” for development as described in N.D.C.C. § 40-58-06(1); and 2) also be “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 . . .” The fact that the City created a wish list of proposed renewal projects, without more, does not support its actions diverting property tax money. Further, it is axiomatic that before property tax money is diverted into the City’s TIF Fund the City must approve the use of tax increment financing to fund the approved project.

[¶11] The City contends it may divert property tax money regardless of whether it has any approved projects, and regardless of whether it has approved the use of tax increment financing, as long as it has adopted a “renewal plan on an area-wide approach

which includes numerous authorized [proposed] projects in furtherance of such plan.”<sup>2</sup> (Brief of Appellee at ¶16.) And, because the City does not believe its diversion should be linked to any approved project with discernible costs, the diversion shall continue without challenge “until such time as the [City] advises the Auditor the cost of the renewal area has been fully paid or otherwise provided for.” (*Id.* at ¶15.) The fallacy of this argument is most glaring as it relates to the City’s CORE program. The CORE program is essentially a “grant” program whereby the City “banks” TIF funds and then pays them out on a case-by-case basis to downtown business owners. The City uses CORE to avoid the project approval process outlined in the Act. The CORE program is perpetual because it is not tied to any discernible “approved” project. CORE is the “authorized” project – a project to distribute TIF money.

[¶12] The City outlines in great detail all of the past planning activities it has taken concerning a quiet rail project and a parking ramp project. All of this planning detail, however, is superfluous to the City’s argument because none of the items cited by the City show that either project was a pending authorized project under the Act. The City’s ability to prevail is solely dependent on how this Court interprets the City’s Plan.<sup>3</sup> The City contends that anything included in its Plan is an authorized project and therefore each goal or wish contained in the Plan justifies the endless diversion of property tax money regardless of whether the City has actually approved the improvement project or whether the City has approved tax increment financing for the project. This approach is

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<sup>2</sup> The City describes the projects in its Plan as “authorized.” The Plan lists these items as being “proposed.”

<sup>3</sup> If the City is correct, then there was no need for this Court to remand this matter for further proceedings because the same information was before the Court prior to remand as is available now.

inappropriate because it puts the cart before the horse. Approval must come before the diversion of funds.

[¶13] The City's reliance on its past planning activities is also inappropriate given the City's prior arguments in this matter. Haugland's Complaint contends a parking ramp project and a quiet rail project are not within the scope of the Act. These contentions were never adjudicated by the District Court because the City successfully argued Haugland was requesting an advisory opinion concerning future events. Now, after remand, the City points to its past planning activities and attempts to change its position and claim these projects were authorized tax increment financing projects. The City now claims the Specific Improvement Plan "expressly" provides that the parking ramp will be funded with tax increment funds. (Brief of Appellee at ¶48.) The City cannot have it both ways. It is bound by the law of the case which establishes that as to these projects the City did not take any official action so as to create a justiciable controversy.

[¶14] The City does not address the applicability of the law of the case. There are two mutually exclusive concepts involved. Either the City's Plan and the Specific Improvement Plan, as they relate to the quiet rail project and the parking ramp project, have legal significance, creating a justiciable controversy, or they do not. The City contended below that its past planning activities had no legal significance. The City is estopped from now claiming these projects were authorized.

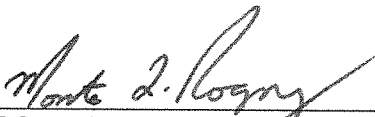
[¶15] If this Court allows the City to avoid the law of the case Haugland is entitled to be heard on his challenge to whether these projects are authorized by the Act. Haugland has not waived or abandoned his ability to challenge either on the merits. Haugland did not appeal the District Court's decision because that decision supports his

argument – that the City is acting illegally in diverting property tax money in support of projects which have not been approved or authorized by the City.

**CONCLUSION**

[¶16] Haugland requests this Court reverse the District Court's summary judgment.

Dated this 17th day of July, 2013.

BY: 

Monte L. Rogneby (#05029)

[mrogneby@vogellaw.com](mailto:mrogneby@vogellaw.com)

Amanda E. Peterson (#06943)

[apeterson@vogellaw.com](mailto:apeterson@vogellaw.com)

**VOGEL LAW FIRM**

US Bank Building

200 North 3rd Street, Suite 201

PO Box 2097

Bismarck, ND 58502-2097

Telephone: 701.258.7899

Facsimile: 701.258.9705

ATTORNEYS FOR PLAINTIFF/APPELLANT

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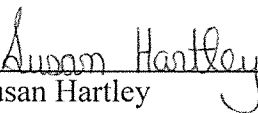
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**Affidavit of Service by Electronic Mail**

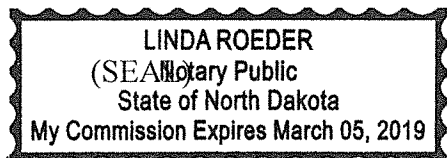
STATE OF NORTH DAKOTA    )  
  ) ss.  
COUNTY OF BURLEIGH        )


Susan Hartley, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on July 15, 2013, Appellant's Reply Brief was filed electronically with the Clerk of Court of the North Dakota Supreme Court through email, and that the same document was electronically served through email upon:

Randall J. Bakke  
rbakke@smithbakke.com

  
\_\_\_\_\_  
Susan Hartley

Subscribed and sworn to before me this 15th day of July, 2013.



  
\_\_\_\_\_  
Notary Public  
\Burleigh County, North Dakota

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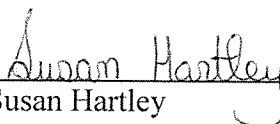
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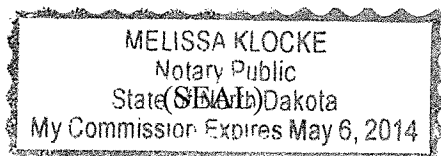
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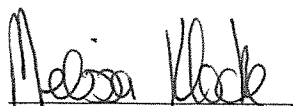
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Randall J. Bakke  
rbakke@smithbakke.com

  
\_\_\_\_\_  
Susan Hartley

Subscribed and sworn to before me this 17th day of July, 2013.



  
\_\_\_\_\_  
Notary Public  
\Burleigh County, North Dakota