

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

STATE OF MISSOURI, ex inf.)	
CHARLES J. DYKHOUSE,)	
BOONE COUNTY COUNSELOR, in his)	
official capacity,)	
)	
Relator,)	
)	
v.)	Case No. 14BA-CV00493
)	
CITY OF COLUMBIA,)	
)	
Respondent.)	

JUDGMENT AND ORDER

Today's date is December 16, 2015. After an August 28, 2015 post-trial conference in which the Court suggested that the parties resolve the matter without court order, on December 14, 2015, the parties advised that they were unable to resolve their differences and the cause was ripe for ruling by the Court.

On May 28, 2015, this cause came on for trial. Relator, Boone County Counselor Charles J. Dykhouse, appeared in person. Respondent City of Columbia appeared by Attorney Brad Letterman and Attorney Nancy Thompson. Parties announced ready. Relator requested the Court make certain factual findings and for an opinion containing a statement of grounds for its decision pursuant to Missouri Supreme Court Rule 73.01(c). Cause heard. Relator adduced evidence and rested. Respondent adduced evidence and rested.

The Court having duly considered the evidence adduced, the arguments made and the suggestions filed, enters the following Judgment and Order:

Relator filed this Quo Warranto action seeking relief for Respondent's failure to comply with the reporting requirements of RSMo §99.865 relating to its administration of certain Tax Increment Financing (TIF) projects.

Relator requested the relief of ouster, which would prohibit Respondent from engaging in new TIF projects for a period of not less than five years from the date of the most recent violation in calendar year 2014.

Relator, the Boone County Counselor, has the authority to bring this cause of action on his own information pursuant to a mutual cooperation agreement with the Boone County Prosecuting Attorney under the provisions of RSMo §56.640.3. The Court has jurisdiction over Respondent as a municipal corporation whose corporate boundaries are wholly included within the limits of the County of Boone, and this action inquires into the authority of that municipal corporation to take actions relating to future TIF projects.

ANALYSIS OF RSMO §99.865

RSMo §99.865.1, in pertinent part, provides as follows:

Each year the governing body of the municipality, or its designee, **shall** prepare a report concerning the status of each redevelopment plan and redevelopment project, and **shall** submit a copy of **such report** to the director of the department of economic development. (Emphasis added.)

RSMo §99.865.2 provides as follows:

Data contained in the report mandated *pursuant to the provisions of subsection 1 of this section* and any information regarding amounts disbursed to municipalities pursuant to the provisions of section 99.845 shall be deemed a public record, as defined in section 610.010. **An annual statement** showing the payments made in lieu of taxes received and expended in that year, the status of the redevelopment plan and projects therein, amount of outstanding bonded indebtedness and any additional information the municipality deems necessary **shall be published in a newspaper of general circulation in the municipality.** (Emphasis added.)

RSMo §99.865.3 provides as follows:

Five years after the establishment of a redevelopment plan and every five years thereafter the governing body shall hold a public hearing regarding those redevelopment plans and projects created pursuant to sections 99.800 to 99.865. The purpose of the hearing shall be to determine if the redevelopment project is making satisfactory progress under the proposed time schedule contained within the approved plans for completion of such projects. Notice of such public hearing shall be given in a newspaper of general circulation in the area served by the commission once each week for four weeks immediately prior to the hearing.

The above three subsections of RSMo §99.865 impose three (3) different reporting requirements on municipalities engaging in TIF projects. The reporting requirements imposed in subsections 1 and 2 of RSMo §99.865 are relevant to this case.

Prior to 2009, RSMo §99.865 imposed no clear penalty upon a municipality for its failure to comply with reporting requirements as required in that statute. The General Assembly changed that, however, by enacting House Bill No. 191 (2009), which added a specific consequence for a municipality's failure to comply with reporting requirements imposed in RSMo §99.865 by adopting, *inter alia*, a new subsection 7. It provides:

Any municipality which fails to comply with the **reporting requirements provided in this section** **shall be prohibited** from implementing any new tax increment finance project for a period of **no less than five years from such municipality's failure to comply.** (Emphasis added.)

This lawsuit focuses on the City's administration of Tax Increment Financing projects – projects that, generally, involve the public subsidizing of private development by the allocation of a portion of tax dollars produced from the project to pay for certain aspects of the project.

In Section 89.865.2, the Legislature made it explicit that the reports required by the section are “public records” as provided in 610.011, RSMO. And, as stated in 610.011, RSMO, “it is the public policy of this state that . . . records . . . of public governmental bodies be open to the public.” This policy “shall be liberally construed . . . to promote this public policy.” It is clear to the Court that the City violated their mandated obligation to report to the public; a mandate

that cannot and should not be taken lightly. The City's arguments that even if it had reported as required, it should be excused, because it, the City, (a) didn't have much to report or (b) the State Departments in which we failed to file the report didn't say we did anything wrong, are simply not convincing – not controlling.

It is the Court's opinion that the Public's right to know includes both the existence and non-existence of public facts and that the protector of those rights in these circumstances is to be the City – the City did not protect the Public.

Part and parcel of American democracy is the notion that governmental functions should be carried out in a manner that is open to public scrutiny and accessible to the people. In addition to expressing the statute's overarching policy that governmental activities should be conducted "in a manner that is open to public scrutiny," the General Assembly established a presumption in favor of openness through RSMo 610.011.1. To this end, RSMo 610.011.1 provides that the state's Sunshine Law "shall be liberally construed and its exceptions strictly construed to promote this public policy." (See A Hobson's Choice: Ensuring Open Government or Conserving Government Funds, 66 Mo. L. Rev. 431 (Mekel, 2001)).

Based on those statutory provisions, the Court makes the following factual findings:

**FACTUAL FINDINGS OF REPORTING VIOLATIONS UNDER
RSMO §99.865.1 and RSMO §99.865.2**

The Court makes the following specific finding of reporting violations:

1. The Court finds the Respondent violated the reporting requirements imposed in subsection 1 of RSMo §99.865 as shown by Relator's Exhibit #7, which is incorporated herein by reference. This shows between 7-9 separate violations.¹

2. The Court finds the Respondent violated the reporting requirements imposed in subsection 2 of RSMo §99.865 as shown by Relator's Exhibit #8, which is incorporated herein by reference. This shows 16 separate violations.

CONCLUSION

When Respondent, a municipality, fails to comply with any of the 3 separate reporting requirements imposed in RSMo §99.865, then RSMo §99.865.7, by its plain language, imposes a penalty by removing the municipality's power to engage in new TIF projects *for a period of no less than five years* from the municipality's failure to comply with said reporting requirements. The Court finds that the City of Columbia failed to comply with the reporting requirements imposed in RSMo §99.865.1 and RSMo §99.865.2 a total of between 23-25 times since 2009, with its last violation occurring in calendar year 2014. As shown in Relator's Exhibit #1, the deposition of Deputy City Manager Tony St. Romaine (page 59, lines 14-22), Columbia continues to consider TIF as a funding option in 2016 for an electrical project. Deputy City

¹ The Court is aware of Executive Order 13-02 in which Missouri Governor Jay Nixon purportedly changed the filing location of the reports from subsection 1 of RSMo §99.865 from the Missouri Department of Economic Development to the Missouri Department of Revenue. That change arguably conflicts with the plain language of RSMo §99.865.1, but the Court does not need to reach the issue of whether a filing with DOR satisfies the statute as the Court declines to impose consecutive 5-year prohibitions for either the 23 or the 25 separate reporting violations committed by Respondent. Rather, the Court's imposition of a 20-year prohibition is supported by either the 23 or the 25 count of separate violations.

Manager Tony St. Romaine testified as a designee of Respondent pursuant to Rule 57.03(b)(4) and, thus, his statements are binding admissions of Respondent. See *State ex. rel. Reif v. Jamison*, 271 S.W. 3d 549, 551 (Mo banc. 2008).

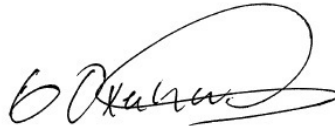
The City ignored the public's right to know.

In making those plans to use TIF, Columbia attempts to usurp to itself a power it does not possess, as it lost the power to create TIFs for a period of no less than five years from 12/31/2014, or through at least 12/31/2019. Though Relator requests that the Court impose a longer penalty, the Court declines to do so.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. A Judgment of ouster is granted in favor of Relator and against the City of Columbia, and by this Judgment the City of Columbia is prohibited from implementing any new tax increment finance project for a period of no less than five (5) years from the last violation of the reporting requirements of RSMo §99.865, or through December 31, 2019;
2. Costs are taxed to Respondent.

So ordered.



Gary Oxenhandler
Circuit Judge, Division 2
Circuit Court of Boone County, Missouri

Honorable Gary Oxenhandler, Division II

DATED: December 16, 2015

ATTACHMENTS

- Relator's Exhibit #7
- Relator's Exhibit #8

COURT SEAL OF



BOONE COUNTY