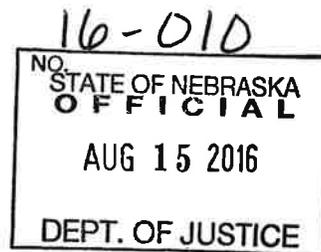




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DOUGLAS J. PETERSON
ATTORNEY GENERAL



TO: Senator Mike Groene
Nebraska Legislature

FROM: Douglas J. Peterson, Attorney General
L. Jay Bartel, Assistant Attorney General

RE: Propriety of the Use of Tax Increment Financing for the Acquisition,
Planning and Preparation for Development of Undeveloped Vacant Land
Under Neb. Rev. Stat. § 18-2123 (2012).

Neb. Rev. Stat. § 18-2123 (2012) provides, in part, that “[u]pon a determination, by resolution, of the governing body of the city in which such land is located, that the acquisition and development of undeveloped vacant land, not within a substandard or blighted area, is essential to the proper clearance or redevelopment of substandard or blighted areas or a necessary part of the general community redevelopment program of the city,..., the acquisition, planning, and preparation for development or disposal of such land shall constitute a redevelopment project which may be undertaken by the authority....” During the recent legislative session, you introduced LB 719, which proposes to amend § 18-2123 to provide that “[t]ax-increment financing as provided in section 18-2147 shall not be used for the acquisition, planning, and preparation for development or disposal of undeveloped vacant land as described in subsection (1) of [§ 18-2123], nor shall undeveloped vacant land be declared or designated blighted and substandard to qualify for the use of tax-increment financing.” LB 719, § 1. You have requested our opinion as to whether tax increment financing may currently be used for

the acquisition, planning, and preparation for development of undeveloped vacant land authorized under § 18-2123, and, if so, whether use of tax increment financing for this purpose is consistent with Neb. Const. art. VIII, § 12.

At the outset, we note it is our long-standing policy not to provide opinions to members of the Legislature on the interpretation or constitutionality of existing statutes. Op. Att'y Gen. No. 157 (Dec. 24, 1985). Accordingly, we normally would decline to provide an opinion on the question presented. As you have proposed legislation which could be impacted by our conclusion, we will proceed to respond to your question.

A. Community Development and Tax Increment Financing ["TIF"]

The Community Development Law, Neb. Rev. Stat. §§ 18-2101 to 18-2144 (2012 and Cum. Supp. 2014) ["CDL"] generally "authorizes a city to define and acquire substandard or blighted areas and redevelop them in accordance with an approved redevelopment plan which in turn shall conform to the general plan for the municipality as a whole." *Monarch Chemical Works, Inc. v. City of Omaha*, 203 Neb. 33, 36, 277 N.W.2d 423, 425 (1979). Cities or villages may create a division or department to function as a community development agency, or may establish a Community Redevelopment Authority ["CRA"] to prepare and carry out redevelopment plans for areas which have been declared substandard and blighted. Neb. Rev. Stat. §§ 18-2101.01, 18-2102 and 18-2102.01 (2012). After a redevelopment plan has been prepared and approved, a CRA may contract with redevelopers regarding the use of property for residential, commercial, industrial, or recreational purposes or other public purposes within a community development area in accordance with the redevelopment plan, and "provide grants, loans, or other means of financing to public or private parties in order to accomplish the rehabilitation or redevelopment in accordance with the redevelopment plan." Neb. Rev. Stat. § 18-2107(4) (2012). Section 18-2123 of the CDL provides:

Upon a determination, by resolution, of the governing body of the city in which such land is located, that the acquisition and development of undeveloped vacant land, not within a substandard or blighted area, is essential to the proper clearance or redevelopment of substandard or blighted areas or a necessary part of the general community redevelopment program of the city, or that the acquisition and development of land outside the city, but within a radius of three miles thereof, is necessary or convenient to the proper clearance or redevelopment of one or more substandard or blighted areas within the city or is a necessary adjunct to the general community redevelopment program of the city, the acquisition, planning, and preparation for development of such land shall constitute a redevelopment project which may be undertaken by the authority in the manner provided in the foregoing sections.

Redevelopment projects may be funded by the use of "Tax Increment Financing" ["TIF"], which allows the increased property taxes generated by the redevelopment to be used to finance the redevelopment. Neb. Rev. Stat. §§ 18-2147 to 18-2153 (2007); 350 N.A.C. § 18.001.01. After a redevelopment project is approved, the city or CRA may

issue TIF bonds to finance the project. See Neb. Rev. Stat. § 18-2124(3) (2012). A redevelopment plan may provide that real property taxes in a redevelopment project shall be divided “for a period not to exceed fifteen years after the effective date of such provision. . . .” Neb. Rev. Stat. § 18-2147(1) (2012). Taxing entities can levy taxes on real property in the project on the redevelopment project valuation, also known as the base value, which means “the assessed valuation on the taxable property in a redevelopment project last certified to the political subdivisions in the year prior to the effective date of the provision authorizing the dividing of ad valorem tax pursuant to” Neb. Rev. Stat. §§ 18-2103(21) and 18-2147 (2012). 310 N.A.C. § 18.002.15. The portion of tax assessed on real property in the redevelopment project in excess of the base value for the current year, the redevelopment project excess valuation, is accounted for separately and used to pay off the financing or debt incurred for the project for a period not to exceed fifteen years. Neb. Rev. Stat. § 18-2147(1)(b) (2012). Notice of the provision for dividing taxes must be sent by the city or CRA to the county assessor on or before August 1 in the calendar year that the division of real property taxes is to become effective. Neb. Rev. Stat. § 18-2147(3) (2012); 350 N.A.C. § 18.003.03.

B. Constitutional Authorization of TIF

In 1978, a constitutional amendment was presented to voters to approve authorizing cities and villages to issue bonds and other evidence of indebtedness to acquire and redevelop substandard and blighted property in a redevelopment project, and to pledge and apply to pay off such indebtedness all taxes levied on the value of real property in excess of the prior year’s valuation on property in the project area for a period not to exceed fifteen years. 1978 Neb. Laws, LB 469, § 1. The amendment was adopted and became Neb. Const. art. VIII, § 12. In 1984, this provision was amended to allow cities and villages to incur indebtedness to rehabilitate substandard and blighted property, in addition to permitting acquisition and redevelopment. 1984 Neb. Laws, LR 227. An amendment altering the financing provisions relating to redevelopment of substandard and blighted property by further defining the project area was approved in 1988. 1987 Neb. Laws, LR 11. Neb. Const. art. VIII, § 12, currently provides as follows:

For the purpose of rehabilitating, acquiring, or redeveloping substandard and blighted property in a redevelopment project as determined by law, any city or village of the state may, notwithstanding any other provision in the Constitution, and without regard to charter limitations and restrictions, incur indebtedness, whether by bond, loans, notes, advance of money, or otherwise. Notwithstanding any other provision in the Constitution or local charter, such cities or villages may also pledge for and apply to the payment of the principal, interest, and any premium on such indebtedness all taxes levied by all taxing bodies, which taxes shall be at such rate for a period not to exceed fifteen years, on the assessed valuation of the property in the project area portion of a designated blighted and substandard area that is in excess of the assessed valuation of such property for the year prior to such rehabilitation, acquisition, or redevelopment.

When such indebtedness and the interest thereon have been paid in full, such property thereafter shall be taxed as is other property in the respective taxing jurisdictions and such taxes applied as all other taxes of the respective taxing bodies.

C. Analysis

Section 18-2123 authorizes the acquisition, planning, and preparation for development of undeveloped vacant land as a redevelopment project where the land "is not within a substandard or blighted area." As Neb. Const. art. VIII, § 12, authorizes the use of TIF based "on the assessed valuation of the property in the project area portion of a designated blighted and substandard area that is in excess of the assessed valuation of such property for the year prior to [] rehabilitation, acquisition, or redevelopment", the issue is whether TIF can be used in connection with the acquisition and development of undeveloped vacant land under § 18-2123 since such land is not within an area designated as "blighted and substandard."

The Nebraska Supreme Court has recognized the following general rules governing the interpretation of constitutional provisions:

The intent and understanding of [the] framers [of a constitutional provision] and the people who adopted it as expressed in the instrument is the main inquiry in construing it. . . . The words of a constitutional provision will be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests they are used in a technical sense. The court may not supply any supposed omission, or add words to or take words from the provision as framed. It must be construed as a whole, and no part will be rejected as meaningless or surplusage, if it can be avoided. If the meaning is clear, the court will give to it the meaning that obviously would be accepted and understood by the layman. . . . It is permissible to consider the facts of history in determining the meaning of the language of the Constitution. . . . It is also appropriate and helpful to consider, in connection with the historical background, the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy its terms imply.

State ex rel. Spire v. Beermann, 235 Neb. 384, 389-90, 455 N.W.2d 749, 752 (1990) (quoting *State ex rel. State Railway Comm'n v. Ramsey*, 151 Neb. 333, 340-41, 37 N.W.2d 502, 508 (1949) (citations omitted)).

As noted previously, art. VIII, § 12, was added to the Nebraska Constitution in 1978. As originally approved by the voters, the amendment provided that cities or villages could acquire and develop "substandard or blighted property" in a redevelopment project, and issue bonds or other evidence of indebtedness for the redevelopment to be repaid by property taxes on the assessed value of the property in excess of the assessed value for the year prior to acquisition and redevelopment for a period not to exceed fifteen years. 1978 Neb. Laws LB 469, § 1. A 1984 amendment, however, removed the word "or"

between “substandard” and “blighted”, replacing the word with “and”. 1984 Neb. Laws LR 227, § 1. This is consistent with the CDL, which refers to development or redevelopment of “substandard and blighted areas”. See Neb. Rev. Stat. §§ 18-2102 (2012) (Declaring intent to allow cities and villages to renew “substandard and blighted areas”); 18-2103(20) (Cum. Supp. 2014) (Defining community redevelopment area as “a substandard and blighted area which the community redevelopment authority designates as appropriate for a renewal project”); 18-2107(4) (2012) (Granting CRAs various powers to rehabilitate or redevelop “substandard and blighted areas”); 18-2109 (2012) (Requiring redevelopment project area be designated as a “substandard and blighted area” prior to preparation of a redevelopment plan.).¹ The plain language of both art. VIII, § 12, and the CDL, requires limiting the use of TIF to fund redevelopment projects only if they are included in an area designated as “substandard and blighted”. Accordingly, on its face, the use of TIF for the acquisition, planning, and preparation for development of undeveloped vacant land that is not within a substandard and blighted area under § 18-2123 would appear to be inconsistent with art. VIII, § 12.

In analyzing this question, however, it is necessary to consider the impact of the Nebraska Supreme Court’s decision in *Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998) [*Fitzke*]. In *Fitzke*, owners of property located near an area within the City of Hastings [“City”] challenged the City’s determination that undeveloped agricultural land added to an existing redevelopment area was blighted and substandard, and granting the use of TIF for development of a campground on the land. Based on a “Blight and Substandard Determination Study” prepared by a consultant retained by the City’s CRA, the City declared a portion of the City [Area 7] “blighted and substandard” and approved a redevelopment plan for the area. 255 Neb. at 48, 582 N.W.2d at 305. City officials were approached by a person with a plan to develop a campground on an undeveloped parcel of property in the northern part of the City which was being used as a cornfield. The proposed campground site was located outside of Area 7. *Id.* The consulting firm that performed the original blighted and substandard study for Area 7 could not conclude that the additional land met such criteria, but recommended it be included in Area 7. The City Council approved a resolution to add the land and “declare the expanded Area 7 as blighted and/or substandard.” *Id.* at 49, 582 N.W.2d at 305. The CRA modified the Area 7 redevelopment plan to provide for development of a campground in the area added by the resolution, and, as an incentive, approved a grant to the developer to be repaid through TIF. *Id.* at 50, 582 N.W.2d at 305. The CRA then entered into a redevelopment contract for construction of the campground. *Id.*, 582 N.W.2d at 306.

The *Fitzke*’s and other owners of property near the proposed campground challenged the legality of including the campground site in Area 7, and the grant of TIF. *Id.* at 50-51, 582 N.W.2d at 306. The trial court found the addition of land to Area 7 was

¹ The terms “Substandard areas” and “Blighted area” are defined, respectively, in Neb. Rev. Stat. § 18-2103(10) and (11) (Cum. Supp. 2014).

improper because “[l]and may not be added to an existing redevelopment area unless it is established that the additional land is itself blighted or substandard.” *Id.* at 51, 582 N.W.2d at 306. The trial court further determined that, “[u]nless necessary to relieve blight or substandard conditions on a specific site the mere incorporation of land into a redevelopment area is not sufficient to qualify the land for a blight or substandard designation...”, and that there was “no showing that the proposed development would eliminate any identifiable blight or substandard condition.” *Id.* Ultimately, the trial court concluded that the blighted and substandard designation of the expanded Area 7 was “contrary to the specific limitations of the relevant statutes of the State of Nebraska and [was] invalid...,” and rescinded the redevelopment contract, declaring it “void from its inception.” *Id.*

On appeal, the Nebraska Supreme Court addressed the propriety of the trial court’s finding that the blighted and substandard designation was invalid, and its determination that the redevelopment contract and grant of TIF were therefore void. Discussing the CDL generally, the court recognized that “statutes similar to the CDL have been interpreted as applying to areas rather than individual properties, and courts have refused to invalidate blight determinations with respect to an area merely because a single parcel within the area would not be considered blighted if viewed in isolation.” 255 Neb. at 58, 582 N.W.2d at 310. Indeed, the court recognized it “acknowledged this ‘area rule’ in” a prior case. *Id.* (citing *Monarch Chemical Works, Inc. v. City of Omaha*, 203 Neb. 33, 41, 277 N.W.2d 423, 428 (1979)).

Noting it was “undisputed” that the land which included the proposed campground site “consisted of undeveloped land used exclusively as a cornfield prior to its incorporation in Area 7...”, and that the CRA’s “consultant was unable to state that this parcel was itself blighted or substandard within the meaning of the CDL...”, the court found that, “in light of the area rule”, it “disagreed with the conclusion of the district court that land may not be added to an existing redevelopment area unless the additional land is itself blighted or substandard.” *Id.* at 59-60, 582 N.W.2d at 310-11. The court stated that “[t]he CDL does not specifically address the question of the incorporation of territory into an existing community development area which has previously been declared blighted or substandard.” *Id.* at 59, 582 N.W.2d at 311. Prior to addressing this question, the court discussed various provisions of the CDL, including: (1) identification of a community development area declared to be substandard and blighted; (2) formulation of a redevelopment plan for the area; and (3) implementation of the redevelopment by means such as acquisition, sale, leasing, and contracting for redevelopment. *Id.* at 60, 582 N.W.2d at 311. Included in the court’s discussion was reference to § 18-2123, which it stated “provides that undeveloped and vacant land situated within a city but not within a substandard or blighted area may not constitute a redevelopment project under the CDL unless the governing body of the city first determines by resolution that such land ‘is essential to the proper clearance or redevelopment of substandard or blighted areas or is a necessary part of the general community redevelopment program of the city.’” *Id.* at 61, 582 N.W.2d at 311.

Following this discussion of the CDL, the court stated:

Under this statutory scheme, a private development project would be eligible for tax increment financing only if it is included within an area which has previously been declared blighted or substandard and is in furtherance of an existing redevelopment plan for that area. The declaration of property as blighted or substandard is not simply a formality which must be met in order to assist a private developer with tax increment financing; it is the recognition of a specific public purpose which justifies the expenditure of public funds for redevelopment....If a private development project is ineligible for tax increment financing because it is located on land which is not blighted or substandard within the meaning of the CDL, it logically follows that eligibility could not be created by simply incorporating the project site into an adjacent area which has been declared blighted or substandard and revising the redevelopment plan for that area to include the project. Such a result would be contrary to the legislative intent underlying the CDL, which is to eliminate blighted and substandard urban areas through a cooperative effort of the public and private sectors, not to aid private developers. We therefore hold that under the CDL, land cannot be added to an existing community redevelopment area unless (1) the additional land is declared blighted or substandard within the meaning of the CDL or (2) the additional land is reasonably necessary to accomplish the implementation of the existing redevelopment plan. *Id.* at 61, 582 N.W.2d at 311-12 (citations omitted) (emphasis in original).

Applying this test, the court noted it was undisputed that the land which included the campground site “was not itself blighted or substandard within the meaning of the CDL...”, and that the district court found there was “no showing that the proposed development would eliminate any identifiable blight or substandard condition” of Area 7. *Id.* at 62, 582 N.W.2d at 312. The record also did not show “that the incorporation of this tract into Area 7 was reasonably necessary to carry out the redevelopment plan for Area 7...” Further, “the record contain[ed] no facts establishing that the development of the campground was necessary for the elimination of blight and substandard conditions in the original Area 7, pursuant to the original redevelopment plan.” *Id.* In view of these facts, the court concluded that, “[w]hile construction and operation of the campground may have been a desirable economic development for Hastings, this factor alone [did] not justify incorporating the campground site into an existing redevelopment area to permit the use of tax increment financing as an incentive to the developer.” *Id.* The court thus affirmed the district court’s finding that the expansion of Area 7 to include the campground was arbitrary and not supported by the evidence, and its determination that the redevelopment contract authorizing the TIF grant “was invalid and void ab initio.” *Id.*

Fitzke establishes that undeveloped land may be added to a redevelopment area if it is either declared “blighted and substandard” or is “reasonably necessary to accomplish” implementation of an existing redevelopment plan. Section 18-2123 authorizes the governing body of a city to acquire and develop undeveloped vacant land within the city, even though it is not in a substandard or blighted area, if the governing

body determines by resolution that it “is essential to the proper clearance or redevelopment of substandard or blighted areas or a necessary part of the general community development program of the city....” The requirement that the acquisition or development of the undeveloped vacant land be “essential” to redevelopment or “a necessary part” of the city’s community development program is akin to the test announced by the court in *Fitzke*, which recognizes that, if undeveloped land is not itself substandard and blighted, it can be included in a redevelopment area (and thus be eligible for TIF) if it is “reasonably necessary” to implementation of an existing redevelopment plan.² Accordingly, the use of TIF for the purposes set out in § 18-2123 may be deemed proper for undeveloped vacant land which is not within a substandard and blighted area, provided the land is “essential” to redevelopment of substandard or blighted areas or a “necessary part” of the community redevelopment program.³

CONCLUSION

Neb. Const. art. VIII, § 12, authorizes the use of TIF “for the purpose of rehabilitating, acquiring, or redeveloping substandard and blighted property in a redevelopment project” within “a designated blighted and substandard area.” As § 18-2123 relates to acquisition or development of undeveloped vacant land which is “not within a substandard or blighted area”, applying the literal language of art. VIII, § 12, appears to foreclose the use of TIF in relation to the acquisition, planning, and preparation for development of such land as a redevelopment project. In *Fitzke*, however, the Nebraska Supreme Court held that, under the CDL, land cannot be added to an existing community redevelopment area and qualify for TIF unless “(1) the additional land is declared blighted or substandard within the meaning of the CDL or (2) the additional land is reasonably necessary to accomplish the implementation of the existing redevelopment plan.” 255 Neb. at 61, 582 N.W.2d at 312 (emphasis in original). The requirement in § 18-2123 that the acquisition or development of the undeveloped vacant land be “essential” to redevelopment or “a necessary part” of the city’s community development program is akin to the test announced by the court in *Fitzke* recognizing that, if

² Of course, if undeveloped vacant land is within a substandard and blighted area, § 18-2123 is not applicable. Also, if undeveloped vacant land is declared substandard and blighted under § 18-2109 as part of a redevelopment plan for a redevelopment project area, the TIF authorization contained in § 18-2147 would apply. We express no opinion as to whether undeveloped or vacant land may be declared substandard and blighted.

³ Section 18-2123 also authorizes “the acquisition and development of land outside the city, but within a radius of three miles thereof, [which] is necessary or convenient to the proper clearance or redevelopment of one or more substandard or blighted areas within the city or is a necessary adjunct to the general community redevelopment program of the city....” Given the similar “necessity” requirement for the acquisition and development of land outside the city limits in this portion of the statute, this presumably also authorize the use of TIF in connection land acquired for these purposes.

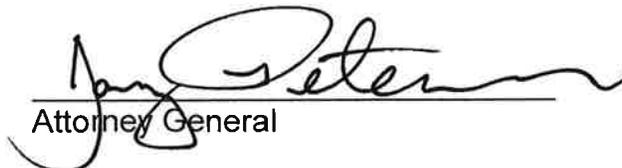
that, if undeveloped land is not itself substandard and blighted, it can be included in a redevelopment area (and thus be eligible for TIF) if it is “reasonably necessary” to implementation of an existing redevelopment plan. Accordingly, despite the “substandard and blighted” requirement in art. VIII, § 12, the *Fitzke* decision indicates that the use of TIF for the purposes set out in § 18-2123 may be proper for undeveloped vacant land which is not within a substandard and blighted area, provided the land is “essential” to redevelopment of substandard and blighted areas or a “necessary part” of the community redevelopment program. As the question of whether TIF may be used in connection with the acquisition, planning, preparation, and development of undeveloped vacant land under § 13-2123 is not certain, you may wish to pursue clarifying legislation.⁴

Very truly yours,

DOUGLAS J. PETERSON
Attorney General


L. Jay Bartel
Assistant Attorney General

Approved by:


Attorney General

pc Patrick J. O'Donnell
Clerk of the Nebraska Legislature

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⁴ LB 719, of course, is not limited to amending § 18-2123 to provide that TIF may not be used for the acquisition, planning, and preparation for development of undeveloped vacant land under the limited circumstances set out in that statute. It would, in addition, provide that no undeveloped vacant land can “be declared or designated blighted and substandard to qualify for the use of” TIF.