

**THE STATE OF NEW HAMPSHIRE**

**Rockingham Superior Court**

PO Box 1258

Kingston, NH 03848 1258

603 642-5256

**NOTICE OF DECISION**

ROBERT P SULLIVAN  
CITY OF PORTSMOUTH/LEGAL DEPARTMENT  
1 JUNKINS AVENUE  
PORTSMOUTH NH 03801

**06-E-0108 Nine Seventy Six Realty Trust, et al vs. City of Portsmouth**

Please be advised that on 10/09/2007 Judge McHugh made the following order relative to:

**Final Order ;**  
copy enclosed

10/09/2007

Raymond Taylor  
Clerk of Court

cc: Thomas M Keane  
David A. Anderson  
James T. Kilbreth, Esq.  
Jacqueline W. Rider, Esq.

**THE STATE OF NEW HAMPSHIRE**

**ROCKINGHAM COUNTY**

**SUPERIOR COURT**

Nine Seventy Six Realty Trust  
1000 Market Street Corporation, Trustee

v.

City of Portsmouth

Docket No: 06-E-0108

**FINAL ORDER**

On February 17, 2006 the plaintiff filed the within Petition for Declaratory Judgment seeking to invalidate the Portsmouth City Counsel's December 19, 2005 Bond Resolution as being contrary to Part II, Article 5 of the New Hampshire Constitution and RSA 33:3. The plaintiff is critical of that portion of a Joint Development Agreement entered into between the City of Portsmouth and HarborCorp, LLC, a private developer, on November 14, 2005, that requires the City to bond \$15 million dollars of public funds for the purpose of constructing a parking garage in the city. It is the position of the plaintiff that the expenditure of public funds for this purpose results in a substantial financial benefit to HarborCorp, LLC at the expense of the citizens of Portsmouth. The case was tried to the Court on September 5, 6 and 7 of this year. A total of seven witnesses offered their testimony and the Court was given over 60 exhibits to review.

A Pretrial Memorandum filed by the City accurately sets forth the background of this case. In December of 2005 the City of Portsmouth passed a \$15 million dollar bond resolution to acquire a public parking facility to be built in connection with a hotel and conference center (collectively the "Project"). The Project grew out of a longstanding interest of the City in encouraging the development of the so-called "Northern Tier." That interest was reflected in a study commissioned by the City in June of 1998, in which it

determined that a conference center and hotel would provide a significant boost to the City's economy and the further development of the area. In addition, the City has had a longstanding desire for more parking.

These identified needs led to discussions with HarborCorp about how its property in the Northern Tier located next to the existing Sheraton Hotel might be used for these purposes. The plaintiff characterizes these discussions as one-sided with HarborCorp making certain demands and the City agreeing to meet them. Obviously HarborCorp enjoyed an initial advantage because it owned the property that the City was interested in. At about the same time, the City Council determined that, as a policy matter, it was not appropriate to build a garage on the so-called Worth lot, a limited existing parking area, as had been recommended by the City Manager and his staff. Rather, the Council directed the Manager to work with HarborCorp to include a public parking facility in a public-private partnership that would involve development of the HarborCorp property into a conference center and hotel. The result of the discussions that followed was first a memorandum of understanding and ultimately a Joint Development Agreement.

The planned Project includes 200 plus hotel rooms, 21 condominium residences, approximately 5,000 sq. ft. of retail space to be owned by the City, and 18,500 sq. ft. of combined meeting and banquet space capable of seating 750 people for a sit down meal and 1,000 people for a meeting. In addition, the Project includes construction of a public parking facility with 657 parking spaces on land owned by HarborCorp, which would be conveyed to the City and owned and operated by the City.

Numerous public meetings and hearings regarding the Project were held before the Portsmouth Planning Board, the Portsmouth Economic Development Commission and the City's Historic District Commission prior to the City Council's approval of this public-private

partnership. All of the relevant documents were provided at public meetings and posted on the City's website and the matter was subject to extensive media coverage from the beginning. Moreover, the City engaged its own consultant to complete an independent review of the Project. The consultant, Hospitality Resolutions, Inc. estimated that tourism spending (excluding lodging), would be \$10-\$12 million per year, that total indirect and direct sales at \$14-\$17 million per year would benefit local businesses including restaurants, retail stores and service establishments located in downtown Portsmouth, and that the Project would generate annual real estate taxes of \$750,000.

The Joint Development Agreement notes that "the City has an interest in securing additional public parking in the downtown area of the City," and that "the City has an interest in the diverse economic benefits which would be created for the City by the construction and operation of a conference center located in the City's downtown...." As contemplated by the Joint Development Agreement, the City Manager represented to the Council members a memorandum recommending that the City Council pass the first reading to authorize a bond resolution for construction of a public parking facility, which was acted on at the Council Meeting of December 5, 2005.

The City Manager provided the Mayor and the City Council with a copy of the bond resolution, the legal debt limits, Standard and Poor's analysis of the City's finances as of July 25, 2005, a letter from Peter Frazier of First Southwest Company providing independent financial advice to the City, three debt service proformas (A-C) including revenue and usage assumptions, and the Hospitality Resolutions, Inc. study. All these materials were posted on the City's website and were also provided to the public as an informational package at the December 5, 2005, public meeting of the City Council. As a result of a citizen comment, the City Manager provided an additional proforma, proforma

D, to the Council on December 19, 2005, along with a memorandum recommending that the Council adopt the bond resolution and other materials, including a map showing walking times from the municipal garage to various parts of the City and all these materials, again, were posted on the City's website and provided to the public.

After analyzing all the materials and several hours of public hearing, the Council voted 8-1 to authorize the bond resolution on December 19, 2005. Seven of the Council members spoke in favor of the Project as being in the best interest of the City. Although the plaintiff, Nine Seventy Six Realty Trust, participated fully in the public process, encouraged the public to oppose the Project, presented its own analysis to the Council, and even wrote a letter setting forth its legal arguments, it failed to persuade the Council of its position against the Project.

The plaintiff owns commercial property in the City of Portsmouth. As such, it has an interest in the taxes raised by the City as it is a major taxpayer of Portsmouth. The City wants the Court to know that the real interest of the plaintiff is not as a concerned taxpayer seeking to maximize tax revenue, but rather is a competitor of HarborCorp, LLC who is envious of the Project and who had its own interest in seeking to work with the City to develop a conference center on other property in the city. The defendant claims that because the City was not willing to work with the plaintiff, the plaintiff has sought to expend whatever money it takes to see to it that the Project is defeated. However there is no requirement of good faith in order to challenge the public borrowing of funds. Assuming without deciding that the plaintiff is nothing more than a disgruntled suitor as opposed to a concerned taxpayer, its status as a major property owner in Portsmouth allows it to challenge the City's decision to bond the parking garage.

The evidence submitted at the trial confirms the fact that at least for the purposes of this litigation the plaintiff poses no objection to HarborCorp, LLC's decision to construct a hotel and conference center on property it already owns in the city. The plaintiff appears to concede that HarborCorp, LLC is allowed to develop its real estate as it sees fit. The sole objection raised to the Project is the City's decision to expend \$15 million dollars of public funds towards the construction of a parking garage. The plaintiff also does not challenge the City's conclusion that an additional parking garage is necessary given the traffic demands of Portsmouth. The two existing downtown parking lots are often filled and do not collectively provide for all of the parking needs of the city at the present time. It is the plaintiff's position however that the proposed parking garage, because of the commitment for parking spaces to HarborCorp, LLC, is not going to solve the parking problem of the city but rather is only going to add to it. Moreover it takes issue with the location of the proposed garage, concluding it is too far removed from the center of the city.

The majority of the evidence submitted by the plaintiff at trial was geared to have the Court conclude that because of the potential profit which HarborCorp, LLC stands to make with respect to the construction of its hotel and convention center, it could easily build the parking garage necessary to service the Project at its own expense. Thus the plaintiff concludes that the City made a "bad financial deal" with HarborCorp, LLC by agreeing to fund a parking garage. The plaintiff reasons that because the City was so afraid of losing the convention center, which it deems a necessary addition for numerous reasons, it in essence knuckled under to the demands of HarborCorp, LLC that the City fund the parking garage. The plaintiff questioned several of the defendant's experts about whether in their opinion the potential economic benefit which HarborCorp, LLC would

receive with the construction of its hotel and convention center would enable it to construct the parking garage at its expense and still make the overall Project economically feasible. None of the experts definitively answered that question. While they concluded it was possible, all pointed to the risk of such an expansive project given the uncertainty of financial trends and investment in the future based upon what has occurred in these areas in the recent past.

Although the plaintiff has urged the Court to conclude that HarborCorp, LLC could still make a profit if it were required to fund the parking garage along with the hotel and conference center based upon numerous financial projections made and entered as part of the record in this case, that is not the roll of the Court. The issue here is not whether or not HarborCorp, LLC could build the parking garage and still make the Project profitable. Rather, the issue is whether or not the Joint Development Agreement between the parties is more of a private benefit to HarborCorp than a public benefit to Portsmouth. Both parties concede that to some extent the Joint Development Agreement provides a benefit to the City as well as to HarborCorp, LLC. The question is, which of these entities derives the greatest benefit. If the Court determines that entity to be HarborCorp, LLC then under the Constitution, Statutes, and Case Law, the public bonding for the garage must be found to be improper.

The conclusion of the parties with respect to the public benefit issue was dramatically different. It is the plaintiff's position that the Court must look primarily to whether or not the parking garage, standing alone, provides a substantial benefit to the City. Its argument is that given the location, which the plaintiff alleges is on the fringe of the center city, the proposed garage is not a major benefit to people seeking to visit or shop in the heart of the city. The plaintiff also argues that given the language of the Joint

Development Agreement which commits the use of the majority of spaces in the parking garage to HarborCorp, LLC, the spaces available for public use will not meet the parking needs of the city. Therefore, since the real beneficiary of the garage is HarborCorp, it is HarborCorp that should fund it.

It is the defendant's position that the construction of the parking garage cannot be considered in a vacuum with respect to the issue of public benefit. While the City argues that in fact this parking garage will provide needed spaces for city users as the location is close to the inner part of the city, the garage must be viewed as part of the construction of the hotel and convention center which the City desperately needs. Thus when determining public benefit the City asked the Court to add to the equation the benefit of the convention center in terms of drawing people, money and jobs to the inner city. Viewed in that broad light the City argues that the garage represents a substantial public benefit which dwarfs any benefit which HarborCorp, LLC will receive with its use.

The Project as presently planned awards the majority of parking spaces, at least in the first instance, to HarborCorp, LLC. This extensive use diminishes any public benefit which the parking garage might supply to the City. However that fact has to be weighed with the other factors that exist in this case. HarborCorp, LLC owns the parcel of land upon which the parking garage is to be constructed. There is no evidence to suggest that any other property owner in the City of Portsmouth of comparable size has offered its property to the City for the construction of a parking garage. Thus this is not a situation where a private developer and the City seek to purchase a parcel of land owned by neither of them to construct a garage.

The fact that the Project itself has been on the table, so to speak, for many years and has gone through a series of public hearings before various municipal boards also

weighs in favor of its acceptance. As with other municipal tribunals such as planning boards or zoning boards of adjustment, a city council's opinion and finding with respect to a local issue is entitled to some deference. In this case the Project was before the City Council for an extended period of time and subject to public hearings at which representatives of the plaintiff appeared and were given full opportunity to voice their objection to the funding of the parking garage by the City. The plaintiff does not claim that there were any due process violations in the manner in which the City Council considered the Project, and indeed the evidence suggests that no one opposed to any aspect of it was prohibited from voicing their concerns. Yet while there are some factors present in this case that support the City's position, an objective consideration of the evidence points to the enormous advantage, both financially and by usage, that HarborCorp realizes by the City funding the parking garage, and the private benefit exceeds any public benefit the Project presents for the City.

The issue of public verses private benefit with respect to joint agreements between municipalities and developers, perhaps because there are so few of them, has not generated a great deal of law on the subject. The language contained in Part II Article 5 of the New Hampshire Constitution and also in RSA 33:3 is general and provides little guidance as to what criteria is to be used when considering public verses private benefit in joint ventures. Seemingly all a municipality has to show is that the public benefit in any public-private partnership outweighs any benefit accruing to the private party. So also, there has been very little case law interpreting this language. The leading case as cited by both parties is that of Club Jolliet, Inc. v. City of Manchester 110 N.H. 172 (1970), decided over thirty-five years ago.

While the Club Jolliet case also involved the construction of a public parking garage by a municipality, the use of the garage was not largely for the benefit of one private party as is the case here. Yet the Supreme Court's discussion of the issue is informative.

The concept of a public purpose generally, and specifically as it relates to parking facilities, is neither static nor stationary. (cases cited). What constituted a public purpose in 1870 does not necessarily set the outer limits of that public purpose in 1970. The same thought was expressed by a respected source some years ago in *Green v. Frazier*, 253 U.S. 233, 242, 64 L. Ed. 878, 883, 40 S. Ct. 499, 502-503: "In many instances States and municipalities have in late years seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the domain of private enterprise. (In this case) The entire redevelopment project has been determined to serve a public purpose. Since the public parking garage is essential to the overall project the project is not invalidated because private interests may derive incidental benefits. p.176

While both parties have cited the phrase "incidental benefits" as referenced in Club Jolliet, they have given that phrase a different meaning. Black's Law Dictionary suggests that in a legal sense "incidental" is something less than primary. That means that an incidental benefit is a benefit consisting of something significantly less than one half of the total benefit. If that is the appropriate criteria to use in this case, then the analysis favors the plaintiff's position.

Under the Joint Development Agreement, HarborCorp is guaranteed usage of 325 spaces or 49% of the total of 657 parking spaces to be available in the proposed parking garage at all times, 24 hours a day, 7 days a week. In addition the City is required to reserve for use by HarborCorp or its designees (including the owner of the Sheraton Hotel parcel) another 275 spaces or 42.5% of the 657 spaces from time to time upon request of HarborCorp. Thus at peak times for potential city use, the parking garage would only provide 57 parking spaces to members of the general public. In addition, the City's fourth pro forma distributed at the Council's December 19, 2005 meeting wherein the parking

garage bond request was approved suggests that there will be operational losses associated with the garage that may last for many years.

There is no doubt but that if the Project consisted of only the construction of a parking garage, then under the terms of the Joint Development Agreement the benefit to HarborCorp would be overwhelming. Thus in that case the law would prohibit the expenditure of any public funds. However this project includes a convention center which HarborCorp has agreed to build as its own expense. The evidence revealed that the convention center is the carrot that is driving the City to bond the parking garage construction. City manager John Bohenko admitted as much when he testified that in his mind the need for a convention center trumps all other factors including the City's commitment to bond \$15 million of the cost of a parking garage.

Conceptually, the Court has no difficulty in concluding that the collateral benefits which the City ascribes to the overall Project, including the creation of 300 jobs, more income and greater tax revenue can be considered as weighing public benefit. However even if those things are factored in, the Court is compelled to conclude based upon the evidence put forth at trial that the construction of the parking garage at public expense results in more than just an incidental benefit to HarborCorp. As the plaintiff pointed out, all of these benefits are still available to the City if HarborCorp funds the garage itself.


The Court's ruling herein does not mean that the Project is dead. What it means is that as presently structured, the obligations of the parties under the Joint Development Agreement needs to be modified. The City Council needs to take another look at the garage's construction funding and use to make sure that the final agreement does not provide HarborCorp with more than an incidental benefit. Perhaps HarborCorp would agree to drastically reduce its guaranteed parking spaces or fund a substantial portion of

the garage construction itself. The possibilities of reducing the benefit to HarborCorp in the garage are endless and by law the City Council must consider them in the first instance. The sole conclusion reached by the Court in this case is that the present agreement between the City and HarborCorp, which commits the City to fund \$15 million of the cost of the garage is unlawful.

Both parties filed Requests for Findings of Fact and Rulings of Law. The Court denied many of the requests of the parties largely because they contain many different propositions and conclusions. If a particular request contains two sentences with one of them being accurate and one inaccurate, by rule the request must be denied. With that standard in mind the Court grants plaintiff's Requests 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 24, 25, 26, 28, 29, 30, 32, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 51, 53, 54, 55, 56, 57, 58, 59 and 62. It denies plaintiff's Requests 6, 7, 18, 19, 22, 23, 27, 31, 33, 34, 41, 49, 50, 52, 60 and 61. All of defendant's Requests are granted with the exception of Requests 34, 35, 36 and 39 which are denied.

So Ordered.

DATED: October 9, 2007

  
Kenneth R. McHugh  
Presiding Justice