

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Erling "Curly" Haugland,)	
)	
Plaintiff and Appellant,)	
)	Supreme Court No. 20130100
vs.)	
)	
City of Bismarck,)	
)	
Defendant and Appellee.)	
)	

ON APPEAL FROM SUMMARY JUDGMENT DATED FEBRUARY 1, 2013,
ISSUED BY THE HONORABLE DONOVAN FOUGHTY,
SOUTH CENTRAL JUDICIAL DISTRICT,
BURLEIGH COUNTY, NORTH DAKOTA, CIVIL NO. 08-10-C-801

BRIEF OF APPELLEE CITY OF BISMARCK

Randall J. Bakke #03898
Shawn A. Grinolds #05407
SMITH BAKKE PORSBORG SCHWEIGERT ARMSTRONG
122 E. Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
rbakke@smithbakke.com
Attorneys for Appellee
City of Bismarck

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RESPONSE TO HAUGLAND’S STATEMENT OF THE ISSUES

(1.) Plaintiff/Appellant Erling “Curly” Haugland (“Haugland”) inappropriately attempts to expand the scope of the issues appropriately before this Court on appeal. Pursuant to the decision of this Court in *Haugland v. City of Bismarck*, 2012 ND 123, 818 N.W.2d 660, only two issues were remanded to the district court for determination, as follows:

1. whether City of Bismarck (“Bismarck”) passed an appropriate resolution relative to the 1994 modification to Bismarck’s Urban Renewal Plan (“Plan”) finding the revised renewal area consists of slum or blighted areas (*Haugland* at ¶ 55; App. 138); and
2. whether there were any pending authorized renewal projects within Bismarck’s renewal area when the district court granted Bismarck summary judgment on January 12, 2011 (*Haugland* at ¶ 64; App. 143).

(2.) On remand, the district court determined there was no genuine issue of material fact in dispute relative to these two issues, and determined both of the above issues in Bismarck’s favor. Therefore, the appropriate issues on appeal are whether the district court erred in granting summary judgment in City’s favor on the two issues listed above.

RESPONSE TO HAUGLAND’S STATEMENT OF THE CASE

(3.) Bismarck denies the assertions in paragraphs 8, 9 and 11 of Haugland’s Brief that Bismarck has asserted a right to “perpetually” divert property taxes into its Tax Increment Fund, and denies doing so.

(4.) In the first sentence of paragraph 9 of Haugland Brief he asserts “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 has been “approved” by the City. (Underline added.) In fact, the district court’s original grant of summary judgment (App. 101) found as follows:

Hauglands claim relative to the proposed quiet rail and 6th Street parking ramp is premature. The City has not approved any tax increment financing for those projects. Dismissal of these claims is granted as the courts cannot render advisory opinions. Bies v. Obregon, 558 N.W.2d 855 (1997).

In other words, the district court did not find the referenced projects had not been approved by the City. Instead, the district court simply found the City had not yet approved any future tax increment financing for those projects, and therefore Haugland’s challenge of the use of tax increment financing on those projects was premature.

(5.) Haugland erroneously states the issues remanded to the district court for determination in paragraph 12. The issues actually remanded to the district court are as stated in Response to Haugland’s Statement of the Issues, above.

(6.) With respect to the allegations in paragraph 13, the district court concluded Haugland’s claims regarding use of tax increment funds to construct these projects were simply premature and requested an improper advisory opinion from the court as Bismarck had not “approved” the use of tax increment funds to construct these projects, although such funding was “authorized” under Bismarck’s Plan.

(7.) Bismarck denies the assertions in paragraph 14, in their entirety.

(8.) In paragraph 23, Haugland misstates the decision of this Court. The only issue remanded to the district court relative to the 1994 amendment to Bismarck’s Plan was whether Bismarck passed an appropriate resolution finding the revised renewal area consists of slum or blighted areas. (*Haugland* at ¶ 55; App. 138.) This Court did not

remand the issue of whether a proper public hearing was held relative to the 1994 amendment. Regardless, the 1994 amendment to Bismarck's Plan was made following a properly noticed public hearing as discussed below.

(9.) Bismarck denies Haugland's assertion in paragraph 24 this Court's order on remand required Bismarck to produce a complete copy of its resolution finding the revised renewal area was comprised of slum or blighted areas. Instead, the issue remanded to the district court for determination was whether Bismarck passed an appropriate resolution in this regard.

(10.) With respect to the allegations in paragraph 25, Bismarck also asserts its CORE Incentive Program constituted both an authorized and approved project under Bismarck Plan on the date of the district court's original grant of summary judgment. The district court agreed.

(11.) Haugland mischaracterizes the district court's decision in paragraph 27. The district court did not comment on the amount of tax increment funds which could be accumulated in the tax increment fund. Bismarck is not asserting it is entitled to divert as much property tax as it wants into the fund , but rather only as much as Bismarck reasonably believes is necessary to accomplish the goals and objectives of Bismarck's Plan.

RESPONSE TO HAUGLAND'S STATEMENT OF THE FACTS

(12.) As a preliminary matter, the majority of Haugland's Statement of Facts is comprised of quotations, references and Haugland's interpretation of the Urban Renewal Act. Bismarck asserts the Act speaks for itself and no response to Haugland's interpretation thereof in his statement of facts is necessary. In any event, Bismarck

specifically disputes the following:

(13.) Bismarck denies the assertion in paragraph 35 the “development or renewal plan” must set “forth the details for how a ‘development or renewal project’ consistent with the ‘general plan’ will be completed.” (Underline added.) No such requirement appears in the Act. Bismarck notes Haugland concedes in the last sentence of paragraph 35 that Bismarck’s approval of a renewal plan results in the authorization of the renewal projects contained in the renewal plan.

(14.) Bismarck denies the implication of paragraph 36 only two funding sources may be utilized for paying for a development or renewal project pursuant to the Act. Although the Act grants municipalities the authority to utilize tax increment financing and total or partial tax exemptions, the Act does not preclude a municipality from utilizing other sources of funding.

(15.) Bismarck denies the assertion in paragraph 37 and footnote 2 the Auditor must be advised of a known amount of money to be diverted to the tax increment fund when the tax diversion is commenced. There is nothing in the Act which requires this. Instead, the Act requires the Auditor to continue with the tax diversion until such time as the municipality advises the Auditor the cost of the renewal of the renewal area has been fully paid or otherwise provided for. N.D.C.C. § 40-58-20(10).

(16.) Bismarck denies the assertion in paragraph 38 the Act does not permit tax diversion to a tax increment fund until the city has “approved” a project and a plan for completing the project. Bismarck approved a renewal plan on an area-wide approach which includes numerous authorized projects in furtherance of such plan.

(17.) Bismarck denies the assertions in paragraph 40. Bismarck’s Plan meets the

definition of a “development or renewal plan” under the Act. The list of objectives and proposed projects in Bismarck’s Plan are authorized objectives and projects in furtherance of the goals and objectives of the Plan.

(18.) With respect to paragraph 41, Bismarck admits that as of the district court’s original grant of summary judgment in favor of Bismarck on January 12, 2011, Bismarck had not “approved” construction of, or given final “approval” for tax increment financing of either the quiet rail or 6th street parking ramp projects.¹ However, both projects, as well as tax increment financing thereof, are authorized under Bismarck’s Plan. Bismarck has “approved” a Specific Improvement Project (plans) for the parking ramp which contemplates use of tax increment financing, of an undetermined amount.

(19.) Bismarck denies Haugland’s characterization of the “primary issue” on appeal in this action as described in footnote 4. Tax increment financing of Bismarck’s Plan is based on an area-wide approach, not a project specific approach as Haugland asserts is required – a position rejected by this Court in *Haugland*.

(20.) Bismarck denies Haugland’s characterization in paragraphs 51 and 52 of the two issues remanded to the district court. The issues actually remanded are as described in the Response to Haugland’s Statement of the Issues, above.

(21.) Bismarck denies Haugland’s characterization in paragraphs 53, 55 and 56 of the evidence presented by Bismarck to the district court on remand.

¹ The public record will reflect that in late May of 2013, the Bismarck City Commission awarded construction bids for the construction of the 6th Street Parking Ramp and “approved” tax increment funding thereof under Bismarck’s Plan. Bismarck is now fully committed to proceed with the ramp project. Bismarck has also engaged a design consultant for the quiet rail project, whose fees are to be paid out of the tax increment

LAW AND ARGUMENT

I. HAUGLAND MISSTATES THE ISSUES ON APPEAL

(22.) Relative to Bismarck's current Plan, the factual issue remanded to the district court for determination was not whether there were any pending authorized projects for which tax increment financing has been approved as of January 12, 2011, but rather "whether there were any authorized renewal projects in the renewal area" as of such date. This Court merely inquired whether Bismarck's renewal plan for the renewal area was completed as of January 12, 2011, i.e. whether Bismarck's Plan included any authorized renewal projects for which collected tax increment funds may be utilized in the future.

(23.) Under Haugland's interpretation of this Court's decision, Bismarck must apply/allocate tax increment funds on a project by project basis. Such an interpretation was rejected by this Court which determined Bismarck may take an area-wide approach to tax increment financing. The Court's determination Bismarck's CORE Incentive Program complies with the Act illustrates this point. Although tax increment funds are utilized to fund CORE, at least in part, tax increment funds are not specifically allocated to CORE as they are collected each year. Instead, the tax increment funds are simply held in one fund account and applied as needed to fund projects approved under CORE on a case by case basis.

(24.) As noted by the district court, the Act does not mandate renewal projects have authorized undertakings or activities, and this Court did not conclude a municipality must authorize renewal projects in place for the renewal plan to continue. Instead, this Court

fund. Bismarck is awaiting the project design and cost estimates on quiet rail and has not yet made a decision on whether to proceed with the project.

determined the tax increment funding of Bismarck's Plan may continue until the costs associated with the renewal area have been fully paid or sufficient funds have been received so tax increment funds no longer need to be collected, in the reasonable discretion of Bismarck's City Commission. (App. 142-43 at ¶¶ 62-64; App. 242-43.)

(25.) Bismarck's CORE Incentive Program, 6th Street Parking Ramp ("Ramp") and Quiet Rail projects were all "authorized" renewal projects under Bismarck's approved Plan as of January 12, 2011. Whether tax increment financing for such projects had been "approved" by the Bismarck City Commission is irrelevant.

II. HAUGLAND CONFUSES THE TERMS "AUTHORIZED" AND "APPROVED"

(26.) Haugland misstates Bismarck's prior statements to this Court and the district court relative to the status of the Ramp and Quiet Rail projects. Bismarck never stated the Ramp and Quiet Rail projects were not "authorized" under the Plan, or that tax increment financing for either was not "authorized" by the Plan. As discussed below, both projects are authorized under the Plan, and tax increment financing, in whole or in part, for each project is authorized by the Plan. However, as of January 12, 2011, Bismarck had not given "approval" for construction of either project, or given "approval" for any specific funding for construction with respect to either project.² Although Bismarck had expended tax increment funds for vendor services (feasibility study, soil testing, asbestos testing, etc) relative to the Ramp and Quiet Rail projects before commencement of this

² It would not have been prudent to give such "approval" until after bids had been received and considered by the Commission. Bismarck was on the verge of requesting bids on the Ramp project when this lawsuit was commenced. (App. 147 at ¶ 16.) Also, refer to footnote 1 for the current status of these projects.

action, discussed below, such expenditure was authorized under Bismarck's Plan.

Regardless, Haugland's claims in this action relative to these projects are limited to Bismarck's planned future use of tax increment funds on these projects – Haugland has not challenged Bismarck's past expenditure of tax increment funds on these projects.

(App. 7-22.) In this context, the district court's determination Haugland's challenge of Bismarck's future potential expenditure of tax increment funds for construction of the Ramp or Quiet Rail projects was premature was absolutely correct. Bismarck's prior representations to the district court and this Court were entirely accurate and in no way misleading as to the ripeness of Haugland's claims pertaining to these projects.

(27.) Haugland also misinterprets application of tax increment financing under the Act. The diversion of property taxes into a tax increment fund is both "authorized" and "approved" upon a municipality's adoption or substantial modification of a renewal plan. In other words, the diversion of property taxes is approved at the renewal plan level – not at the project specific level. Once a municipality's plan with tax increment financing has been approved, a municipality may collect and expend the tax increment funds in furtherance of the plan's goals and objectives as directed by the municipality's governing body - no further public "approval" process is required.

III. PENDING AUTHORIZED RENEWAL PROJECTS WITHIN BISMARCK'S RENEWAL AREA ON JANUARY 12, 2011

(28.) The first issue on appeal is whether there were any pending authorized renewal projects in Bismarck's renewal area when the district court originally granted Bismarck summary judgment on January 12, 2011. In other words, was Bismarck's Plan serving any ongoing purpose which justifies retention of tax increment funds by Bismarck. This

Court determined Bismarck’s area-wide approach to urban renewal is consistent with the Urban Renewal Law, constitutional law, and is permissible.

(29.) A copy of the most recent version of Bismarck’s Plan, last modified March 9, 2010, is provided in the Supplemental Appendix at p. 86. The current boundaries of the Renewal Area are described in Exhibit A to the Plan, and depicted in Map #1, also attached to the Plan. The “Objectives of the Urban Renewal Plan” are listed at paragraph A(2) of the Plan. In addition, the Plan includes a list of “Proposed Renewal Actions” for the Renewal Area at paragraph A(3), which include in pertinent part, but not limited to, the following:

- * * *
- d. Rehabilitation of buildings and lands to local standards established by the Plan.

- * * *
- 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:

- * * *
- 8) Construction of a public parking ramp on the E ½ 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 Infill
- 3) Technical Assistance Bank
- 4) Façade 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 89-91 at ¶ A(3)(d-e.)

(30.) Notably, Bismarck's current Plan includes authorization for construction of a public parking ramp on the E ½ of Block 68, Original Plat (i.e. 6th Street Parking Ramp), construction of Quiet Rail facilities at surface crossings within the Renewal Area, the CORE Incentive Programs (component parts described in ¶ A(3)(e)), as well as other planned improvements.

A. Bismarck's CORE Incentive Program

(31.) There is no genuine dispute CORE is a fully authorized and approved renewal project which this Court has held complies with the Act. *See Haugland* at ¶ 57 (rejecting Haugland's challenge of the CORE Incentive Program.) CORE was an authorized renewal project in the renewal area when the district court decided this case. Summary judgment in favor of Bismarck is justified relative to Bismarck's current Plan on this basis alone as CORE establishes the existence of a pending authorized project as of January 12, 2011.

(32.) Haugland is asserting a “gotcha” argument and misinterprets this Court’s decision when he argues there were no specific projects under CORE in progress as of January 12, 2011. CORE itself is the authorized renewal project under Bismarck’s Plan. Whether any specific projects under CORE were in progress on January 12, 2011 should be irrelevant. Regardless, CORE projects were in progress when this lawsuit was commenced by Haugland in April of 2010. (App. 208 at ¶ 2.) Out of prudence, Bismarck temporarily suspended consideration of new CORE applications until these legal proceedings were resolved. (App. 208 at ¶ 3.) However, even as of January 12, 2011, at least one CORE project was still in progress, with the CORE reimbursement grant pertaining to said project being paid out on July 20, 2011. (App. 208 at ¶ 4.) Bismarck intends to continue with the CORE Program until such time as Bismarck, in its discretion, determines the objectives of the Plan as a whole in the Renewal Area, have been achieved. (App. 149 at ¶ 33.) The whole point of CORE is to have funds available for when these smaller downtown improvement projects are presented-projects which further Bismarck’s objectives of remediating and preventing the spread of slum and blight. Bismarck’s prudence in temporarily suspending consideration of CORE applications pending a final resolution of Haugland’s legal claims should not be punished.

B. The 6th Street Parking Ramp Was A Pending Authorized Renewal Project Within Bismarck’s Renewal Area On January 12, 2011

(33.) Bismarck has been considering construction of the 6th Street Parking Ramp (between Thayer and Broadway Avenues) for many years. As evidenced by correspondence from the Bismarck Parking Authority to MedCenter One Health Systems dated October 14, 2005, November 29, 2005 and January 9, 2006 (App. 155-59),

Bismarck began negotiating with MedCenter One no later than 2005 relative to Bismarck's acquisition of the 6th Street location from MedCenter One for a nominal sum with the understanding Bismarck would construct a parking ramp thereon for use, in part, by MedCenter One at a set rate for an extended period of time. On February 15, 2006, Bismarck (via Bismarck Parking Authority) entered into a Development Agreement and attached Amendment to Development Agreement (collectively "Original Agreement") with MedCenter One, Inc. granting Bismarck an option to purchase the subject land owned by MedCenter One for purposes of constructing said parking ramp, upon certain conditions. (SA 125-28.) Among the conditions to the option was Bismarck's acquisition of other land from third-parties upon which the ramp would be constructed, referenced in the Development Agreement as the Linssen Property, and Medcenter One's agreement to lease parking space in the parking ramp. (*Id.*) Bismarck ultimately acquired ownership of the Linssen Property. (*Id.*)

(34.) Commission meeting minutes from May 23, 2006 evidence discussion regarding requests for proposals relative to the future construction of the subject ramp. (SA 105.) Bismarck's original option with MedCenter One to purchase the subject property expired on August 15, 2007, although the parking ramp project was still being considered thereafter. (SA 119 at ¶ 6.)

(35.) On July 14, 2009, the Commission authorized progress on the Ramp through the design phase to a completed plans and specifications document, and to award the project design to Ulteig Engineers. (App. 160.) A Master Professional Services Agreement between Ulteig Engineers and Bismarck relative to the Ramp was entered into on August

17, 2009. (App. 161-69.) A “Project Schedule/Milestones” dated August 27, 2009 prepared by Ulteig Engineers summarizes planned progress on the project. (App. 170.)

(36.) On October 1, 2009, Walker Parking Consultants conducted a “Kick-Off Meeting” relative to the 6th Street Parking Ramp. (App. 171.) On November 3, 2009, Bismarck held a “Public Open House and Comment Opportunity” relative to the Ramp. A copy of the advertisement for said public meeting, along with design concepts for the parking ramp, are provided at pages 172 through 176 of the Appendix.

(37.) On December 22, 2009, the Commission approved a request to prepare modifications to Bismarck’s Plan and to prepare a specific improvement plan for the Ramp project. (SA 110.)

(38.) On or about December 29, 2009, the Commission received an Opinion of Probable Cost relative to the Ramp from Walker Parking Consultants (App. 177-84). At this early stage, the projected cost of a five level parking ramp was \$6,134,693, and a six level parking ramp was \$7,438,835.

(39.) On January 12, 2010, the Commission received a progress report on the Ramp project noting progression from schematics to full plans and specifications. (SA 113.) Soil tests, asbestos and environmental testing, cost estimates, and selection of the design for the ramp based upon public input had been completed. (*Id.*) Drawings of all proposed designs, as well as a complete report was presented to the Commission. (*Id.*)

(40.) On January 13, 2010, a public hearing on the Ramp project was held before the Renaissance Zone Authority. (SA 82-83.) On January 26, 2010, the Commission approved the 6th Street Parking Ramp Specific Improvement Plan. (SA 116.) During the January 26, 2010 Commission Meeting, City Administrator Bill Wocken advised the

Commission the plan is to use tax increment financing for part of the Ramp project, in an amount not yet determined for partial financing. (*Id.*)

(41.) On February 10, 2010, a public hearing before the Renaissance Zone Authority was held on proposed revisions to Bismarck's Plan relative to the Ramp. (SA 84-85.) On February 23, 2010, the Commission considered and approved the proposed changes to the Bismarck Plan. (SA 79-80.)

(42.) On March 9, 2010, in addition to again approving modifications to the Bismarck Plan, the Commission also held a properly noticed public hearing on, and approved, the Specific Improvement Plan for the construction of a parking ramp on 6th Street (East Half of Block 68, Original Plat) in accordance with the Plan, and upon recommendation of Bismarck's Urban Renewal Agency, following public hearings before said agency. A copy of the Specific Improvement Plan dated March 9, 2010 ("SIP") is provided at pages 99 to 102 of the Supplemental Appendix. A copy of the March 9, 2010 City Commission meeting minutes are provided at pages 73 to 77 of the Supplemental Appendix.

(43.) According to the SIP, the ramp will include either five or six levels and have spaces for between 410 and 490 cars. The SIP provides further, in relevant part, as follows:

The project is expected to cost between \$7,072,958 and \$8,371,343 depending on the bids received and the alternative chosen by City. The project will be financed with a combination of parking revenue from spaces within this ramp, parking revenue from other ramps currently operated by the Bismarck Parking Authority and tax increment funds. A complete financial package for the project will need to be completed after bids are received but current estimates are for tax increment funds needed for the project to be between \$5,400,000 and \$7,000,000. The remainder of the project would be financed with parking revenues.

This project is important to the prevention of urban blight and furtherance of economic development in the downtown area in accordance with the Official

Urban Renewal Plan in several ways. The project will demolish several marginal buildings in the downtown. The buildings are in various stages of deterioration and are largely functionally obsolete. It will serve to enhance the quality of development in this area of the downtown through the use of an architecturally enhanced building design. The other major advantage to redevelopment of the downtown will, of course, be the addition of a sizeable parking resource that will allow the use of present parking lots for future structures.

This project supports Urban Renewal Plan Objectives A, B, D1, D3, D4 and D5 [reproduced above under small letters a, b, d(1), d(3), d(4) and d(5)].

(SA 101-02 at ¶ A(3).) Notably, the approved SIP notes the Ramp will be financed, in part, through tax increment financing. In addition, paragraph D of Bismarck's Plan last modified March 9, 2010, expressly states tax increment financing is contemplated, whether in whole or in part, for all projects referenced in Bismarck's Plan.

(44.) A properly noticed public hearing before the City Commission was held on March 9, 2010 at which all aspects of the projects were discussed and persons in attendance were afforded an opportunity to hear and be heard prior to its adoption. (SA 124.) The project had been reviewed and recommended by both Bismarck's Urban Renewal Agency (i.e. "Renaissance Zone Authority") and the City Planning Commission, as noted in City's February 23, 2010 meeting minutes (SA 79). The Ramp project had previously been extensively discussed at public City Commission meetings on May 23, 2006, March 25, 2008, December 22, 2009, January 12, 2010, and January 26, 2010 (meeting minutes for each provided at pages 103-117 of the Supplemental Appendix).

(45.) Provided at pages 129 to 131 of the Supplemental Appendix is a copy of an updated Development Agreement which was considered and informally agreed upon between Bismarck and MedCenter One on or about March of 2010 which would have again granted Bismarck the option to purchase MedCenter One property to facilitate

City's construction of a public parking ramp on 6th Street. (SA 119 at ¶ 7.) The updated Development Agreement was never executed due largely to commencement of the current litigation herein. (*Id.*) As progress on, and interest in, the project has waned since commencement of this litigation, Bismarck sold the Linssen Property to MedCenter One with an agreement Bismarck may repurchase the property from MedCenter One should the decision later be made to move forward with this project. (*Id.*)

(46.) As of January 12, 2011, Bismarck had not yet accepted bids for the Ramp or finally committed to any financing package for the project. (App. 147 at ¶ 15.) When Haugland commenced this action, Bismarck was on the verge of requesting bids for the construction of the Ramp. (App. 147 at ¶ 16.) This is evidenced, in part, by the minutes of a March 25, 2010 meeting of the 6th Street Ramp Steering Committee (App. 185) indicating the steering committee was "Awaiting an opinion from the Attorney General on the validity of a possible lawsuit regarding the TIF financing for this project. Until this opinion is received, no request for approval to advertise the project will be presented to the City Commission. Date is uncertain at this time." The question raised in the March 18, 2010 Attorney General request (App. 205-06) was whether the ramp constituted a "public improvement" within the meaning of the Urban Renewal Law for which tax increment funds could be utilized. As a result of commencement of this litigation, the North Dakota Attorney General did not respond to this request for an opinion. The fact Bismarck was on the verge of requesting bids when this action was commenced is further evidenced by the agenda of the 6th Street Ramp Steering Committee meeting of April 8, 2010 (App. 186) to discuss progress on the Ramp project.

The agenda indicates progress on the project was to be discussed, as well as “TIF lawsuit impact on consideration by City Commission for approval to advertise for bids”, and “Discussion on completion of documents for bidding and construction on project.” Bismarck decided to hold off on completion of this project pending resolution of Haugland’s claims in this action. (App. 148 at ¶ 19.) Now that this Court has addressed Haugland’s claims, the Bismarck City Commission has moved the project forward. (App. 148 at ¶ 20; footnote 1 hereof.)

(47.) Due to changes in the marketplace since 2010, it is now anticipated the cost to construct the Ramp may exceed the original estimate. (App. 148 at ¶ 21.) It has always been Bismarck’s intention to utilize tax increment funds to finance this project. (App. 148 at ¶ 22.) In fact, Bismarck paid for preliminary vendor services in relation to the Ramp project out of the Tax Increment Fund prior to the district court’s original grant of summary judgment on January 12, 2011, including design and professional engineering services, asbestos survey, and soil testing. (App. 210; App. 213-14 at ¶¶ 3, 4.) The district court found this fact significant in determining the ramp project was a pending authorized project under Bismarck’s Plan as of January 12, 2011. (App. 244.) The district court also determined the ramp project was ongoing and the present litigation was hampering progress on the project. (App. 244.) Again, Bismarck put this, and all other projects under the Plan, on hold once Haugland commenced this litigation.

(48.) The Ramp was an authorized renewal project within the renewal area as of January 12, 2011, both pursuant to the terms of Bismarck Plan last approved March 9, 2010, but also pursuant to a Special Improvement Plan approved by the Bismarck City Commission on March 9, 2010 (SA 99-102.) Both Bismarck’s Plan and the Special

Improvement Plan authorize the use of tax increment funds for completion of the Ramp, subject to approval by the Bismarck City Commission. Paragraph D of Bismarck's Plan expressly states tax increment financing is contemplated for completion of all projects listed in the Plan, including the Ramp. The Specific Improvement Plan expressly provides "The project will be financed with a combination of parking revenue from spaces within this ramp, parking revenue from other ramps currently operated by the Bismarck Parking Authority **and tax increment funds**. A complete financial package for the project will need to be completed after bids are received but current estimates are for tax increment funds needed for the project to be between \$5,400,000 and \$7,000,000. The remainder of the project would be financed with parking revenues." (SA 102 at ¶ A(3)(bold added.) Bismarck was on the verge of requesting bids for the construction of the 6th Street Parking Ramp when this lawsuit was commenced. (App. 147 at ¶¶ 15-16.) All of the evidence presented to the district court on remand establishes conclusively the Ramp has been at all times from and after the date of the district court's original grant of summary judgment a pending authorized renewal project within the renewal area under Bismarck's Plan.

C. **Quiet Rail Was A Pending Authorized Renewal Project Within Bismarck's Renewal Area On January 12, 2011**

(49.) As with the Ramp, the construction of a Quiet Rail Zone within the Renewal Area has been in the works for many years. On September 13, 2005, the Commission directed requests for proposals be obtained relative to a Quiet Rail Zone to ascertain whether such a project was feasible. (App. 187-88.) A copy of an article from the Bismarck Tribune dated September 16, 2005 and titled "City staff starts work on CORE ideas" (App. 189)

further evidences the Commission's authorization to move forward with obtaining requests for proposals from consultants on implementing quiet rail. On September 27, 2005, Bismarck City Administrator Bill Wocken directed Bismarck City Engineer Mel Bullinger to proceed with various tasks in furtherance of ascertaining the feasibility of a Quiet Rail Zone. (App. 190.) On March 14, 2006, the Commission awarded a contract to SRF Consulting for consulting services for the purpose of ascertaining the approximate cost of implementing quiet rail. (App. 191.)

(50.) Commission meeting minutes of September 26, 2006 evidence the Renaissance Zone Authority recommended amendments to Bismarck's Plan to, in part, "[d]evelop strategy for implementing a quiet rail zone; Will have a report this fall." (SA 66.) On October 24, 2006, following a properly noticed public hearing, the Commission approved modifications to Bismarck's Plan, including specific inclusion of "Quiet Rail Zone" as a program to encourage private investment in the core of the community. (SA 34, 72.) The October 24, 2006 modifications to the Bismarck Plan were approved by resolution dated January 23, 2007. (SA 42-46.)

(51.) On June 12, 2007, and again on July 10, 2007, the Commission approved an expansion of the quiet rail study to include additional crossings. The expanded area would include crossings at Airport Road, 24th Street and 26th Street. (App. 192-95.)

(52.) Commission meeting minutes of March 25, 2008 evidence discussion of a Quiet Rail Zone Assessment and Renaissance Zone Authority recommendation to move forward with a ballot measure on quiet rail. (SA 107-08.) A copy of the RZA's Summary & Recommendation in this regard is provided at pages 196-99 of the Appendix. The Commission approved a ballot measure on the Quiet Rail Zone project. (*Id.*) The

Quiet Rail Zone project on the ballot measure would have been funded by both tax increment financing and a sales tax. The ballot measure was voted down by the electorate in an advisory vote on June 10, 2008. (App. 200.) The Quiet Rail Zone project which was voted down in 2008 included, in part, crossing upgrades located both within, and without, the Renewal Area.

(53.) On October 8, 2009, the Downtown Business Association purportedly circulated an email (App. 201-02) to its members encouraging them to appear before the Commission at the October 13, 2009 Commission meeting to support construction of Quiet Rail in the downtown area, to be funded with tax increment funds, and not sales taxes. On October 13, 2009, members of the Downtown Business Association appeared before the Commission to express their support for the Quiet Rail project. (App. 204.)

(54.) On December 22, 2009, the Commission approved a request to work on proposed revisions to Bismarck's Plan to, in part, expand Renewal Area boundaries from the middle of streets to their outside boundaries to facilitate Quiet Rail facilities, and to move forward with a specific improvement plan for Quiet Rail. (SA 110.) These plans were to be limited to within the confines of the Renewal Area (i.e. scaled back from the Quiet Rail Zone voted down in 2008). The Quiet Rail project would replace specified railway crossings located within the Renewal Area with various safety devices, including, among other things, center meridians to prevent vehicles from circumnavigating cross-bucks, and pedestrian mazes. Implementation of these devices and resulting discontinued sounding of train horns in the downtown area would accomplish two legitimate goals of Bismarck – elimination of sound pollution in the downtown area which negatively impacts private investment in the downtown area, a cause of the spread of slum and blighted areas in the

downtown area, as well as the promotion of public safety and welfare.

(55.) The Bismarck City Commission approved the most recent revisions to Bismarck's Plan on March 9, 2010. (SA 75-77.) Among those revisions was the inclusion of "[c]onstruction of Quiet Rail facilities at surface crossings within the Urban Renewal Plan area." (SA 90.) Bismarck's Plan also authorizes the use of tax increment financing for all of the projects listed (authorized) in the Plan, including Quiet Rail pursuant to paragraph D thereof, which provides, in relevant part: "It is contemplated that the cost of the completion of the renewal of the Revised Area will be paid or reimbursed from tax increments as authorized and provided in Section 40-58-20, NDCC" The Plan authorizes the use of tax increment financing for completion of the renewal projects listed in the Plan, subject to approval by the Bismarck City Commission. In fact, Bismarck utilized tax increment funds for payment of preliminary vendor services (feasibility study) pertaining to the Quiet Rail project. (App. 214 at ¶¶ 5-6; App. 211-12.) The district court found this fact significant in determining the Quiet Rail project was a pending authorized project under Bismarck's Plan as of January 12, 2011. (App. 244.) The district court also determined the Quiet Rail project was ongoing and the present litigation was hampering progress on the project. (App. 244.) As stated by the district court, "[w]hile Plaintiff may argue that he may not see signs of progress on these projects, the various studies conducted with the TIF funds by Bismarck are necessary first steps prior to the undertaking of construction of the projects." (App. 244.)

(56.) Quiet Rail is a pending and authorized project within Bismarck's Plan, the purpose of which is to prevent and/or alleviate the spread of slum and/or blighted conditions in the Renewal Area. The objectives of Bismarck's Plan have not yet been

achieved. (App. 149 at ¶ 34.) Bismarck's Renewal Area is still comprised of combined areas of slum and blight which the 6th Street Parking Ramp, Quiet Rail Project, CORE Incentive Programs, and other projects identified in the March 9, 2010 Plan are designed to address. Until the Commission, in its discretion, makes a determination all Plan objectives relative to the projects authorized (i.e. listed) in the Plan have been met and paid for (or provision for payment made), Bismarck is justified in retaining tax increment funds for those purposes.

(57.) Tax increment funds currently being held by Bismarck are needed for completion of Bismarck's Plan, as a whole, on an area-wide approach – not only on a project by project approach. This Court has confirmed the area-wide approach is permissible. Therefore, regardless of whether the Commission has specifically directed the use of tax increment funds for construction of any one project is immaterial. As discussed above, Bismarck's Plan includes several pending authorized projects for which tax increment funds will be required for completion. Bismarck's Plan continues to serve a purpose for which tax increment funds are required.

IV. BISMARCK PASSED AN APPROPRIATE RESOLUTION IN 1994 TO ADD PROPERTY TO ITS URBAN RENEWAL PLAN

(58.) The second issue on remand was whether Bismarck's Board of City Commissioner's passed a resolution finding the revised Renewal Area resulting from the November 8, 1994 amendments to Bismarck's Plan included slum and/or blighted areas appropriate for an urban renewal project. This issue stems from two sections of the Urban Renewal Law – specifically, N.D.C.C. § 40-58-05 and § 40-58-06. Both sections essentially require, in relevant part, the governing body of a municipality adopt a

resolution finding the renewal area is a slum or blighted area, and designate the area as appropriate for a development or renewal project.

(59.) Following this Court's decision on the prior appeal, Bismarck conducted a further search of its records to ascertain whether any additional documentation beyond what was previously provided to the district court and this Court exists relative to the 1994 modification to Bismarck's Plan. The following additional documentation was located and presented to the district court in support of Bismarck's motion for summary judgment on remand:

- Memo from Attorney Robert Wefald dated November 8, 1994 – requesting inclusion of one block owned by Gary Anderson into the Renewal Area covered by Bismarck's Plan (App. 151.)
- Memorandum from Bill Wocken, City Administrator, to File dated November 9, 1994 noting “On Tuesday, November 8, 1994, the Board of City Commissioners held a continuation of the Public Hearing on the modification of the Bismarck Urban Renewal Plan. Action by the Board was to approve the Plan as attached.” (App. 152.)
- Resolution (first page only - missing second page) finding described area (encompassing entire Renewal Area as comprised as a result of the 1994 amendment to Bismarck's Plan) to “consist of a combination of slum and blighted areas and is designated as appropriate for an urban renewal project:” (App. 153-54.)

Despite diligent inquiry, Bismarck has been unable to locate the second page of the

subject Resolution.³ (App. 146 at ¶ 4.) However, the portions produced contain the legal description of the 1994 revised renewal area along with the finding such area “consist of a combination of slum and blighted areas and is designated as appropriate for an urban renewal project. . . .” (App. 146 at ¶ 4.)

(60.) Bill Wocken is, and has been, Bismarck’s City Administrator since October 1, 1994. (App. 145 at ¶ 1.) Mr. Wocken was Bismarck’s City Administrator when the modifications to Bismarck’s Plan were made in November of 1994. (App. 146 at ¶ 5.) It is Mr. Wocken’s belief and recollection the Bismarck City Commission passed the subject Resolution and made the findings of the existence of slum and blighted areas within the renewal area during the November 8, 1994 Commission meeting when the 1994 modifications to Bismarck’s Plan were approved. (App. 146 at ¶ 5.) A copy of relevant excerpts from the Commission meeting minutes of November 8, 1994 approving the 1994 modifications to Bismarck’s Plan were provided to the district court. (Supp. App. 28.) In addition, it is Mr. Wocken’s belief the subject Resolution would have been duly executed in the normal course of business. (App. 146 at ¶ 5.)

(61.) Bismarck respectfully submits sufficient direct and circumstantial evidence has been presented to establish the *Resolution Relating to the Modification of a Downtown Urban Renewal Plan for the City of Bismarck* (App. 153-54) was adopted by the Bismarck City Commission during the November 8, 1994 City Commission meeting. The first page of such resolution includes a specific finding the revised renewal area “consists of a combination of slum and blighted areas and is designated as appropriate for

³ The records involved are almost 20 years old, and very few public entities, if any, have record retention policies for this length of duration.

an urban renewal project” Although a couple of lines from the legal description of the revised renewal area carried over onto the second page of the resolution, which cannot now be located, nobody disputes following the November 8, 1994 meeting tax increments pertaining to the revised renewal area were being collected for use under Bismarck’s Plan – such collection was not a coincidence. In addition, the notice published in the Bismarck Tribune on August 25, 1994 relative to the public hearing on the proposed 1994 Plan modification (App. 207) indicates the proposed modification to the Plan will include “an area between 9th and 12th streets and between Main and Sweet Avenues,” – an area encompassing the revised renewal area following the 1994 modifications.

(62.) Haugland’s assertion that production of a full copy of the resolution adopted by Bismarck pursuant to N.D.C.C. § 31-09-10 is the only way for Bismarck to prove compliance with the Act is without merit. Under Haugland’s logic, every time official government documents are lost or destroyed, whether by casualty or otherwise, the legal effect of such would be that all government action evidenced by such documents never occurred or would be otherwise invalidated. Such an outcome would be nonsensical. Although production of the full original resolution would be ideal, such production is not the only means by which official government action can be proven. As determined by the district court, N.D.C.C. § 31-09-10 is permissive (“[o]fficial documents may be proved as follows”) and merely provides one method for proving official documents. Pursuant to North Dakota Rule of Evidence 1005 dealing with public records, if a copy of an official document “cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.”

(63.) Although not an issue remanded by this Court to the district court for

determination, Haugland contends Bismarck failed to hold a proper public hearing relative to the 1994 amendment to Bismarck Plan. The district court properly concluded Bismarck fully complied with notice requirements in this regard.

(64.) On August 25, 1994, a notice of a public hearing on the proposed 1994 modifications to Bismarck's Plan was published in the Bismarck Tribune, in compliance with N.D.C.C. § 40-58-06(3). (App. 207.) A public hearing on the proposed modifications was held before the Bismarck City Commission, as noticed, on August 30, 1994. A copy of the meeting minutes pertaining thereto is in the record. (SA 6.) The Bismarck City Commission listened to public comments regarding the proposed Plan modifications, including the objections of Haugland, as noted in the minutes. Following the conclusion of public comments, and following a motion to vote on the proposed modifications being seconded, the City Commission decided to continue the hearing to afford the City Commission an opportunity to obtain an opinion from the North Dakota Attorney General as to whether parcels of land which had improvements made on them could be dropped from the tax increment district, the issue raised by Haugland. In other words, the delay in the City Commission's approval of the 1994 Plan modifications was due to the City Commission's prudence in considering the objections raised by Haugland – a delay Haugland now asserts was improper.

(65.) Bismarck fully complied with the procedural requirements of the Act in adopting the 1994 Plan modifications by properly noticing and holding a public hearing on the proposed modifications, and listening to all public comments thereon. The Bismarck City Commission was not required to vote on the issue on August 30, 1994, and instead elected to continue the vote on the issue to give the City Commission an opportunity to

obtain a legal opinion from the Attorney General and to otherwise reflect on the matter. The opinion of then Attorney General Heidi Heitkamp dated October 17, 1994 (SA 7-11.) was subsequently received by Bismarck. Based upon said opinion, on November 8, 1994, Bismarck completed the public hearing continued from August 30, 1994, and approved the proposed modification of Bismarck's Plan to expand the Renewal Area to add roughly five to six additional blocks to the Renewal Area. (SA 28.) The legal description of the revised boundary of the Renewal Area under Bismarck's 1994 Plan, and a map depicting same, are attached to the 1994 Plan (SA 24-27). The Act did not require Bismarck to start over and hold a second noticed public hearing on the issue. Following the August 30, 1994 public hearing, all that was left to be done was to vote on the proposed modifications to the Plan. The Bismarck City Commission did so on November 8, 1994.

(66.) There is no requirement under the Act that approval of a modification to a plan be made at, or even on the same date as, the public hearing at which the proposed modifications are opened for public discussion. Instead, North Dakota Century Code § 40-58-06(3) simply requires a properly noticed public hearing be held on the subject, while subparagraph 4 authorizes the governing body to approve a plan modification “[f]ollowing the hearing” referenced in subparagraph 3. In other words, although the Act requires a properly noticed public hearing be held to afford the public an opportunity to voice their input on the subject, the Act does not require the governing body to make a decision at that time. The governing body may make its decision at any time following the hearing. This interpretation is both consistent with the plain wording of the statute, as well as logical in providing the governing body time to consider the opinions expressed by the public at the public hearing. That is exactly what happened in this case.

V. REMAND INAPPROPRIATE

(67.) Haugland's assertion this case should be remanded for a determination of whether the Ramp and Quiet Rail projects constitute "public improvements" to address slum or blight conditions in the event it is determined either project was "approved" by Bismarck is without merit. First, Haugland waived this issue by failing to raise it in the prior appeal. Second, he failed to include this issue in his most recent Notice of Appeal (App. 248). In addition, the Ramp and Quiet Rail projects would constitute "public improvements" as a matter of law.

CONCLUSION

(68.) For the reasons discussed above, City requests the district court's grant of summary judgment in favor of City dismissing all of Haugland's claims be affirmed, in its entirety.

Dated this 18th day of June, 2013.

SMITH BAKKE PORSBORG
SCHWEIGERT ARMSTRONG

By s/Randall J. Bakke
Randall J. Bakke (#03898)
Shawn A. Grinolds (#05407)
122 East Broadway
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendant/Appellee
City of Bismarck

CERTIFICATE OF COMPLIANCE

(69.) The undersigned, as attorneys for the Defendant/Appellee City of Bismarck in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 7,945.

Dated this 18th day of June, 2013.

SMITH BAKKE PORSBORG
SCHWEIGERT & ARMSTRONG

By s/Randall J. Bakke
Randall J. Bakke (ND ID# 03898)
Shawn A. Grinolds (ND ID# 05407)
122 E. Broadway Ave.
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendant/Appellee
City of Bismarck

