

HELEN BURNS SHARP AND THE STATE )  
OF TENNESSEE *ex rel.* HELEN BURNS )  
SHARP, )

for Summary Judgment (“MSJ”) on June 5, 2014. In addition, the two third-party Defendants, MBSC Black Creek, LLC and IDB Investor, LLC, had filed a Motion to Incorporate by Reference. The third-party Defendants wanted to adopt the Defendants’ MSJ. The third-party Defendants contended that if the Defendants’ MSJ was granted and the lawsuit filed by Helen Burns Sharp (“Ms. Sharp”) was dismissed as to the Defendants, then the third-party Complaint filed by IDB and Chattanooga against the third-party Defendants should be dismissed as moot.

The Defendants asked that Ms. Sharp’s lawsuit be dismissed as there were no material facts in dispute. The Defendants relied upon their (1) Statement of Undisputed Material Facts; (2) Memorandum of Law; (3) Affidavit of George H. Masterson; and (4) deposition excerpts of Ms. Sharp. First, the Defendants argued that Ms. Sharp had no standing to challenge the Tax Increment Financing (“TIF”) granted to the third-party Defendants. Second, they contended that the Economic Impact Plan (“EIP”) approved by the Defendants met the definition of a “project” in Tenn. Code Ann. § 7-53-312. Third, the action by the Chattanooga City Council and the Hamilton County Commission should be given deference by the court under the “fairly debatable” standard.

The Defendants, in addition to arguing that Ms. Sharp had no standing or right to sue, also contended that Ms. Sharp was not an “expert” in TIF and that Mr. Masterson was an expert. However, on July 7, 2014 the court had stricken Mr. Masterson’s Affidavit as evidence in support of the Defendants’ MSJ upon Ms. Sharp’s Motion to Strike. The court also denied Ms. Sharp’s Motion to Continue the MSJ hearing.

The parties agreed for the disposition hearing on the MSJ to be held on July 10, 2014 at 1:30 p.m. However, due to the court’s calendar, all parties graciously agreed to advance the

hearing to 12:15 p.m. All parties were present and the arguments went forward at that time.

The Defendants' arguments on the MSJ were primarily handled by attorney Phillip A. Noblett, who represents Chattanooga. Some of the presentation was a background history of TIF, which was a relatively new concept and law. Indeed, the third-party Defendants' TIF application was said to be the first TIF in Hamilton County. Mr. Noblett saw the ultimate question as a matter of law. Did the EIP proposed by the third-party Defendants meet the definition of a "project", which was required for TIF. Mr. Masterson, a Nashville attorney who represented the third-party Defendants in the TIF process, said it did.

The Defendants argued that Ms. Sharp's Response, filed on July 9, 2014, was untimely and should not be considered. Alternatively, they argued that the court must consider the deposition of Mr. Masterson, which was a part of Ms. Sharp's Response. If the July 9, 2014 Response was considered, then Mr. Masterson's deposition was the only expert proof about what a "project" is within the TIF statutes. The court must give deference to the approval of the TIF by Chattanooga and Hamilton. Therefore, the Defendants should be granted summary judgment.

Attorney Michael A. McMahan, counsel for IDB, commented on the court's striking Mr. Masterson's affidavit. He contended that the deposition testimony of Mr. Masterson proved that the proposed development plan was a project.

Attorney James P. Catalano, representing the third-party Defendants, argued that Ms. Sharp had no standing to sue. Even if she had standing, Ms. Sharp had no expert to prove that the EIP was not a project in view of Mr. Masterson's deposition and/or expected trial testimony.

Attorney John P. Konvalinka had previously moved to strike Mr. Masterson's affidavit that

the third-party Defendants' EIP constituted a project because such was a legal determination for the court and Mr. Masterson was not able to opine on the ultimate issue. Mr. Konvalinka argued that the EIP did not meet the definition of a project, that the land covered by the EIP was in two counties, and argued other issues and maps in opposition to the MSJ. Tennessee Code Annotated § 7-53-312(b) (Supp. 2013) requires the project to "be located in the municipality."

The court decided but did not announce its agreement with the Defendants' argument that Ms. Sharp's July 9, 2014 Response should not be considered. The Response was not filed within five days of the hearing as required by Tenn. R. Civ. P. 56.04. The court points out that Ms. Sharp did file a timely Response on July 3, 2014. Thus, there is no expert opinion before the court on what constitutes a TIF-eligible project. Therefore, the MSJ fails on this point.

At the end of the argument, the court denied granting the MSJ and dismissing the lawsuit. The court found that Ms. Sharp had standing to challenge the action of IDB in approving the TIF in a Memorandum Opinion and Order filed on June 5, 2013. Although Ms. Sharp may not be uniquely injured more than any other member of the public, there were exceptions to this general rule recognized in Tennessee. One exception is the ability of a taxpayer to challenge the legality of spending public funds. *Cobb v. Shelby County Bd. of Commissioners*, 771 S.W.2d 124 (Tenn. 1989); *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 62 (Tenn. Ct. App. 2001). Ms. Sharp had been active in presenting her opinion and objections on the EIP and validity of TIF to IDB and other governmental officials. The court had also pointed out that Ms. Burns had also asserted that IDB had violated the terms of the Open Meetings Act. Tenn. Code Ann. § 8-44-101 *et. seq.*

The court wants to explain its denial of the MSJ. One, Ms. Burns does have standing in the

court's opinion. Two, there is no expert opinion before the court on what constitutes a project. Mr. Masterson's Affidavit was stricken and his deposition was filed too late to be considered by the court for MSJ purposes. Even if the issue of project were decided in the Defendants' favor, the lawsuit would still have continued as Ms. Sharp had sued upon IDB's violation of the Open Meetings Law. Three, the court had great concerns that IDB had made the decision to finalize the third-party Defendants' IEP and grant TIF based upon the unqualified opinion letter of Mr. Masterson, the attorney for the third-party Defendants. The court did not have personal experience with bonds but found it suspicious that the applicant's attorney (1) gave the expert opinion on whether the EIP proposal constituted a project or not and (2) his opinion was the ultimate basis upon which the TIF note and other documents were approved.

After the court denied the MSJ, the third-party Defendants asked to continue the trial as some persons were not able to attend the trial, scheduled for July 15, 16, and 17, 2014. The Defendants asked the court to allow them an immediate, interlocutory appeal to the Court of Appeals. Mr. Konvalinka wanted to put on Ms. Sharp's proof on July 15, 2014 so the record would be complete as to his client's evidence on the illegality of the project and the TIF award.

The court indicated its view that these motions were not good options and would be denied. However, the court requested that the attorneys meet and discuss possible solutions. This did not result in any agreement. The court erred in making that suggestion. The Defendants forwarded a proposed Order setting forth their understanding of the court's ruling and statements. Ms. Sharp's counsel preliminarily objected to that proposed order on numerous grounds, including the cancellation of the trial. Ms. Sharp presented her own proposed order which was simple and to the

point. The court has declined to sign any of the proposed orders, in part so the court can better articulate its decision on the denial of the MSJ and the other issues presented. Thus, the court decided to set forth its ruling in more detail.

In the present case, Ms. Sharp "won." The court has declared null and void IDB's final approval of the EIP and TIF grant's being funded by the note and other papers completing the process. This court holds that the issue of whether the third-party Defendants' EIP is a project or not is moot. A decision of this court on that issue at this time would be advisory. The court does not know if the previously submitted EIP will be reconsidered again by IDB or whether an amended plan, to meet some of Ms. Sharp's objections, will be submitted. At this time, such is mere speculation.

*State v. State*, 347 S.W.2d 47 (Tenn. 1961) involved a petition for *habeas corpus* filed by Mr. Lewis. The trial court's denial of the petition was appealed. Thereafter, the grand jury returned a no true bill and Mr. Lewis was released. On appeal, Mr. Lewis and others asked the Supreme Court to determine the constitutionality of Tenn. Code Ann. § 18-410. The Supreme Court declined to do so. The Supreme Court stated:

In 1 Am.Jur., Section 19, at page 417, the author of this work says:

"In general, the courts do not determine speculative and abstract questions of law, or lay down rules for the future conduct of individuals in their business and social relations; they are confined in their judicial action to real controversies wherein the legal rights of parties are necessarily involved and can be conclusively determined."

In other words, the practice followed by most all courts, if not

all, is shown to be, unless there is in existence a legal right, that the courts will not determine the matter, because when the question involved in the action as originally brought is no longer in existence it has become moot. A very interesting discussion of the question with cases cited from all over the United States will be found in Vol. 1A of Corpus Juris Secundum, under the title Actions, beginning at Section 17, page 1012. Subsection c., under this Section, is a definition of what constitutes a moot case. The author says:

"A moot case is one in which there is no real controversy; a case which seeks to determine an abstract question which does not rest on existing facts or rights."

The best statement of the question herein involved that we have found was made in *Southern Pac. Co. v. Eshelman*, as reported in D.C., 227 F. 928, 932. That court said:

"However convenient or desirable for either party that the questions mooted in the case be authoritatively settled for future guidance, the court is not justified in violating fundamental principles of judicial procedure to gratify that desire. To invoke the jurisdiction of a court of justice, it is primarily essential that there be involved a genuine and existing controversy, calling for present adjudication as involving present rights, and although the case may have originally presented such a controversy, if before decision it has, through act of the parties or other cause, lost that essential character, it is the duty of the court, upon the fact appearing, to dismiss it."

\*\*\*\*\*

A number of authorities are therein cited, all of which are various and sundry United States Supreme Court decisions, including *State of Tennessee v. Condon*, 189 U.S. 64, 23 S. Ct. 579, 47 L. Ed. 709.

The above quoted statement of the court in that case is practically and to all intents and purposes a copy of a statement

made in 2 Encyc.Sup.Ct.R., 289.

We in this State have consistently followed this principle. The courts of this State have no right to render an advisory opinion. They do so render advisory opinions in some States, but we do not. We have repeatedly held that where only the taxing of the costs is involved and the major question has become moot that we will not consider the question. *State ex rel. Wilson v. Bush*, 141 Tenn. 229, 208 S.W. 607....

*Id.*, 347 S.W.2d at 48. The Supreme Court refused to decide the constitutionality of the statute.

A very interesting case is *Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W.2d 151 (Tenn. Ct. App. 1992), a decision by then Judge Koch.

There are two points for this trial court. First,

This court may vacate an agency's decision in a contested case when the agency's procedure violates statutory provisions or is otherwise unlawful. Tenn. Code Ann. § 4-5-322(h)(1), -322(h)(3) (1991). We may also vacate a decision when it is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Tenn. Code Ann. § 4-5-322(h)(4). We have determined that the Commission abused its discretion by attempting to implement its regulatory reform plan and technology master plan through adjudication rather than through rulemaking.

*Id.*, 844 S.W.2d at 163-64.

Second,

The manner in which the Commission has gone about formulating its technology modernization policies raises legitimate concerns. The companies that stood to benefit most from the regulatory changes played a significant role in formulating them. If the regulatory reform plan and the technology master plan are adopted, the companies will be able to modernize their networks without seeking additional debt or equity financing and will also be



poised to enter into new competitive markets.

The concerns about the formulation of the Commission's policies are only deepened by the way the Commission has gone about trying to implement them. The Commission "approved" its new policies before receiving any public comment and then attempted to implement them before completing the required rulemaking process. This wholesale circumvention of orderly rulemaking process calls the fairness of the entire process into question.

The TCTA's disqualification arguments are, however, premised on adjudicatory rather than rulemaking standards. Since we have vacated the Commission's adjudicatory decision and have directed the Commission to complete its rulemaking procedure, we need only review the bias issue using the rulemaking standards.

*Id.*, 844 S.W.2d at 165.

Finally, *Brown v. Chapdelaine*, No. 01A01-9408-CH-00371, 1994 Tenn. App. LEXIS 776 (Dec. 30, 1994) is an example that easily illustrates the mootness and advisory opinion issues. In *Brown*, a grandmother sued to enforce a custody decree. However, the grandmother died before the appeal was heard. Thus, the appeal was dismissed. The same result would have occurred if the grandmother died before the trial of the case.

The court's decision not only grants victory to Ms. Sharp but accomplishes, in a different manner, the oral motions made on July 10, 2014. The third-party Defendants do not have to worry about non-available witnesses for a trial that will not occur. Also, the Defendants have an automatic right of appeal as to the issues covered by this Order. Ms. Burns also has a right of appeal.

The court realizes that its action of granting judgment at this time is unusual. However,

Ms. Sharp pleaded that IDB's approval of the TIF note and other documents were subject to an opinion of the Attorney General or bond counsel. IDB admitted such at its October 5, 2012 Answer when it approved the TIF note and other documents subject to "an opinion of the State of Tennessee Attorney General or counsel." Paragraph 23 of the Defendants' Answer filed on June 20, 2013 and Exhibit 2 attached thereto. Exhibit 2 is a copy of the Minutes of the Special Meeting of the Board of Directions of the Industrial Development Board. The court confirmed this matter with all counsel on July 7, 2014 when other motions were considered.

Further, there is no doubt or dispute that Mr. Masterson was the attorney representing the third-party Defendants seeking the TIF. It was also Mr. Masterson's unqualified opinion letter that satisfied IDB's "subject to." The opinion letter was not delivered to the board members in a public meeting nor did IDB vote in public to accept Mr. Masterson's letter as an "unqualified" opinion letter. Either Mr. Masterson had, at a minimum a conflict of interest, or the IDB should have used independent counsel or the attorney general for its decision and not accepted Mr. Masterson's opinion which was the product of some qualms and rewriting. The court holds that the Open Meetings Law was violated and the IDB's action was "null and void."

Therefore, it is **ORDERED:**

1. Ms. Sharp's Motion to Strike the Affidavit of Mr. Masterson, as support for the Defendants' MSJ, is granted;
2. Ms. Sharp's Motion for Additional Time to respond to the Defendants' Motion for Summary Judgment is denied;
3. Ms. Burns' Response filed on July 9, 2014 shall not be considered in ruling on the

Defendants' MSJ as such Response was not submitted five days before the hearing ;

4. The Defendants' Motion for Summary Judgment is denied based upon (a) the court's holding that Ms. Sharp does have taxpayer standing in this case; (b) there being no undisputed evidence or "expert opinion" that the third-party Defendants' EIP was a project, (c) the issue of "project" is not totally dispositive of the lawsuit based upon IDB's alleged violations of the Open Meetings Law, and (d) the court's concerns about IDB's decision to grant TIF based upon the unqualified opinion letter of Mr. Masterson, who represented the third-party Defendants, either with or without a public meeting;

5. The third-party Defendants' oral motion to continue the trial is denied;

6. The Defendants' oral Motion for an interlocutory appeal, pursuant to Rule 9, Tennessee Rules of Appellate Procedure, is denied;

7. The record is without dispute that (a) IDB approved the note and final documents implementing the third-party Defendant's IEP and TIF subject to approval by the attorney general or an unqualified opinion letter of counsel; (b) the second letter sent to IDB by Mr. Masterson was deemed an unqualified opinion letter (by at least a majority of the members of IDB), (c) IDB never had a public meeting to confirm and announce its prior decision based upon the condition subsequent being satisfied by Mr. Masterson's letter, and (d) Mr. Masterson was the attorney representing the third-party Defendants in seeking the TIF;

(8) Ms. Sharp had accused IDB of secret meetings in its consideration of the two opinion letters from Mr. Masterson and alleged such violated the open Meeting Law, which meant its actions should be declared null, void, and of no effect and the court agrees with her;

(9) The court has *sua sponte* granted Ms. Sharp's prayer and declared that IDB's resolution granting TIF based upon the third-party Defendants' IEP and approving the note and other documents is null and void and of no legal effect, and the court takes this action because the same result would have occurred, even after two and one-half (2½) days of trial, due to the violation of the Open Meetings Law and the "approval" based upon the legal opinion of the third-party Defendants' attorney's opinion letter;

(10) Having decided that IDB's action is null and void, the court is aware that it is not supposed to give advisory opinions; the lawsuit has been resolved and there is no reason to have a trial, as such would be an unnecessary expense of money for five attorneys, time for witnesses, and judicial economy as no other issues would be determined, such as whether the EIP is a project or not, whether the actions of the City and/or County were legal (the actions of the City and County are also moot at this point), etc. as the court would reach the same result and decision that the IDB's final actions were null and void;

(11) It is not the court's function (through an advisory opinion) to tell IDB how to handle the third-party Defendants' EIP, such as whether the third-party Defendants must submit a new application or whether IDB on its own action or upon request should put the initial application on its agenda, or outlined in the Defendants' proposed order;

(12) The Clerk's costs are adjudged against IDB, for which execution may enter; and

(13) This is a final order.

**ENTER:**



Chancellor - Part 1

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and exact copy of this Order has been sent by email and placed in the United States Mail addressed to the following person (s):

John P. Konvalinka, Esquire  
Thomas M. Gautreaux, Esquire  
633 Chestnut Street, Suite 900  
Chattanooga, TN 37450-0900  
jkonvalinka@gkhpc.com

Michael A. McMahan, Esquire  
132 Ridgeway Drive  
Chattanooga, TN 37421  
M.mcmahan@epbfi.com

Phillip A. Noblett, Esquire  
100 E. 11<sup>th</sup> Street, Suite 200  
Chattanooga, TN 37402  
noblett@mail.chattanooga.gov

Rheubin M. Taylor, Esquire  
Hamilton County Attorney  
Room 204, County Courthouse  
Chattanooga, TN 37402  
Rmtaylor@hamiltontn.gov

James P. Catalano, Esquire  
Nelson Mullins Riley & Scarborough, LLP  
One Nashville Place  
150 Fourth Avenue, North, Suite 1100  
Nashville, TN 37219  
Jim.catalano@leitnerfirm.com

This the 16<sup>th</sup> day of July, 2014.

**S. Lee Akers, Clerk and Master**

By:

 5N  
Deputy Clerk and Master