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IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD No. 730181

STENDIG DEVELOPMENT CORPORATION,

Appellant,

v.

CITY OF DANVILLE,

Appellee.

APPENDIX

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MEMORANDUM FOR LIS PENDENS
(Filed July 7, 1972)

RE: STENDIG DEVELOPMENT CORPORATION v. CITY OF
DANVILLE

KNOW ALL MEN that Stendig Development Corporation, by counsel, does hereby give notice of lis pendens by this memorandum filed in the Clerk's Office of the Corporation Court of Danville, Virginia, on the 7th day of July, 1972, by setting forth as follows: There is now pending in the Corporation Court of Danville, Virginia, a certain cause, the style of which is Stendig Development Corporation v. City of Danville, a Municipal corporation; the general object thereof being to obtain specific performance of an agreement between the said City of Danville and the said Stendig Development Corporation, requesting the City of Danville to convey title to said Stendig Development Corporation for the sum of \$32,000.00, all in accordance with advertised request for bids by said City of Danville, and the properly submitted high bid of Stendig Development Corporation; therefore, subjecting property owned by the City of Danville to decree of specific performance requested from said Court; the description of said property being as follows:

All of that property located in the City of Danville, Virginia, near Riverside Drive in said City, and more particularly described as follows:

Lots 81A and 146A, as shown on Tax Map, sheet 61, bound by Hickory Lane on the west, Highland Avenue on the south, Hillcrest Road on the east, and Valley Avenue on the north, containing 3-1/3 acres, more or less, and being all of that property located north of the Aiken Bridge commonly known as the *SHALE PIT* property and owned by the City of Danville, Virginia, a Municipal corporation of Virginia.

WITNESS the following signature this 7th day of July, 1972.

STENDIG DEVELOPMENT CORPORATION

* * *

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AMENDED BILL OF COMPLAINT
(Filed September 21, 1972)

To The Honorable Stuart L. Craig, Judge of Said Court:

Your plaintiff, Stendig Development Corporation, respectfully represents:

1. That on August 12, 1969, the defendant herein, the City of Danville, by Resolution duly adopted by its Council, authorized and directed, through its City Manager, that the hereinafter described real estate of which it claimed to be seised and possessed in fee simple, be appraised and then offered for sale on a sealed bid basis with the right reserved to accept or reject any and all bids. Said real estate, known as the "Shale Pit Property," situate and being in the City of Danville, Virginia, is more particularly described as follows:

Lots 81A and 146A, as shown on Tax Map, sheet 61, bound by Hickory Lane on the west, Highland Avenue on the south, Hillcrest Road on the east, and Valley Avenue on the north, containing 3½ acres, more or less, and being all of that property located north of the Aiken Bridge commonly known as the *SHALE PIT* property and owned by the City of Danville, Virginia, a Municipal corporation of Virginia.

Said real estate had been used by the City of Danville for no purpose other than as a borrow pit from which gravel and other material had been taken for use in building streets.

2. Pursuant to said Resolution, the property in question was appraised at \$16,650.00. Said property was then advertised for sale by sealed bids which were to be received until 5:00 P.M., September 3, 1969. Your plaintiff, Stendig Development Corporation, submitted the high bid in the amount of \$32,000.00, which was considerably in excess of the appraised value.

3. No question was ever raised by anyone about the adequacy of the amount of the bid of the plaintiff which is the primary reason for reserving the right to reject bids in such cases, however, there were two questions raised about said high bid. One dealt with whether or not the bids had been properly opened and the other concerned the matter of whether Stendig Development Corporation should be permitted to bid

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because of a possible conflict of interest on the part of its president, Joseph L. Stendig.

4. At a special meeting of the Council of the defendant held on September 12, 1969, a resolution was offered and seconded that the high bid of the plaintiff be accepted with the purchaser willing to take a chance on the validity of the deed. The resolution was amended to couple with the acceptance a request that the City Attorney present to the Court a petition for declaratory judgment on the questions as to whether the bids were properly opened and whether or not the highest bidder was eligible to bid. The vote on this resolution was:

Yeas—Six, Nays—Three

By this six to three favorable vote, the Council of the defendant accepted the bid of the plaintiff and entered into a contract to sell the "Shale Pit" to Stendig Development Corporation.

5. Notwithstanding this affirmative vote of six to three, being one more affirmative vote than necessary to authorize the sale of the *Shale Pit*, (under Section 10 of the City Charter the affirmative vote of only five members of Council was required to sell such property), the City Attorney ruled that the vote for the resolution was lost, stating that the Charter required seven affirmative votes.

No motion was made to reconsider the vote on the acceptance of the high bid and such action has never officially been reconsidered; if in fact an acceptance of the offer of the high bidder, once made, could be reconsidered. Council of the defendant apparently assuming that the City Attorney was correct and that the vote on the acceptance of the high bid had in fact lost, proceeded to consider what action should be taken with respect to the bids received for the purchase of the *Shale Pit*.

A resolution to reject all bids and to re-offer the property for sale at public auction was proposed, but this was rephrased to reject all bids and to seek a declaratory judgment on the validity of the opening of the bids and on the eligibility of Stendig Development Corporation to bid. This was first defeated by a vote of four to five.

Following a short recess, the following resolution was adopted by a vote of nine to nothing:

"A Resolution Rejecting All Bids For Surplus Property Near Riverside Drive And Authorizing And Directing That The Ques-

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tions Concerning The Opening Of The Bids And The Propriety Thereof With Respect To The Conflict Of Interest Provisions Of The City Charter Be Submitted To The Corporation Court Of Danville On A Petition For Declaratory Judgment.

“BE IT RESOLVED by the Council of the City of Danville that all bids for surplus property near Riverside Drive in the City of Danville be rejected and that since a doubt exists in the minds of members of City Council as to the City’s proper course of procedure because of the conflicting claims of the bidders, the City Attorney is hereby authorized and directed to submit to the Corporation Court of Danville, Virginia the question of the propriety of the manner in which the bids for said property were opened and also whether or not the purchaser by reason of membership on the Planning Commission of the City of Danville of the President of the corporate purchaser comes within the conflict of interest provisions of Chapter 2 Section 19 of the City Charter upon a Petition for Declaratory Judgment.”

A copy of the full minutes of the meeting of September 12, 1969, are attached hereto as Exhibit “A.”

6. Subsequently, on December 14, 1970, said Corporation Court of Danville rendered an opinion deciding the two issues submitted to it by the City of Danville, favorable to Stendig, specifically that the bids were legally and properly opened in substantial compliance with the advertised method of opening and that said Joseph L. Sendig was not in violation of the applicable law, the Virginia Conflict of Interests Act. Therefore, the determination of the Court on the two issues submitted to it by the City resulted in a finding that the bids were properly opened and that Stendig Development Corporation was a proper bidder.

7. If the action of City Council set forth in paragraph 4 hereof did not amount to an acceptance of the plaintiff’s bid, the action of Council set forth in paragraph 5 above did not amount to rejection of the plaintiff’s bid. Had City Council wished to reject the bid of Stendig Development Corporation for any other reason or reasons, it could have done so and there would have been no occasion or reason for submitting the matter to the Court on the two issues it did. But having decided to go to Court, the Council legally and morally committed the City to accept-

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ance of the bid of the plaintiff except for the two matters it thought proper to have legally resolved by the Court. There was a meeting of the minds of the parties, namely, the plaintiff and the defendant, subject to two contingencies, both of which were removed by order of the Court. The plaintiff relied on the action of the defendant as well as upon the preceding formal action of Council along with the advertisements, correspondence and other writings of the defendant and did make its acceptance thereto in writing, all of which constituted a legal and binding contract between the plaintiff and defendant for the defendant to convey the hereinbefore described real estate to the plaintiff for the sum of \$32,000.00, the amount of the high bid.

8. Once the matters in question had been resolved by the Court and there existed no valid or logical reason for the defendant not to proceed with the sale and direct conveyance of the property to the plaintiff, it acted in an arbitrary and frivolous manner by failing to conclude the sale to the plaintiff. In this act of abuse of discretion, the plaintiff has been denied his equal protection under the law in violation of the Virginia Constitution and the Constitution of the United States.

9. That there has been shown nothing improper in the actions of the plaintiff who has continued to act in good faith but on the other hand, contrary to the presumption that the sovereign is always presumed to act in good faith, the defendant has proceeded to further abuse its discretion by scheduling a new sale of the property authorized by only five votes of its Council. The plaintiff alleges that this act on the part of the defendant is illegal and prejudicial to the rights of the plaintiff who is already the rightful and legal purchaser of the property.

10. Your plaintiff further represents that it has always been willing and ready to comply on its part by paying to the defendant the amount of its high bid upon the defendant delivering to your plaintiff a deed for the said premises, in accordance with their understanding and agreement, yet the said City of Danville refused, and still refuses, to comply on its part; although the plaintiff is and always has been ready to pay the amount of the high bid to the defendant and to fully perform on its part.

Your plaintiff, therefore, prays that the City of Danville may be made a party defendant to this bill and be required to answer the same; that the said defendant may be decreed specifically to perform the said

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agreement entered into with your plaintiff as hereinbefore set forth, and to make a good and sufficient deed to your plaintiff for the said described premises; your plaintiff being ready and willing, and is hereby offering specifically to perform the said agreement on its part and alleging that it would be inequitable for the defendant to fail to do so on its part; and that your plaintiff may have such other and further relief as equity may require and to Your Honor may seem meet and as in duty bound it will ever pray.

Respectfully submitted,

STENDIG DEVELOPMENT CORPORATION

* * *

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EXHIBIT A
(Filed September 21, 1972)

A special meeting of Council was held on the above date at 1:00 o'clock P.M. The meeting was called to order by the President and the Council Call was read by the Clerk as follows:

COUNCIL CALL

Danville, Va., September 12, 1969

Mr. E. G. McCain
Chief of Police of the City of Danville

You are hereby notified that a SPECIAL meeting of the City Council of the City of Danville is called to be held in the Council Chamber of said City at 1:00 o'clock P.M. of this date for the purpose of:

1. Reconsidering bids received for surplus land near Riverside Drive
2. Taking action on Resolution authorizing the City Manager to execute pole attachment agreement with Danville Cablevision Company
3. Considering such other matters as may be properly presented

And to summon the following members of said body to attend said meeting. In attestation of each member accepting such summons, he is required to acknowledge the same by attaching his signature hereto opposite his name.

MEMBERS

Dr. D. L. Arey
Mr. W. Onico Barker
Mr. John W. Carter
Mr. Robert H. Clarke
Mr. Gus W. Dyer, Sr.
Mr. Charles H. Harris
Mr. W. C. McCubbins
Mr. Dan A. Overbey, Jr.
Mr. F. W. Townes, III

ACKNOWLEDGMENT

S/D. L. Arey, M.D.
S/W. Onico Barker
S/John W. Carter and
S/Robert H. Clarke
S/Gus Dyer W. A. Ferguson
S/Charles H. Harris
S/R. Owen
S/D. A. Overbey, Jr.
S/F. W. Townes—By B.G.

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You will also notify the following officials of said meeting, to-wit:

OFFICIALS

PRESS

Mr. Frank A. Faison, City Manager	Radio Station WBTM
Mr. W. Bascom Jordan, City Attorney	Radio Station WDVA
Mr. C. C. Crowder, Jr., Dir. Public Works	Radio Station WILA
Mr. V. W. White, City Engineer	Radio Station WYPR
Dr. C. J. Mathes, City Health Officer	

and the DANVILLE REGISTER & EVENING BEE
and COMMERCIAL APPEAL

S/R. L. Hall Clerk of Council	S/W. C. McCubbins President
----------------------------------	--------------------------------

On Roll Call the following were present. Messrs. Arey, Barker, Carter, Clarke, Dyer, Harris, Overbey, Townes and McCubbins (9). Absent: None (0).

The invocation was offered by City Manager Faison and was followed by a motion by Mr. Dyer, seconded by Mr. Clarke and carried, that the approval of the minutes of the meeting of September 9, 1969 be postponed until a later meeting.

The first item on the Agenda was reconsideration of bids received on surplus land located near Riverside Drive, the bids having been considered at the regular Council meeting on September 9, 1969.

Before discussion commenced, City Attorney Jordan said he would like to make a statement. He said that since the last meeting at which time a point was raised by Mr. John W. Daniel as to the eligibility of the Stendig Development Company's submitting a bid, he had researched the matter. He referred to a letter written by the Attorney General of Virginia expressing opinion when an inquiry was made as to a member of a County Planning Commission being eligible for appointment to a School Board, that in his opinion the Planning Commission member is an officer of the County and therefore ineligible. Mr. Jordan concluded therefore that since Mr. Stendig is a member of the Planning Commission of the City he is an officer of the City and therefore under the "conflict of interest" section of the Charter is ineligible to submit a bid. Mr. Clarke made a motion, seconded by Mr.

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Overbey and carried that the regular order of business be suspended to permit visitors present to be heard.

Mr. Joe Stendig was the first to speak and asked the City Attorney to distinguish between the term ineligible and conflict of interest. Mr. Jordan replied that in the terminology of ineligibility it did not infer that he had done anything wrong in submitting a bid. Again Mr. Stendig inquired if it would be unfair if the City accepted his bid. Mr. Jordan read excerpts from the Attorney General's letter and explained the application of the City Charter with that of the State and concluded by saying that although he differed with the opinion of the Attorney General, he could not override his opinion and say that he is wrong.

Mr. Stendig again inquired if his bid was acceptable with all members voting favorable, would the sale be proper? Mr. Jordan said that there could be no exception to the City Charter and referred to the specific phrases referring to an "officer" of the City. Mr. Stendig again took issue as to the fact that he is an officer of the City and stated that the subject of land had never come before the Planning Commission and as to conflict of interest he did not believe that such existed.

Attorney Charles Warren next addressed Council and said that if he were in the position of the City Attorney that he would take the same stand as to an opinion but that he would like to point out that the opinion expressed in the Attorney General's letter is that of only one man—a lawyer. Mr. Warren continued by saying that, in his opinion, he is in total disagreement with the Attorney General and that he does not believe Mr. Joe Stendig is an "officer" of the City since as a member of the Planning Commission he serves only in an advisory position with no authority. Mr. Warren asked Council to consider the bids on the basis of fairness, pointing out that the complainant (low bidder) has become a sore loser. He told Council further that 7 votes are needed to accept the bid and that the Stendig Development Company will take its chances before the Courts as to the value of a deed. He concluded his remarks by saying that he thinks his associate Joe Stendig is entitled to such a decision.

Mr. Stendig said he would like to comment further and pointed to objection raised at the September 9th meeting by Mr. John Daniel as to the method used in opening the bids. He referred to the advertisement as being a loosely drawn press release and there is no ordinance as to procedure to follow. He further pointed out that the City Attorney's

ruling at the last meeting was that the opening of the bids had been substantially complied with in keeping with the advertisement.

Mr. Warren again addressed Council and said that the alternative to giving Stendig Development Company sufficient votes in accepting his bid would be for the City Attorney to secure a declaratory judgment.

Mr. Jordan told Council that the basic requirement in seeking a declaratory judgment is that bonafide controversy has developed in a matter and he indicated that this is certainly true with respect to the bids.

Attorney Huggins addressed Council and said that he had no interest in the matter at all and did not know about the Attorney General's opinion but that the bids had been submitted in good faith and since the City has nothing to lose he recommended that the matter be submitted to the Courts for a declaratory judgment. Mr. George Mowbray inquired of Chairman Carter if it were not true that after the meeting was postponed he was pressured into the opening of the bids by the bidders wanting to know the results of the bid. Mr. Carter answered Mr. Mowbray in the affirmative.

Mr. John Daniel defended his request by saying that he only inquired of Col. White and Chairman Carter as to when the bids would be opened and neither was pushed. He said he was concerned as to how and when the bids would be opened.

Councilman Harris asked Mr. John Daniel if the amount in his bid was the amount that he bid for the property. This was confirmed by Mr. Daniel. He ask Mr. Stendig the same question as to the amount in his bid being correct and he received an affirmative answer.

No other person wishing to speak, Dr. Arey made a motion, seconded by Mr. Overbey and carried that the regular order of business be resumed.

Mr. Overbey inquired of the City Attorney if he would favor a declaratory judgment. He said that he thought that if there were 7 favorable votes the City would be taking a chance and subject to a court decision if approved. Dr. Arey questioned the City Attorney as to the opening the bids and whether or not the Court could render a decision as to the validity of the method used. Mr. Jordan said that he supposed that such could be included in a petition. Dr. Arey then asked the clerk to read the advertisement as published and this was done.

Councilman Barker said he would like to make an observation, it

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being that when he heard the City Attorney's opinion it seemed the situation had been well answered by the Attorney General's letter. He expressed appreciation that "things" were on better keel than at the last Council meeting. In referring to the broadness of the conflict of interest opinion, he said that good Government sometimes keep good people out of office and their services are lost. In Danville, he said, we need a breakdown as to who is involved in serving on boards and commissions so that good people will never decline to serve the City. He further expressed an opinion that a declaratory judgment is needed in the case of the bids and that he would not like to take the challenge of Attorney Warren. He also said that he would not like to take action and invite legal proceedings. He suggested that the matter be tabled or decision to sell be withdrawn and asked the City Attorney if withdrawal offer to sell could result in a declaratory judgment. Mr. Jordan replied that the City could get into a position of law as to its reason for rejection. He also said that Mr. Warren might want the matter adjudicated.

Mr. Townes inquired of the City Attorney the proper procedure to follow whereupon Mr. Jordan replied that the City could make a petition to the Court as to whether or not the highest bid is valid. Mr. Barker offered a resolution that the bids be rejected and property re-offered at public auction with the provision in the advertisement that the bids would start at \$32,000. It was seconded by Mr. Townes.

Mr. Clarke inquired if such a procedure would be legal. The City Attorney told him that it would and read the Charter which requires 7 favorable votes. Mr. Carter pointed out that if the question is placed before the Court positive action will be necessary as there would be no controversy if all bids are rejected.

Mr. Carter offered a substitute resolution, seconded by Mr. Dyer, that the property be sold to the highest bidder with the purchaser willing to take a chance on the validity of the deed. The resolution was amended by Mr. Carter, seconded by Mr. Clarke, that the City Attorney be requested to present to the Court petition for declaratory judgment to include the question as to whether or not the bids were properly opened and second, whether or not the highest bid (Stendig Development Company) was eligible to bid. Following clarification of the substitute resolution, it was ruled that 7 votes would be required for the substitute resolution and 5 for the original offered by Mr. Barker. Mr. Barker pointed out that if the matter is lost in the Court the starting price for the prop-

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erty as included in his resolution would be lost under the substitute resolution. Mr. Dyer commented that he considered the procedure used as one of "shopping for bids" after accepting sealed bids. Mr. Barker commented that there was such a variance in the bids and appraisal that the City should get top value. Dr. Arey said he would have to vote against the resolution but if it was determined that the bids were opened properly he would reverse his vote. A vote on the substitute resolution resulted as follows:

YEAS: Messrs. Carter, Clarke, Dyer, Harris, Overbey, McCubbins (6).
NAYS: Messrs. Arey, Barker, Townes (3). ABSENT: None (0).

(See Resolution No. 69-9.13 copied below)

The City Attorney ruled that the vote was lost.

The original resolution of Mr. Barker was considered. Mr. Townes said he would like to amend Mr. Barker's resolution to include a request that the City Attorney seek a declaratory judgment. The City Attorney stated that Council really is getting into a conflict of action. The original resolution was restated. The City Attorney suggested that no bids be accepted while litigation is pending. Mr. Barker rephrased his original resolution and moved that all bids be rejected and that a declaratory judgment be asked with reason given being opening validity of bids and the opinion of the Attorney General with respect to eligibility of Stendig Development Company. It was seconded by Mr. Townes and the vote resulted as follows: YEAS: Messrs. Arey, Barker, Harris, Townes (4). NAYS: Carter, Clarke, Dyer, Overbey, McCubbins (5). ABSENT: None (0). (See Resolution No. 69-9.14.)

RESOLUTION NO. 69-9.13

A Resolution To Accept The High Bid Of Stendig Development Corporation In The Amount Of \$32,000 For The Purchase Of Surplus Property Near Riverside Drive.

BE IT RESOLVED by the Council of the City of Danville that the high bid of Stendig Development Corporation in the amount of \$32,000 for surplus property near Riverside Drive be, and the same hereby is, accepted with the understanding that the purchaser would defend all actions against said purchase.

RESOLUTION NO. 69-9.14

A Resolution Rejecting All Bids For Surplus Land Near Riverside Drive And That The Same Be Re-Offered For Sale At Public Auction Beginning At A Price Of \$32,000.

BE IT RESOLVED by the Council of the City of Danville that all bids made for surplus land near Riverside Drive be, and the same are hereby, rejected; and,

BE IT FURTHER RESOLVED that said surplus land be re-offered for sale at public auction with the bidding to begin at the sum of \$32,000.

The City Attorney ruled that the resolution was lost.

Following a short recess, Mr. Carter offered a resolution when business was resumed, seconded by Mr. Dyer that all bids submitted be rejected since there appears doubt in the minds of some members of Council as to whether or not they were properly opened and whether or not the highest bidder is eligible to bid. The resolution was adopted by the following vote. YEAS: Messrs. Arey, Barker, Carter, Clarke, Dyer, Harris, Overbey, Townes, McCubbins (9). NAYS: None (0). ABSENT: None (0).

RESOLUTION NO. 69-9.15

A Resolution Rejecting All Bids For Surplus Property Near Riverside Drive And Authorizing And Directing That The Questions Concerning The Opening Of The Bids And The Property Thereof With Respect To The Conflict Of Interest Provisions Of The City Charter Be Submitted To The Corporation Court Of Danville On A Petition For Declaratory Judgment.

BE IT RESOLVED by the Council of the City of Danville that all bids for surplus property near Riverside Drive in the City of Danville be rejected and that since a doubt exists in the minds of members of City Council as to the City's proper course of procedure because of the conflicting claims of the bidders, the City Attorney is hereby authorized and directed to submit to the Corporation Court of Danville, Virginia the question of the propriety of the manner in which the bids for said property were opened and also

whether or not the purchaser by reason of membership on the Planning Commission of the City of Danville of the President of the corporate purchaser comes within the conflict of interest provisions of Chapter 2 Section 19 of the City Charter upon a Petition for Declaratory Judgment.

* * *

There being no further business, upon motion of Mr. Clarke, duly seconded and carried, the meeting adjourned.

* * *

DEMURRER TO AMENDED BILL OF COMPLAINT
(Filed September 22, 1972)

The Defendant says that the Amended Bill of Complaint is not sufficient in law for the following reason, to-wit:

1. Said Amended Bill of Complaint sets forth no grounds for equitable relief.

CITY OF DANVILLE

* * *

PLEA OF RES ADJUDICATA
(Filed September 22, 1972)

Now comes the Defendant, City of Danville, and says that Plaintiff may not maintain this declaratory judgment action against the Defendant on whether or not Plaintiff's bid for the property in question in this proceeding has been rejected because in the declaratory judgment action heretofore instituted and conducted in this Court, wherein the Plaintiff herein was one of the defendants and the Defendant herein was the plaintiff, the Court held and decided that the bids submitted by the defendants for the property had been rejected, all of which is shown by a copy of the Final Decree of the Court, which is hereto annexed to be read and considered as a part hereof.

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WHEREFORE, Defendant says that said issue in this suit has already been adjudicated.

And this Defendant is ready to verify.

CITY OF DANVILLE

* * *

FINAL DECREE ATTACHED TO PLEA OF RES ADJUDICATA
(Filed September 22, 1972)

VIRGINIA:

IN THE CORPORATION COURT OF DANVILLE
City of Danville

Plaintiff

v.

General Development Company, Inc., et al

Defendants

FINAL DECREE

This cause came on this day to be heard upon the Petition for Declaratory Judgment and the Exhibits filed therewith; process duly served on each defendant; the Answers of defendants, General Development Company, Inc. and Stendig Development Corporation; upon the evidence presented ore tenus by the parties; the Briefs of General Development Company, Inc. and Stendig Development Corporation and the reply Brief of General Development Company, Inc.; and was argued by counsel.

And It Appearing To The Court, concerning the question of the way the bids of the defendants were opened, that there was no bad faith, fraud or breach of integrity on the part of any person involved in the opening thereof and that any irregularity as to the opening by reason of the variance between the method of opening and the advertised procedure for opening said bids was inconsequential and harmless in result;

And It Further Appearing To The Court that the question of a possible conflict of interests as to the bid made by Stendig Development Corporation acting through its President, Joseph L. Stendig, has, since the filing of this suit, been resolved and rendered moot by the enactment

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by the General Assembly of Virginia at its 1970 Session, the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia, which Act repealed and superseded § 19 of Chapter II of the Charter of the City of Danville and all other Acts, Charter provisions and ordinances in conflict therewith, and since the bids in question were rejected by plaintiff and further action is necessary by the Council of the City of Danville before the property can be sold;

The Court doth Adjudge, Order and Decree that the first question set out in the Petition for Declaratory Judgment is answered in the affirmative in that the bids were opened in substantial compliance with the advertised method of opening; that the second question has been resolved and rendered moot since the filing of the Petition herein by the enactment of the Virginia Conflict of Interests Act, supra, and that the bids submitted by the defendants for the property which is the subject of this suit having been rejected by the Council of the City of Danville, Council now has the option to rescind its rejection and accept the higher bid of Stendig Development Corporation or to ask for new bids to begin at \$32,000, the amount of the existing high bid, either at public auction or by sealed bid and that acceptance of the existing bid or any new bid made by Joseph L. Stendig, acting for Stendig Development Corporation while he is at the same time a member of the Planning Commission of the City, would not, by reason of the Conflict of Interests Act, be a conflict of interest.

And It Further Appearing that this suit should be dismissed at plaintiff's costs and removed from the docket;

It is further Ordered that this cause be, and it hereby is, dismissed at plaintiff's costs and removed from the docket.

To all of which, both defendants, by counsel, except.

* * *

SPECIAL PLEA IN BAR TO AMENDED BILL OF COMPLAINT
(Filed September 22, 1972)

Now comes the Defendant, City of Danville, and says that Plaintiff is barred from the remedy it seeks by its Amended Bill of Complaint filed in this cause for the reasons as follows:

1. As stated in Paragraph 1 of the Amended Bill of Complaint, City Council did on August 12, 1969 adopt Resolution No. 69-8.3 au-

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thorizing the sale of the "*Shale Pit*" property. A copy of said resolution is hereto attached as Exhibit "A."

2. As implied in Paragraph 5 of the Amended Bill of Complaint by the reference to § 10 of the City Charter, § 10 of Chapter II of the City Charter does provide that no ordinance shall be adopted by the Council unless it shall have received the affirmative votes of *at least* five members. (Emphasis added.) Pursuant to this authority of the City Charter and also § 125 of the Constitution of Virginia (1902), City Council on April 11, 1955 adopted an ordinance amending and reordaining § 2-17 of the City Code to provide that no ordinance or resolution selling *any public property* shall be valid unless the same be passed by the Council by a recorded affirmative vote of three-fourths of members elected to the Council. (Emphasis added.) Accordingly, the resolution referred to in Paragraph 4 of the Amended Bill of Complaint introduced on September 12, 1969 was lost because the required affirmative vote of three-fourths of the members elected to the Council (seven votes) was not received. The vote of six to three was one vote short of that required for passage of the resolution to sell public property. A copy of the aforesaid resolution amending and reordaining § 2-17 is hereto attached as Exhibit "B."

3. As stated in Paragraph 5 of the Amended Bill of Complaint, no motion to reconsider the aforesaid defeated resolution has ever been made and neither has there ever been seven affirmative votes of Council on a resolution to sell the "*Shale Pit*" to anybody whomsoever.

4. Contrary to the allegation in Paragraph 7 of the Amended Bill of Complaint, Council on September 12, 1969 adopted Resolution No. 69-9.15 rejecting all bids, including that of Joseph L. Stendig for the "*Shale Pit*" property. A copy of said resolution is attached hereto as Exhibit "C."

5. Contrary to the allegation in Paragraph 8 of the Amended Bill of Complaint, all bids for the property were rejected as aforesaid, because there existed in the minds of the members of City Council a doubt as to the City's proper course of procedure. Because of the conflicting claims of the bidders, Council by said resolution also authorized that two questions be submitted to the Corporation Court of Danville in a Petition for Declaratory Judgment, which was done under the style of a case

City of Danville v. General Development Company, Inc. and Stendig Development Corporation, as follows:

FIRST: Was the opening of the bids for the sale of the property in question by the Chairman of the Finance Committee in the presence of the City Clerk a substantial compliance with the advertised method of opening the bids?

SECOND: Is the president of Stendig Development Corporation, the said Joseph L. Stendig, in violation of the conflict of interest provisions of § 19 of Chapter 2 of the Charter of the City of Danville by reason of his bidding on property being sold by the City while he was at the same time a member of the City Planning Commission?

6. By Final Decree entered in said case on December 14, 1970, the Court answered said two (2) questions in the following terms:

AND IT APPEARING TO THE COURT, concerning the question of the way the bids of the defendants were opened, that there was no bad faith, fraud or breach of integrity on the part of any person involved in the opening thereof and that any irregularity as to the opening by reason of the variance between the method of opening and the advertised procedure for opening said bids was inconsequential and harmless in result;

AND IT FURTHER APPEARING TO THE COURT that the question of a possible conflict of interests as to the bid made by Stendig Development Corporation acting through its President, Joseph L. Stendig, has, since the filing of this suit, been resolved and rendered moot by the enactment by the General Assembly of Virginia at its 1970 Session, the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia, which Act repealed and superseded § 19 of Chapter II of the Charter of the City of Danville and all other Acts, Charter provisions and ordinances in conflict therewith, and since the bids in question were rejected by plaintiff and further action is necessary by the Council of the City of Danville before the property can be sold;

The Court doth ADJUDGE, ORDER and DECREE that the first question set out in the Petition for Declaratory Judgment is

answered in the affirmative in that the bids were opened in substantial compliance with the advertised method of opening; that the second question has been resolved and rendered moot since the filing of the Petition herein by the enactment of the Virginia Conflict of Interests Act, supra, and that the bids submitted by the defendants for the property which is the subject of this suit having been rejected by the Council of the City of Danville, Council now has the option to rescind its rejection and accept the higher bid of Stendig Development Corporation or to ask for new bids to begin at \$32,000, the amount of the existing high bid, either at public auction or by sealed bid and that acceptance of the existing bid or any new bid made by Joseph L. Stendig, acting for Stendig Development Corporation while he is at the same time a member of the Planning Commission of the City, would not, by reason of the Conflict of Interests Act, be a conflict of interest.

7. Said Decree decided that Plaintiff's bid had been rejected and gave Council two (2) options as to how it could dispose of the property in question in the following terms:

(a) Council now has the option to rescind its rejection and accept the higher bid of Stendig Development Corporation, or

(b) Ask for new bids to begin at \$32,000, the amount of the existing high bid, either at public auction or by sealed bid.

8. At its regular May meeting, 1972, held on May 9, Council by duly authorized majority vote adopted Resolution No. 72-5.16, by which the City Manager was directed to offer for sale on Saturday, July 8, 1972, at public auction, subject to the confirmation of Council, the surplus property of the City near Riverside Drive, known as the "*Shale Pit*"; the bidding at said sale to start at \$32,000 pursuant to the express authorization given to it by option (b) in the aforesaid Decree. In so doing, Council acted within the letter of one of the options given to it by the Court. A copy of the aforesaid resolution is attached hereto as Exhibit "D."

9. At the aforesaid sale held on July 8, 1972, General Development Company, Inc. made the high bid of \$51,000, which bid is subject to confirmation of Council pursuant to the terms of the ordinance aforesaid

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by which said property was offered for sale. Council has not acted on that bid.

10. In offering said property for sale at public auction Council acted not upon any presumption of law, but rather pursuant to the expressed authority of this Court and in so doing violated the rights of no person and acted neither arbitrarily nor in a frivolous manner. Therefore, no constitutional question can possibly be involved in this suit other than the § 125 question hereinbefore mentioned.

And this the City of Danville is ready to verify.

CITY OF DANVILLE

* * *

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EXHIBIT A
(Filed September 22, 1972)

PRESENTED: August 12, 1969

ADOPTED: August 12, 1969

RESOLUTION NO. 69-8.3

A Resolution Authorizing City Manager To Secure Appraisals Of Surplus Real Estate Owned By The City At The North End Of The New Broad Street Bridge; Further Authorization To City Manager To Offer Same For Sale On Sealed Bid Basis With Council Reserving The Right To Accept Or Reject Any And All Bids.

BE IT RESOLVED by the Council of the City of Danville that the City Manager is hereby authorized and directed to secure appraisals on the surplus real estate owned by the City at the North end of the new Broad Street Bridge; and,

BE IT FURTHER RESOLVED that the City Manager is hereby further authorized and directed to offer same for sale on a sealed bid basis, such proposal for sale to include within the terms thereof the provision that Council shall and does reserve the right to accept or reject any and all bids.

* * *

App. 22

EXHIBIT B
(Filed September 22, 1972)

PRESENTED AND ADOPTED: April 11, 1955
An Ordinance To Amend And Re-Ordain Section 2-17 Of The
Code Of The City Of Danville, Virginia, 1952

* * * * *

BE IT ORDAINED by the Council of the City of Danville that Section 2-17 of the Code of the City of Danville, Virginia, 1952, be and the same is hereby amended and re-ordained so as to read as follows:

Sec. 2-17. Disposition of public property; franchises.

No ordinance or resolution selling any public property shall be valid unless the same be passed by the council by a recorded affirmative vote of three-fourths of members elected to the council.

No franchise, lease or right of any kind to the use of any such public property in a manner not permitted to the general public shall be granted for a period of over thirty years. Before granting such franchise or privilege for a term of thirty years, except for a trunk railway, bids therefor shall be advertised once a week for four successive weeks in a newspaper published in the city. Such grant, and any contract in pursuance thereof, may provide that upon the termination of the grant, the plant, as well as the property, if any, of the grantee in the streets, avenues and other public places, shall thereupon, without compensation to the grantee, or upon the payment of a fair valuation therefor, be and become the property of the city, but that the grantee shall be entitled to no payment by reason of the value of the franchise. Every such grant shall specify the mode of determining any valuation therein provided for and shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates, and the maintenance of the property in good order throughout the term of the grant.

* * *

App. 23

EXHIBIT C
(Filed September 22, 1972)

PRESENTED: September 12, 1969

ADOPTED: September 12, 1969

RESOLUTION NO. 69-9.15

A Resolution Rejecting All Bids For Surplus Property Near Riverside Drive And Authorizing And Directing That The Questions Concerning The Opening Of The Bids And The Property Thereof With Respect To The Conflict Of Interest Provisions Of The City Charter Be Submitted To The Corporation Court Of Danville On A Petition For Declaratory Judgment.

BE IT RESOLVED by the Council of the City of Danville that all bids for surplus property near Riverside Drive in the City of Danville be rejected and that since a doubt exists in the minds of members of City Council as to the City's proper course of procedure because of the conflicting claims of the bidders, the City Attorney is hereby authorized and directed to submit to the Corporation Court of Danville, Virginia the question of the propriety of the manner in which the bids for said property were opened and also whether or not the purchaser by reason of membership on the Planning Commission of the City of Danville of the President of the corporate purchaser comes within the conflict of interest provisions of Chapter 2 Section 19 of the City Charter upon a Petition for Declaratory Judgment."

* * *

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EXHIBIT D
(Filed September 22, 1972)

PRESENTED: May 9, 1972

ADOPTED: May 9, 1972

RESOLUTION NO. 72-5.16

A Resolution Directing City Manager To Offer For Sale At Public Auction, Subject To Confirmation, Surplus Property Of The City Near Riverside Drive Known As "The Shale Pit."

BE IT RESOLVED by the Council of the City of Danville that the City Manager be, and he hereby is, directed to offer for sale on Saturday, July 8, 1972, at public auction, subject to confirmation of Council, the surplus property of the City near Riverside Drive known as "the shale pit"; the bidding at said sale to start at \$32,000 pursuant to the order of the Corporation Court of Danville entered December 14, 1970 in the case of *City of Danville v. General Development Company, Inc., et al.*

* * *

ORDER

Entered September 27, 1972

This day came the parties by counsel on the pleadings heretofore filed, and it is agreed that the Special Plea filed by the City of Danville shall also be considered as an answer.

It is further stipulated and agreed that no proof will be required of the following: Minutes of Council of the City of Danville for August 12, 1969, September 9, 1969, September 12, 1969; and that the Declaratory Judgment rendered in the case of *City of Danville v. General Development Company, Inc. and others* shall be considered as part of the record in this case. It is further stipulated that § 2-17 of the Code of the City of Danville and provisions of the Charter of the City of Danville, Chapter I § 4 subsection 52 and Chapter II § 10, shall likewise be considered without further proof. It is further stipulated and agreed that the property in question was heretofore used by the City of Danville for the purpose of obtaining gravel and for fill dirt and that the same was later graded by the City with the intention of selling same.

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The Court having heard argument of counsel doth postpone decision, and the City shall file authorities not later than the 14th day of October and the plaintiff shall reply thereto not later than the 25th day of October.

ENTER this 27th day of September, 1972.

* * *

EXCERPT FROM DANVILLE CITY CHARTER
(Filed September 27, 1972)

Chapter 1, Section 4, Sub-section 52:

“Acquisition, disposition, etc., of property generally. The city shall have, for the purpose of carrying out any of its powers and duties, power to acquire by gift, bequest, purchase or lease, and to own and make use of, within and without the city, lands, buildings, other structures and personal property, including any interest, right, estate or easement therein, and in acquiring such property to exercise, within and without the city, the right of eminent domain as hereinafter provided in this chapter; and to sell, lease or otherwise dispose of the same.”

Chapter 2, Section 10:

“Adoption Of Ordinances, Etc., At Meetings Open To Public; Voting Procedure Generally; Members With Financial Interest In Question Not To Vote; Reconsideration Of Vote At Special Meeting.

No ordinance, resolution, motion or vote shall be adopted by the council, except at a meeting open to the public and, except motions to adjourn, to fix the time and place of adjournment, and other motions of a purely procedural nature, unless it shall have received the affirmative votes of at least five members. All voting except on procedural motions shall be by roll call and the ayes and noes shall be recorded in the journal. No member of the council shall participate in the vote of any ordinance, resolution, motion or vote in which he, or any person, firm or corporation for which he is attorney, officer, director, employee or agent, has a financial interest other than as a minority stockholder of a corporation or as a citizen of the city. No vote shall be rescinded or reconsidered at any special meeting unless at such special meeting there be then present as many members as were present when such vote was taken.”

MEMORANDUM OPINION

(Entered November 17, 1972)

Stendig Corporation, (Stendig), filed its bill against the City of Danville for specific performance of an alleged valid offer, acceptance and contract by the City of Danville (City) for sale of a lot near Aiken Bridge commonly known as the "Shale Pit". It is contended by Stendig that on September 3, 1969, he submitted the highest bid of \$32,000.00 for the said property which was accepted by resolution of the Council of the City on September 12, 1969, by a vote of six to three, and that the action of the Council in determining the resolution was not adopted since a three-fourths vote of the Council was determined to be required was error, and that another resolution of the same, rejecting all bids and seeking declaratory judgment on the questions therein contained, did not amount to a rejection of the bids. The City has contended by special pleas of Res Adjudicata and a special plea involved to the effect that the rejection has been determined in a declaratory proceeding of December 14, 1970, by the Corporation Court of Danville, and that three-fourths majority is required under Section 25 of the Constitution of Virginia, then in effect, and Section 2-17 of the City Code.

There was general agreement as to the facts in this case and in oral argument the Court was requested to determine all questions which could be raised and to consider the pleas as answers. Subsequently written memorandums were filed. In order to clarify the matter it might be well to set out the material facts which are generally agreed upon since the Court made a memorandum of the same, and this will also clarify the Court's opinion.

The City is the owner of the land known as "Shale Pit" acquired by the City for the purpose of and used to secure gravel, and also for fill dirt. This property has been declared no longer necessary for City purposes, and by resolution of August 12, 1969, (Exhibit No. 1), the City Manager was authorized to have the property appraised and offer the same for sale by sealed bids, with right reserved in the Council to reject or accept the bids.

The land was appraised at \$16,650.00 and offered for sale. The highest bid was made by Stendig at \$32,000.00, which bid along with others was received on September 3, 1969. The next highest bid was made by General Development Corporation (General Development).

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At a Council meeting held on August 12, 1969, for the purpose of considering said offers, there was considerable discussion and questions raised as to an irregularity in opening the bids and whether or not a conflict of interest existed on the part of Stendig. (See Exhibit A attached to amended bill as to discussions and actions taken by the Council as herein outlined.) After considerable discussion a resolution was offered that the bids be rejected and the land re-offered for sale, beginning with Stendig's bid of \$32,000.00. Then there was a substitute motion that the Stendig bid be accepted with certain conditions attached. The substitute motion was first submitted resulting in six affirmative votes and three negative. The City Attorney ruled that a three-fourths vote was required to approve and it was then determined that the motion was lost. The original motion was then put and defeated by a six to zero vote. The substitute resolution is the one now in question and is here set forth in full, omitting the caption:

"BE IT RESOLVED by the Council of the City of Danville that the high bid of Stendig Development Corporation in the amount of \$32,000, for surplus property near Riverside Drive be, and the same hereby is, accepted with the understanding that the purchaser would defend all actions against said purchase."

Following a recess Council by a unanimous vote of nine to zero adopted the following resolution:

"BE IT RESOLVED by the Council of the City of Danville that all bids for surplus property near Riverside Drive in the City of Danville be rejected and that since a doubt exists in the minds of members of City Council as to the City's proper course of procedure because of the conflicting claims of the bidders, the City Attorney is hereby authorized and directed to submit to the Corporation Court of Danville, Virginia the question of the propriety of the manner in which the bids for said property were opened and also whether or not the purchaser by reason of membership on the Planning Commission of the City of Danville of the President of the corporate purchaser comes within the conflict of interest provisions of Chapter 2 Section 19 of the City Charter upon a Petition for Declaratory Judgment."

In accordance with the last resolution the City Attorney filed for a declaratory judgment in the Corporation Court of the City, with General Development and Stendig parties thereto. On December 14, 1970, the Court rendered a decision holding there was no material irregularity in opening of the bids; that the conflict of interest question was moot in view of an amendment to the Conflict of Interest Act by the 1970 Legislature, and further in its decree stated, "The bids submitted by the defendants (General Development and Stendig) for the property which is the subject of this suit having been rejected by the Council of the City of Danville, Council now has the option to rescind its rejection and accept the highest bid of Stendig Development Corporation or ask for new bids beginning at \$32,000, the amount of the existing high bid, either at public auction or sealed bids."

The City acting on the decree determined by its resolution of May 9, 1972, offered the property for sale at public auction, "the bidding at said sale to start at \$32,000 pursuant to order of the Corporation Court of Danville", which sale was held on July 8, 1972, and General Development made the highest bid of \$51,000. No action has been taken on this offer, presumably pending outcome of this proceeding. This proceeding was instituted on July 7, 1972, by service on the City of Danville Attorney, and on motion of complainant on September 22, 1972, filed its amended bill which has been answered by the City.

On April 11, 1955, the City adopted an ordinance, Section 2-17, of the Code of the City of Danville, to the following effect:

Section 2-17 Disposition of *Public* Property; Franchises

"No ordinance or resolution selling any public property shall be valid unless the same be passed by the Council by recorded affirmative vote of three-fourths of members elected to the Council."

Section 125 of the Constitution of Virginia then in effect, which is now Section 9 of Article VII Constitution 1971, provides that "the rights of no city or town in and to its water front, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges and *other public places*, and its gas, water and electric works shall not be sold, except by an ordinance or resolution passed by a recorded affirmative vote of three-fourths of all members elected to the Council. . . ." (Italics supplied)

Acting on the City Ordinance and the Constitution the City Attorney advised the Council that the resolution accepting the Stendig bid

had not been passed but was rejected. It is now contended by Stendig that the City Ordinance was intended to comply with the Constitution and that the use of the word "public property" in the ordinance should be construed as "other public places" as set out in the Constitution, and that the "Shale Pit" property was not "other public places" property requiring a three-fourths vote.

Assuming, but not deciding, that the opinion of the Attorney was in error, the Council and all interested parties concurred in his decision and acted on that interpretation and accepted the same as being correct. If the City Attorney was incorrect in his interpretation of the law, all parties having acted raises a mistake of law.

A mistake made with a knowledge of every fact necessary to be known to form a correct conclusion as to the question to be decided is a mistake of law consisting in an erroneous legal deduction from existing facts, and cannot, unless accompanied with imposition, misrepresentation, undue influence, misplaced confidence or surprise, furnish grounds for the interposition for a court of equity. 13 Mich. Dig. 138 "Mistake of Law"; *Piedmont Trust Bank v. Aetna Casualty, etc.* 210 Va. 396, (1969).

Stendig, the City, and General Development were all present at the Council meeting on September 12, 1969, all were represented by attorneys, there was no dispute as to the facts and no objection of any kind was made to the City Attorney's ruling, or action by the Council thereafter, and the ruling has been accepted by Stendig without any objection until the property was offered for sale, a period from September 12, 1969, until July 7, 1972, when this proceeding was filed. The Council acted upon the Attorney's advice and declared the resolution to accept the Stendig bid rejected, and the resolution rejecting all bids was passed.

In the Declaratory Judgment proceeding by the City, the question was not raised nor were the proceedings therein objected to, nor the decree entered on December 14, 1970. In the decision it was recognized by the Court that the City had rejected all bids and laid down rules which might govern the City in event further action was desired, all of which was acquiesced in by Stendig, a party thereto.

Stendig without objection, permitted the property to be offered for sale commencing with his original offer of \$32,000, and acquiesced in the action of the City in acting under the procedures as outlined in the decree of the Court of the Declaratory Judgment which was tantamount to

making an offer on the property, and had no increase bid been made his bid would probably have been accepted, or at least he certainly indicated his desire that it be accepted since he says in the proceedings here that the bid had never been withdrawn.

It is also interesting that after the property had been advertised for sale commencing with his bid, Stendig elected almost on the date the bids were to be received to file the suit for specific performance. He had a right and the proper proceeding would probably have been to enjoin the sale by the City of Danville, if he considered a contract had been entered into and that his bid had been accepted on December 12, 1969.

Stendig has acquiesced in everything that has taken place from the first offer for sale of the property in question down to and through the advertisement of the second sale, permitting his bid to be used as starting bid, and it appears to the Court that he is estopped from any further proceedings.

The Council may have acted under a mistaken view of the law; however, they did act and rejected all bids, which they had a right to do.

It will be noted that the original sale by sealed bids provided that the Council had the right to reject or accept all offers. The Council by nine to zero vote, or a unanimous vote, did reject all bids. There is some mention that no motion was made to reconsider the first resolution above mentioned. The Court does not think this is a valid ground. All resolutions were acted upon at the same meeting and Stendig was represented

It would further be noted that there is nothing in the Constitution to prevent the City from passing a resolution or ordinance providing for the sale of "public property", and the Court is of the opinion that the Council had a right to pass the ordinance which is valid and does not contravene the Constitution.

It is singular to note that in the case of *Town of Victoria v. Ice, Etc. Co.* 134 Va. 124, when Section 125 of the Constitution was being considered it was said on page 128 that the Court said "The section clearly limits the powers of the City Council, and the first clause directs the mode of procedure when it undertakes to sell the *public property* of a municipality of the character thereby designated", and further makes reference to the sales of public property. While this is pure dictum, it is interesting to note that the Supreme Court referred to the Section as effecting public property. There is nothing in the Constitution to prevent

a Council from providing for sale of public property by a proper ordinance duly enacted.

Other questions raised are not necessary to be decided as it can be clearly seen that the Court is of the opinion that the prayer of the Bill should be denied, and an order may be drawn accordingly.

* * *

ATTACHMENT 7 TO MEMORANDUM OPINION OF THE
COURT OF NOVEMBER 7, 1972

PRESENTED AND ADOPTED: June 10, 1948

RESOLUTION

BE IT RESOLVED by the Council of the City of Danville, that the purchase of real estate on Route No. 58 from E. L. Adams in amount approximating \$5200.00 be, and the same is hereby approved. (Material on land used for street improvement.)

APPROVED:

/s/ Everett E. Carter
Mayor

ATTEST:
A. L. Hall

MOTION
(Filed November 29, 1972)

Now comes the plaintiff, Stendig Development Corporation, by counsel, and moves the Court to grant a rehearing in this case and states as grounds for its motion the following:

1. The Court's decision is based, in part, on factual assumptions on matters concerning which no evidence has been presented to the Court.
2. The Court's decision was based, in part, on matters which were not believed to be in issue and were not argued at the time the case was heard on September 27, 1972.

Respectfully submitted,

By /s/ Walter E. Rogers
Counsel for the Plaintiff

LETTER OPINION OF THE COURT DATED DECEMBER 7, 1972

Re: Stendig Development Corporation

v.

City of Danville

Gentlemen:

I have the motion filed by the plaintiff for a rehearing in this matter on the grounds that the Court's decision is based on factual assumptions on matters concerning which no evidence has been presented, and also on matters which are not believed to be in issue and were not argued at the time the case was heard on September 27, 1972.

I have considered the above motions and find that on September 27 an order was entered stipulating certain exhibits which were primarily the minutes of the Council of the City of Danville, and the Declaratory Judgment proceedings of City of Danville v. General Development, et al, and other matters were agreed upon to be considered by the Court as evidence without proof, and that the issues submitted could be decided primarily on the exhibits. When the case was argued certain statements were made in regard to facts which the Court made notes of and were used in the opinion rendered by me on November 7, 1972.

After reviewing my memorandum opinion I think you will find that the facts as stated in the opinion were practically all taken from the exhibits and statements made in argument of the case, and in written memorandums of agreement.

For instance, paragraph 1 on page 2 will be found in Exhibit 4 and Exhibit 1 which are the minutes of June 10, 1946, and August 12, 1969.

Paragraph 2 on page 2 was taken from the Bill of Complaint and statements by counsel and Exhibit A filed with the Bill.

On page 3, the last paragraph was taken from Declaratory Judgment proceedings and order, together with Exhibit 3, with the plea of res adjudicata, and the balance of this paragraph on page 4 from minutes of May 9, 1972, and statement made during argument that General Development made the highest bid of \$51,000.00.

Paragraph 2 on page 4 was taken from Exhibit 4 with the Special Plea, and the Ordinance of the City of Danville 2-71, and the Constitution of Virginia. The rest of the opinion is based primarily on these facts which were agreed to by counsel.

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For this reason the Court does not feel that there should be a rehearing in this case; there has to be some determination and some end to litigation.

As to the Court's decision on matters not argued, my experience has been that numbers of cases were decided not only by the lower courts but by the Court of Appeals on matters which were not argued before the Court, but which the Court found was applicable law, and that was done in this instance.

In view of the above proper orders may be drawn overruling this motion, and also in accordance with the Memorandum Opinion heretofore rendered.

Very truly yours,

Langhorne Jones

FINAL DECREE
(Entered December 30, 1972)

This cause came on this day to be heard upon the Bill of Complaint and the Amended Bill of Complaint, the Defendant's Demurrer and Demurrer to the Amended Bill of Complaint, the Defendant's Special Plea and Special Plea to the Amended Bill of Complaint and Defendant's Plea of Res Adjudicata; the Exhibits duly filed; the memoranda of Counsel; and was argued by Counsel;

And the Court having rendered its written opinion dated November 7, 1972, which is made a part hereof by reference, and the plaintiff having moved for a rehearing on the grounds that the Court's decision appeared to be based, in part, on factual conclusions on matters concerning which no evidence had been presented, and plaintiff's counsel having advised the Court that the only factual conclusions they considered not supported by the stipulated facts and concerning which the plaintiff desired to present evidence were (1) that the plaintiff was represented by counsel at the meeting of the City Council of Danville held September 12, 1969, and (2) that the plaintiff had acquiesced in everything that had taken place from the first offer of sale of the property in question down to and through the advertisement of the second sale, permitting its bid to be used as a starting bid; and the Court, still being of the opinion that the prayer of the Amended Bill of Complaint should be denied, even if the plaintiff had not been represented by counsel at said

meeting of the City Counsel, and had not acquiesced in the advertisement of the second sale and had not permitted his bid to be used as a starting bid, does, therefore, deny the motion for rehearing; for reasons stated in opinion letter of December 7, 1972.

UPON CONSIDERATION OF ALL OF WHICH, it appearing to the Court for the reasons stated in its written opinion of November 7, 1972, as modified hereby, that the prayer of the Amended Bill of Complaint should be denied and that this suit should be dismissed at plaintiff's costs.

It is accordingly ADJUDGED, ORDERED and DECREED that the Prayer of the Amended Bill of Complaint be, and the same hereby is, denied, and this case is dismissed at Plaintiff's costs, and it is further ORDERED that this cause be removed from the docket.

To which Order and Decree Plaintiff by Counsel objects and excepts, as being contrary to the law and the evidence.

* * *

ASSIGNMENTS OF ERROR

(Filed January 22, 1973)

1. The Court erred in failing to hold that the City Council of the City of Danville accepted the offer of Stendig Development Corporation to purchase the "Shale Pit" property when it voted six to three in favor of the motion to accept such offer at its meeting held September 12, 1969.

2. The Court erred in failing to hold that the "Shale Pit" property was not public property which required a three-fourths vote of Council for its sale and in failing to hold that it could be sold by the affirmative vote of a simple majority.

3. The Court erred in holding that all bids for the purchase of the "Shale Pit" property were in fact rejected by the City Council of the City of Danville at its meeting held September 19, 1969.

4. The Court erred in failing to hold that Stendig Development Corporation, having been put by the City to the expense of successfully defending a declaratory judgment suit to determine if the bids for the purchase of the "Shale Pit" property had been properly opened and

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whether a conflict of interest existed, was equitably entitled to have the property conveyed to it at the amount of its bid which was the high bid.

5. The Court erred in failing to hold that the City of Danville was contractually obligated to sell the "Shale Pit" property to Stendig Development Corporation for \$32,000.00 and in failing to decree specific performance of the contract.

6. The Court erred in failing to grant the motion for a rehearing.

* * *