

IN THE SUPREME COURT OF MISSOURI

No. SC83747

CHESTERFIELD VILLAGE, INC.,

Appellant,

v.

CITY OF CHESTERFIELD, MISSOURI,

Respondent.

Appeal from the Circuit Court of the County of St. Louis

Division No. 14

The Honorable James R. Hartenbach

SUBSTITUTE BRIEF OF APPELLANT CHESTERFIELD VILLAGE, INC.

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SUBSTITUTE BRIEF OF APPELLANT CHESTERFIELD VILLAGE, INC.

JURISDICTIONAL STATEMENT

Jurisdiction is now vested in this Court pursuant to its Order of Transfer dated August 21, 2001. This is an appeal from an Amended Order and Judgment entered by the St. Louis County Circuit Court, Division 14, dismissing the First Amended Petition of appellant, Chesterfield Village, Inc. (“Chesterfield Village”). In its Petition, Chesterfield

Village had sought damages against respondent, City of Chesterfield, Missouri (“the City”), under state or, alternatively, federal law for a temporary regulatory taking and/or inverse condemnation of its property by the City without just compensation. The Circuit Court entered an Order on August 16, 2000 sustaining the City’s motion to dismiss the First Amended Petition. On August 30, 2000, the trial court entered its Amended Order and Judgment sustaining the City’s motion to dismiss because Chesterfield Village’s First Amended Petition failed to state a claim upon which relief could be granted.

Chesterfield Village subsequently filed a Notice of Appeal with the Missouri Court of Appeals, Eastern District, and, on May 9, 2001, following briefing and oral argument, the Court of Appeals issued its opinion reversing the decision of the Circuit Court and remanding the cause for further proceedings in that court. After the Court of Appeals denied the City’s timely filed Motion for Rehearing or, in the Alternative, for Transfer to the Supreme Court of Missouri, the City filed its Application for Transfer to this Court on June 25, 2001.

On August 21, 2001, this Court sustained the City’s application and ordered the cause transferred. The issue involved in this appeal is whether Chesterfield Village properly plead a cause of action for a temporary regulatory taking or inverse condemnation for which compensation must be paid to it by pleading that the City unlawfully applied a zoning classification to property owned by Chesterfield Village that did not permit its development in an economically feasible manner and the City refused to rezone that property pursuant to a request to rezone that was proper under the principles of Missouri zoning law. This appeal from the judgment below is within the

general appellate jurisdiction of this Court under Article V, Section 10 of the Missouri Constitution and Supreme Court Rule 83.04. This Court, pursuant to Article V, Section 10 of the Missouri Constitution and Supreme Court Rule 83.09, now has jurisdiction as to all issues the same as if on an original appeal.

STATEMENT OF FACTS

Introduction

The issues in this appeal are basic. The only question is whether Chesterfield Village sufficiently plead a cause of action in its First Amended Petition to enable it to recover damages from the City as just compensation for the temporary regulatory taking of Chesterfield Village's property. Chesterfield Village brought its action against the City, seeking damages for a temporary taking and inverse condemnation under Missouri law or, alternatively, damages for a regulatory taking under federal law pursuant to 42 U.S.C. § 1983. Chesterfield Village's claims resulted from the failure of the City to rezone property owned by Chesterfield Village and Louis and Nancy Sachs to a reasonable zoning classification. Chesterfield Village appeals from the trial court's dismissal of its First Amended Petition for failure to state a claim upon which relief could be granted.

As this matter is before the Court on the trial court's dismissal of Chesterfield Village's First Amended Petition for failure to state a claim, there is no transcript or evidence in the record, only the First Amended Petition and the exhibits attached to that Petition. In ruling on the City's motion to dismiss, the trial court was required to assume that all of Chesterfield Village's averments were true, and to liberally grant to it all

reasonable inferences therefrom. See, e.g., Nazeri v. Missouri Valley College, 860 S.W.2d 303, 306 (Mo. banc 1993); Duggan v. Pulitzer Publishing Company, 913 S.W.2d 807 (Mo. App. E.D. 1993). A petition will not be dismissed for failure to state a claim if it asserts any set of facts which, if proved, would entitle a plaintiff to relief. Id. As a result, all the facts this Court is required to consider on this appeal are found in Chesterfield Village's First Amended Petition. *LF at 5-45 (A12-52).*¹

Factual Background

Until 1997, Chesterfield Village was the owner of a 46.3-acre tract of land located within the City of Chesterfield. *LF at 5-6, ¶¶ 3, 4 and 5 (A12-13)*. The City obtained jurisdiction over the property when it was incorporated as a third class city on June 1, 1988. *LF at 6, ¶ 6 (A13)*. At that time, the City adopted the "NU" Non-Urban zoning classification for the tract that had been previously designated by St. Louis County. Id. Louis and Nancy Sachs were co-owners of the 46.3-acre tract with Chesterfield Village but they assigned their cause of action and claim with respect to that tract to Chesterfield Village. *LF at 6, ¶ 5 (A13)*.

In February 1990, the City adopted a Comprehensive Plan as a recommendation for the general property uses and densities within its jurisdiction. *LF at 21-22, ¶ 11 (A 28-29)*. The Comprehensive Plan was subsequently revised in May 1991 and January

¹ Citations to *LF* refer to the Legal File submitted to the Missouri Court of Appeals, Eastern District, and transferred to this Court by the Clerk of the Court of Appeals. Citations to *A* refer to documents contained within the Appendix to this substitute brief.

1992. Id. The Comprehensive Plan designated Chesterfield Village’s property to be within an area denoted as the “I-64/40 Corridor” but the Plan failed to contain a density recommendation for property located in that corridor. Id.

On July 11, 1994, Chesterfield Village and Louis and Nancy Sachs filed a Petition for a Change of Zoning of the 46.3-acre tract requesting its zoning be changed from the City’s “NU” Non-Urban District classification to its “R-3” Residence District classification with a Planned Environment Unit (“PEU”). *LF at 6, ¶ 7 (A13).*

Chesterfield Village and the Sachs sought this rezoning because the “NU” classification, when applied to residential use, limited development of the tract to lots of three (3) or more acres for single family residences. *LF at 6, ¶ 9 (A13).* As discussed in more detail below, Chesterfield Village contended, and the Circuit Court of St. Louis County eventually found, that the “NU” zoning classification prohibited an economical use of the property. *LF at 7-8, ¶ 19 and 26, ¶ 3 (A14-15 and A33).*

In October 1994, the City adopted an amendment to its Comprehensive Plan known as the West Area Study. *LF at 22, ¶ 12 (A29).* The West Area Study contained recommendations and guidelines for the development of the western part of Chesterfield. Id. At the direction of the City’s Planning Commission, however, Chesterfield Village’s property was not considered in the West Area Study. Id. at ¶¶ 12-13.

The Chesterfield Department of Planning, the Chesterfield Planning Commission and the Planning and Zoning Committee of the Chesterfield City Council all recommended approval of Chesterfield Village’s rezoning petition and PEU request. *LF*

at 7, ¶¶ 11-14 (A14). On February 6, 1995, however, the Chesterfield City Council denied the rezoning petition and PEU request. *LF at 7, ¶ 15 (A14)*.

On March 14, 1995, Chesterfield Village filed an action in the St. Louis County Circuit Court against the City with respect to the zoning of the 46.3-acre tract. *LF at 7, ¶ 16 (A14)*. The suit contended that the City's "NU" zoning ordinance, as applied to the tract, was invalid, illegal, unconstitutional and void because the "NU" classification as applied to the tract was unreasonable, arbitrary and capricious. *LF at 7-8, ¶ 19 (A14-15)*.

The St. Louis County Circuit Court consolidated the lawsuit with a similar lawsuit filed by Chesterfield Village relating to another tract of land. The two consolidated lawsuits bore Cause No. 673678. *LF at 8, ¶ 20 (A15)*. On April 6, 1996, following a bench trial, the court entered its judgment that the "NU" classification was unreasonable, arbitrary, capricious and unconstitutional as applied to the 46.3-acre tract. *LF at 8-9, ¶¶ 21 and 25-27 (A15-16)*. The court noted that the City could have changed the zoning to some category other than the R-3 zoning that Chesterfield Village requested in its petition for change in zoning but, instead, the City chose to retain the "NU" zoning classification. *LF at 8, ¶ 22 and at 24, ¶¶ 28-29 (A15 and A31)*. The court ordered, adjudged and decreed that the "NU" classification as applied to the tract was illegal and, therefore, null and void and ordered the City to place a reasonable zoning classification on the tract. *LF at 9, ¶ 28 (A16)*. Specifically, the court found that:

it [was] not economically feasible to develop [sic] the properties for use in accordance with Chesterfield's current 'NU' Non-Urban District zoning classificaiton [sic], or for

any permitted or conditional use in the classification, and that the properties are not adaptable for use under current zoning.

LF at 26, ¶ 3 (A33). The court further found that the “NU” classification was unreasonable, arbitrary, capricious and unconstitutional as applied to the tract because it was “totally inconsistent with the character of development in the surrounding area and is not required to promote the public safety, health, convenience, comfort, morals, prosperity or general welfare of Chesterfield.” *LF at 8-9, ¶ 25 and 26, ¶ 5 (A15-16 and A33).*

The City did not appeal the court’s judgment. Instead, on June 17, 1996, the City adopted two ordinances that rezoned the 46.3-acre tract and established a PEU for the tract. *LF at 9-10, ¶¶ 29-33 (A16-17).* The tract was rezoned as follows: 8.1 acres to the “R-1” one-acre Residence District classification; 33.1 acres to the “R-2” 15,000 square foot Residence District classification and 5.1 acres to the “R-3” 10,000 square foot Residence District classification. *LF at 9, ¶ 31 (A16).* The result of the two ordinances was such that the 46.3-acre tract was approved for development in a manner substantially similar to that proposed by Chesterfield Village in November 1994 at the direction of the Planning and Zoning Committee of the City Council, which proposal was later rejected by the City Council. *LF at 9-10, ¶¶ 28-33 and 80, ¶ 34 (A16-17 and A53).* Thus, Chesterfield Village and Louis and Nancy Sachs obtained virtually the same result they would have obtained had the property been rezoned as requested in November 1994. *LF at 80, ¶ 34 (A53).*

Procedural History

Chesterfield Village initially brought this action against the City on June 6, 1999 seeking damages with respect to two tracts of property for inverse condemnation under Missouri law or, alternatively, damages for regulatory takings under federal law pursuant to 42 U.S.C. § 1983. Chesterfield Village's claims resulted from the repeated failure of the City to apply a proper zoning classification and from its refusal to rezone two parcels of property owned by Chesterfield Village to reasonable zoning classifications. On February 1, 2000, Chesterfield Village filed its First Amended Petition limiting its causes of action to only one of the two tracts of property. *LF at 5-45 (A12-52)*.² As plead, Chesterfield Village's First Amended Petition stated causes of action for just compensation for the taking of its 46.3-acre tract of property: Count I sought damages for a temporary regulatory taking under Missouri law, Count II sought damages for inverse condemnation under Missouri law and Count III sought damages for just compensation for a temporary regulatory taking under federal law.

On May 17, 2000, the City filed its Motion to Dismiss or, in the Alternative, for Summary Judgment and Defendant's Motion to Dismiss Request for Attorney's Fees. *LF*

² The original Petition filed by Chesterfield Village sought damages for the 46.3-acre tract at issue in this appeal and damages for a 0.6-acre tract. Chesterfield Village amended its original Petition by deleting the takings claims arising from the 0.6-acre tract. Chesterfield Village also added a count alleging a temporary regulatory taking under Missouri law with respect to the 46.3 acre tract.

at 61. In its motion, the City argued that: (1) Chesterfield Village's First Amended Petition failed to state a claim upon which relief could be granted; (2) Chesterfield Village lacked standing to sue; (3) Chesterfield Village's claims were barred by the principles of *res judicata* and collateral estoppel; and (4) Chesterfield Village's prayer for attorneys' fees was in reality a request for punitive damages. *Id.*

On August 16, 2000, following oral argument on the motion, the Circuit Court of St. Louis County, Division 14, sustained the City's Motion to Dismiss. *LF at 108.* The court's order, however, failed to specify the grounds for the dismissal. As a result, Chesterfield Village filed a Motion to Reconsider Dismissal or, Alternatively, Motion to Amend Order. *LF at 109.*

On August 30, 2000, the trial court clarified its prior ruling and entered an Amended Order and Judgment which sustained the City's motion to dismiss on the grounds that Chesterfield Village's First Amended Petition failed to state a claim upon which relief could be granted. *LF at 115 (A55).* Obviously, the court determined that none of the counts stated a cause of action. The Amended Order and Judgment, however, did not specify how or why each count of the First Amended Petition failed to state a cause of action and did not grant Chesterfield Village leave to cure whatever deficiencies the court believed existed therein.

On September 11, 2000, Chesterfield Village filed its Notice of Appeal with the Missouri Court of Appeals, Eastern District. On May 9, 2001, following briefing and oral argument, the Court of Appeals issued its opinion reversing the decision of the Circuit Court of St. Louis County and remanding the cause for further proceedings in the

Circuit Court. Chesterfield Village, Inc. v. City of Chesterfield, Missouri, No. ED 78444, slip op. at 10 (Mo. App. E.D. May 9, 2001) (hereinafter “Slip Opinion”) (A2-11). The Court of Appeals found that Chesterfield Village’s First Amended Petition stated causes of action under Missouri law for a temporary regulatory taking and inverse condemnation and under federal law for a temporary regulatory taking. Id. at 6, 8, and 9 (A7, A9 and A10). The Court of Appeals further found that Chesterfield Village’s claims were not barred by the doctrine of *res judicata*. Id. at 10 (A11).

On May 24, 2001, the City filed its Motion for Rehearing or, in the Alternative, for Transfer to the Supreme Court of Missouri. On June 13, 2001, the Court of Appeals denied that motion. On June 25, 2001, the City filed its Application for Transfer to this Court. On August 6, 2001, the St. Louis County Municipal League, as *amicus curiae*, filed Suggestions in Support of the City’s Application for Transfer. On August 21, 2001, this Court sustained the City’s application and ordered the cause transferred.

POINTS RELIED ON

Standard of Review

Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. banc 1993)

Martin v. City of Washington, 848 S.W.2d 487 (Mo. banc 1993)

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976)

Clark v. Washington University, 906 S.W.2d 789 (Mo. App. E.D. 1995)

I. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DISMISSING COUNT I OF THE FIRST AMENDED PETITION ALLEGING THAT THE CITY'S FAILURE TO REZONE THE SUBJECT PROPERTY TO A REASONABLE ZONING CLASSIFICATION EFFECTED A TEMPORARY REGULATORY TAKING OF CHESTERFIELD VILLAGE'S PROPERTY WITHOUT JUST COMPENSATION IN THAT THE EXISTENCE OF SUCH A CAUSE OF ACTION IS RECOGNIZED UNDER MISSOURI LAW AND CHESTERFIELD VILLAGE ADEQUATELY PLEAD FACTS UPON WHICH RELIEF COULD BE GRANTED

Clay County v. Harley and Susie Bogue, Inc., 988 S.W.2d 102 (Mo. App. W.D. 1999)

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930, 116 S. Ct. 336 (1995)

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987)

Mo. CONST. art. I, § 26

II. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DISMISSING COUNT II OF THE FIRST AMENDED PETITION ALLEGING THAT THE CITY'S FAILURE TO REZONE THE SUBJECT PROPERTY TO A REASONABLE ZONING CLASSIFICATION RESULTED IN AN INVERSE CONDEMNATION OF CHESTERFIELD VILLAGE'S PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF ARTICLE 1, SECTION 26 OF THE MISSOURI CONSTITUTION IN THAT THE EXISTENCE OF SUCH A CAUSE OF ACTION IS RECOGNIZED UNDER MISSOURI LAW AND CHESTERFIELD VILLAGE ADEQUATELY PLEAD FACTS UPON WHICH RELIEF COULD BE GRANTED

Schnuck Markets, Inc. v. City of Bridgeton, 895 S.W.2d 163 (Mo. App. E.D. 1995)

Harris II v. Missouri Dept. of Conservation, 755 S.W.2d 726 (Mo. App. W.D. 1988),

appeal after remand, 895 S.W.2d 66 (Mo. App. W.D. 1995), *cert. denied*, 516 U.S.

930, 116 S. Ct. 336 (1995)

Wintercreek Apartments of St. Peters v. City of St. Peters, 682 F. Supp. 989 (E.D. Mo.

1988)

Ali v. City of Los Angeles, 91 Cal. Rptr.2d 458 (Cal. Ct. App. 1999), *cert denied*,

531 U.S. 827, 121 S. Ct. 77 (2000)

Mo. CONST. art. I, § 26

**III. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DISMISSING
COUNT III OF THE FIRST AMENDED PETITION ALLEGING THAT
THE CITY'S FAILURE TO REZONE THE SUBJECT PROPERTY TO A
REASONABLE ZONING CLASSIFICATION EFFECTED A
TEMPORARY REGULATORY TAKING OF CHESTERFIELD
VILLAGE'S PROPERTY WITHOUT JUST COMPENSATION IN
VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO
THE UNITED STATES CONSTITUTION IN THAT THE EXISTENCE OF
SUCH A CAUSE OF ACTION IS RECOGNIZED UNDER FEDERAL LAW
AND CHESTERFIELD VILLAGE ADEQUATELY PLEAD FACTS UPON
WHICH RELIEF COULD BE GRANTED**

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107

S. Ct. 2378, 96 L.Ed.2d 250 (1987)

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L.Ed.2d

798 (1992)

Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980)

Palazzolo v. Rhode Island, ___ U.S. ___, 121 S. Ct. 2448 (2001)

42 U.S.C.A. § 1983 (1994)

U.S. CONST. amend. V

U.S. CONST. amend. XIV

IV. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DISMISSING COUNTS I, II, III OF THE FIRST AMENDED PETITION TO THE EXTENT, IF ANY, THAT IT RELIED ON THE DOCTRINE OF *RES JUDICATA* TO BAR THE CLAIMS ASSERTED IN THOSE COUNTS IN THAT CHESTERFIELD VILLAGE COULD NOT HAVE ASSERTED ITS CLAIMS IN THE ORIGINAL ACTION BECAUSE THEY WERE PREMATURE AS DAMAGES COULD NOT BE DETERMINED UNTIL THE CITY PLACED A REASONABLE ZONING CLASSIFICATION ON THE SUBJECT PROPERTY.

Lay v. Lay, 912 S.W.2d 466 (Mo. banc 1995)

West Lake Quarry and Material Company v. City of Bridgeton, 761 S.W.2d 749

(Mo. App. E.D. 1988)

Corn v. City of Lauderdale Lakes, 904 F.2d 585 (11th Cir. 1990)

Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225 (11th Cir. 1999), *cert. denied*,

531 U.S. 815, 121 S. Ct. 51 (2000)

ARGUMENT

Standard of Review

In considering this appeal, it is important to note the standard to which the trial court was held in ruling on the City's motion to dismiss. That motion tested "solely...the adequacy of...plaintiff's petition," nothing more. Nazeri, 860 S.W.2d at 306. Moreover, in considering the motion:

[n]o attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

Id. at 306 (internal citation omitted). In considering a motion for dismissal for failure to state a claim, the trial court is required to assume that all of plaintiff's averments are true, and to liberally grant to plaintiff all reasonable inferences therefrom. Id.; Clark v. Washington University, 906 S.W.2d 789, 790-91 (Mo. App. E.D. 1995). If the allegations contained in the petition invoke principles of substantive law which, if proved, would entitle the pleader to relief, the petition suffices and may not be dismissed. Martin v. City of Washington, 848 S.W.2d 487, 489 (Mo. banc 1993); Clark, 906 S.W.2d at 791. It is important to remember that on a motion to dismiss, the court looks only to the sufficiency of the pleading itself. The question on a motion to dismiss is not whether a plaintiff can ultimately prove the allegations of its petition but whether the allegations

are asserted with legal sufficiency. As discussed further herein, Chesterfield Village's First Amended Petition "adequately" stated causes of action in all the counts alleged.

The trial court's dismissal of the claims asserted against the City in the First Amended Petition was tantamount to the entry of a judgment on the merits of those claims. In a court-tried case, a judgment must be overturned if there is no substantial evidence to support it, if it is against the weight of the evidence or if it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). Here, as previously determined by the Missouri Court of Appeals, the trial court erroneously applied the law to the First Amended Petition and, as a result, this Court must reinstate the claims made against the City therein.

I. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DISMISSING COUNT I OF THE FIRST AMENDED PETITION ALLEGING THAT THE CITY’S FAILURE TO REZONE THE SUBJECT PROPERTY TO A REASONABLE ZONING CLASSIFICATION EFFECTED A TEMPORARY REGULATORY TAKING OF CHESTERFIELD VILLAGE’S PROPERTY WITHOUT JUST COMPENSATION IN THAT THE EXISTENCE OF SUCH A CAUSE OF ACTION IS RECOGNIZED UNDER MISSOURI LAW AND CHESTERFIELD VILLAGE ADEQUATELY PLEAD FACTS UPON WHICH RELIEF COULD BE GRANTED.

A. Missouri Law Recognizes a Cause of Action for a Temporary Regulatory Taking and Chesterfield Village’s First Amended Petition Adequately Plead Facts Supporting that Cause of Action.

Count I of the First Amended Petition adequately alleged a cause of action under Missouri law for a temporary regulatory taking. At the heart of Chesterfield Village’s cause of action in Count I of its First Amended Petition is Section 26 of Article I of the Missouri Constitution, which provides that “private property **shall not be taken** or damaged for public use without just compensation.” MO. CONST. art. I, § 26 (emphasis added). In Count I, Chesterfield Village alleged that the application of the City’s “NU” zoning classification was an invalid governmental regulation that resulted in a taking of its property without just compensation under the Missouri Constitution.

In its opinion issued in the case below, the Court of Appeals correctly pointed out that a regulatory taking of private property by the government is a recognized cause of action in Missouri. Slip Opinion, at 4 (A5). Indeed, for many years, Missouri courts have recognized that a regulatory taking of property occurs when a regulation enacted under the police power of the government goes too far. Clay County v. Harley and Susie Bogue, Inc., 988 S.W.2d 102, 106 (Mo. App. W.D. 1999); Schnuck Markets, Inc. v. City of Bridgeton, 895 S.W.2d 163, 167-68 (Mo. App. E.D. 1995); Harris II v. Missouri Dept. of Conservation, 755 S.W.2d 726, 730 (Mo. App. W.D. 1988), appeal after remand, 895 S.W.2d 66 (Mo. App. W.D. 1995), cert. denied, 516 U.S. 930, 116 S. Ct. 336 (1995). When a court finds that a regulation has gone too far and constitutes a taking, it is essentially finding that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Clay County, 988 S.W.2d at 106; Harris, 755 S.W.2d at 730.

The decision of the Court of Appeals below, finding that Missouri law recognizes a cause of action for a temporary regulatory taking of property by the government, is supported by the recent Missouri Court of Appeals decision reached in Clay County v. Harley and Susie Bogue, Inc., 988 S.W.2d 102 (Mo. App. W.D. 1999). In finding that a cause of action for a temporary regulatory taking exists, the Clay County court relied heavily upon the decision of the U.S. Supreme Court reached in First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 107 S. Ct. 2378 (1987). In that case, the U.S. Supreme Court held that temporary regulatory takings are not different in

kind from permanent takings and require compensation under the U.S. Constitution. First English, 482 U.S. at 318, 107 S. Ct. at 2388.

The Clay County court stated that the imposition of an invalid governmental regulation could, under certain circumstances, constitute a regulatory taking of property. Clay County, 988 S.W.2d at 106. The court noted that, generally, courts determine on a case-by-case basis whether a regulation “goes too far.” Id. The court, however, clearly recognized two categories of *per se* takings where a property owner is entitled to compensation for a regulatory taking without a “case specific inquiry.” Id. (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893, 120 L.Ed.2d 798 (1992)). These two situations are: (1) when a regulation causes an actual physical invasion of property and (2) when a regulation denies “all economically beneficial or productive use of land.” Id. at 107 (citing Lucas, 505 U.S. at 1015, 112 S. Ct. at 2893).

The question before the trial court and this Court now with regard to the City’s motion to dismiss is whether there is any set of facts which, if proved by Chesterfield Village, would entitle it to relief. Martin, 848 S.W.2d at 489. Chesterfield Village’s First Amended Petition more than meets this liberal test of pleading sufficiency as Count I clearly stated a claim for *per se* temporary regulatory taking under Missouri law as outlined by the court in Clay County. There is no question that the “NU” zoning classification was an invalid and unreasonable regulation as applied to the property owned by Chesterfield Village. The St. Louis County Circuit Court made it clear in its Judgment, Order and Decree issued in the underlying lawsuit in 1996 that such a zoning

regulation, as applied to the property, was illegal, null and void. *LF at 27 (A34)*. In paragraph 39 of its First Amended Petition, Chesterfield Village alleged that the City's refusal to rezone the tract at issue directly and substantially interfered with Chesterfield Village's property rights, thereby significantly impairing the value of the tract. *LF at 11 (A18)*. Moreover, in paragraphs 40-42, Chesterfield Village plead that it was deprived of all reasonable and economic use of the tract by the City's refusal to rezone the tract under the "NU" classification and that, as a result, Chesterfield Village was forced to leave the tract economically idle. *LF at 12 (A19)*. Importantly, in its judgment in the underlying lawsuit, the Circuit Court of St. Louis County agreed that the zoning regulation denied plaintiff all use of its property, concluding that:

it [was] not economically feasible to devleop [sic] the properties for use in accordance with [the City's] current 'NU' Non-Urban District zoning classificaiton [sic], or for any permitted or conditional use in the classification, and that the properties **are not adaptable for use under current zoning.**

LF at 26, ¶ 3 (A33) (emphasis added). The Court of Appeals below correctly concluded that allegations in Count I of Chesterfield Village's First Amended Petition clearly stated the elements of a cause of action for *per se* regulatory taking and were therefore sufficient to withstand the City's motion to dismiss. The holdings of the United States Supreme Court in First English and Lucas dictate the same conclusion reached by the Court of Appeals below and by the Clay County court. Because Chesterfield Village's

First Amended Petition adequately alleged facts supporting a cause of action for *per se* regulatory taking, the trial court erred in dismissing Count I for failure to state a claim under Missouri law.

B. Application of the Temporary Regulatory Takings Doctrine Is Appropriate When a Municipality Unlawfully Refuses a Request to Rezone Property.

Although Missouri courts, prior to the court below, have not specifically applied the doctrine of temporary regulatory takings actions to a city's unlawful failure to re-zone property, many other jurisdictions recognize that takings actions may arise when a government fails to grant a request to rezone property when that zoning is later found to be unreasonable by a reviewing court. Steel v. Cape Corp., 677 A.2d 634, 111 Md. App. 1 (Md. Ct. Spec. App. 1996); see also Corrigan v. City of Scottsdale, 720 P.2d 513, 518 (Ariz. banc 1986), cert. denied, 479 U.S. 986, 107 S. Ct. 577 (1986) (holding that money damages are recoverable under Arizona law for a temporary taking when a zoning ordinance is declared to be invalid by a court despite arguments from the city that the only remedy should be invalidation of the ordinance); Standard Materials, Inc. v. City of Slidell, 700 So.2d 975, 984 (La. Ct. App. 1997) (stating that a governmental taking may occur in the form of zoning or rezoning).

In Steel, the plaintiff was the owner of property zoned CR (Cottage Residential) which permitted up to 7.2 residential units per acre. Steel, 677 A.2d at 635. Without the knowledge of the property owner, the property was rezoned to OS (Open Space) at the request of the organization that leased the land. Id. The OS zoning category did not

permit any residential units. Id. The property owner later requested that the county re-zone the property from OS to R-5 (Residential). The county board denied the rezoning request based on regulations providing that property could not be rezoned unless the applicant established that schools adequate to serve the uses allowed by the new zoning classification were in existence or planned for construction. Id. at 638-39. The property owner challenged the denial in court. The trial court ordered the board to grant the request to re-zone from OS to R-5. Id. at 635. The court further found that the uses permitted in OS-zoned districts did not include any viable economic uses as applied to the property and was therefore an unconstitutional regulatory taking. Id. at 649-50. The court specifically found that:

[w]hen . . . rezoning requirements . . . [are] used to deny up zoning from a zoning classification that, as applied to a specific property, permits no viable economical uses of the property, the scheme, as applied to that property, constitutes an impermissible regulatory taking, *i.e.*, an unconstitutional taking that requires just compensation.

Id. at 651. Thus, the Maryland Court of Special Appeals has applied the regulatory takings doctrine to a refusal by a municipality to rezone property to a reasonable zoning classification. In the instant case, Chesterfield Village must be compensated for the City's denial of its request to up-zone from the "NU" zoning classification that, as applied to its property, permitted no viable economical use of the property. Such a refusal to rezone was clearly an unconstitutional taking that requires just compensation.

Courts in Iowa also hold that a regulatory taking may occur when a municipality uses its police power to enact zoning regulations that deprive property owners of the beneficial use of their property. Fitzgarrald v. City of Iowa City, 492 N.W.2d 659, 665 (Iowa 1992), cert. denied, 508 U.S. 911, 113 S. Ct. 2343 (1993). The Iowa Supreme Court recognizes “the ‘inevitable danger’ to private property that would exist if the ‘just compensation’ requirements of the [U.S. and Iowa Constitutions] could be circumvented through the guise of police power regulations.” Id. (quoting Business Ventures, Inc. v. Iowa City, 234 N.W.2d 376, 381-82 (Iowa 1975)). The court noted that:

[A] ‘taking’ does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof . . . [T]here has been a taking if, as plaintiffs contend, there has been a substantial interference with their use and enjoyment of their property. . . .

Id. at 665 (quoting Phelps v. Board of Supervisors, 211 N.W.2d 274, 276 (Iowa 1973)).

Although the court in Fitzgarrald found that the plaintiff did not sustain a sufficient loss of value to support a finding that a regulatory taking occurred under the facts presented, it is clear that Iowa courts recognize the existence of a cause of action based on zoning regulations that effect an unconstitutional taking of property requiring compensation. Id. at 666.

Similarly, Tennessee courts recognize that rezoning decisions by a municipality may effect an unconstitutional taking of property without just compensation. In one such

case, the plaintiff owned property on Mud Island, a strip of land located between the Mississippi and Wolf Rivers. Bayside Warehouse Co. v. City of Memphis, 470 S.W.2d 375, 376 (Tenn. Ct. App. 1971). The Memphis city council rezoned the land from the M-2 Industrial classification to the C-3 Commercial classification. Id. The trial court found that due to its location, the property at issue was ideally suited for river-oriented industry. Id. at 377. Moreover, because the property had practically no access to the mainland, the trial court found it difficult to conceive of any commercial use attributable to the property. Id. The court held that the commercial zoning of the property deprived the owner of any beneficial use whatsoever. Id. In finding that the zoning effected a taking, the court stated the well recognized principle that when a regulation goes so far as to deprive an owner of the beneficial use of his property, it becomes confiscatory and constitutes a taking without due process of law. Id. at 378 (citing Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 160 (1922)). The Tennessee Court of Appeals adopted in full the trial court's findings with respect to the unconstitutional taking of the plaintiff's property resulting from the municipality's unreasonable zoning classification. Id. at 377; see also MC Properties v. City of Chattanooga, 994 S.W.2d 132, 136 (Tenn Ct. App. 1999) (recognizing that a failure to grant a rezoning request may constitute an unconstitutional taking of property if the zoning regulations deprive the property owner of the beneficial use of his property).

Other courts also hold that a governmental taking may occur in the form of zoning or rezoning. Standard Materials, Inc. v. City of Slidell, 700 So.2d 975, 984 (La. Ct. App. 1997); Layne v. City of Mandeville, 633 So.2d 608, 610 (La. Ct. App. 1993), writ denied,

635 So.2d 234 (La. 1994). In Layne, plaintiff purchased property located on Lake Pontchartrain zoned as B-2, which permitted various business-related usages. Layne, 633 So.2d at 609. Plaintiff began to explore the possibility of a constructing a hotel or condominium on the property. Id. After public hearings in which neighboring property owners expressed opposition to the project, the property was rezoned by the City of Mandeville to single-family residential. Id. Plaintiff argued that the rezoning was a taking because it was denied the business use of the property. Id. at 609-610. In reversing the trial court's award of summary judgment in favor of the defendant city, the appellate court held that whether a rezoning is a regulatory taking is a factual issue based upon whether the government's action destroyed a major portion of the property's value or eliminated the practical economic uses of the property. Id. at 612; see also Standard Materials, 700 So.2d at 984; see also Zealy v. City of Waukesha, 548 N.W.2d 528 (Wisc. 1996) (recognizing a cause of action for compensation for a regulatory taking when a city rezones property but finding no deprivation of all or substantially all use of the property at issue under the facts presented).

If a rezoning of property that eliminates the practical uses of the property may effect a governmental taking, then it follows that a refusal to rezone that eliminates all practical uses of the property is also a compensable taking. In the instant case, Chesterfield Village plead just such a taking. There is no question that in its First Amended Petition, Chesterfield Village plead that the City's refusal to rezone eliminated the practical economic uses of its property. Indeed, the Circuit Court in the underlying rezoning action so found. Specifically, Chesterfield Village alleged that it was:

deprived of all economically beneficial or productive use of the tract by [the City's] refusal to rezone the tract as it was not economically feasible to develop the tract under the "NU" classification, and Chesterfield Village was thereby forced to leave the tract economically idle.

LF at 12, ¶ 41 (A19).

Although Missouri courts have not yet addressed whether an unlawful refusal to rezone property to a classification that is reasonable under Missouri zoning law may effect a governmental regulatory taking, other jurisdictions have found that a refusal to rezone property can support such a cause of action. In the instant case, Chesterfield Village sufficiently plead the elements of a cause of action for a temporary regulatory taking – a cause of action that is clearly recognized as existing under Missouri law. Clay County, supra. The only question is whether the factual situation of a refusal to rezone property is a regulatory taking under Missouri law. The City's retention of an improper zoning regulation resulting from its denial of Chesterfield Village's proper and reasonable request to rezone should be considered a temporary regulatory taking under Missouri law. As noted above, the Circuit Court of St. Louis County found the City's "NU" zoning classification as applied to Chesterfield Village's property was arbitrary, capricious, unconstitutional, illegal and null and void. *LF at 8-9, ¶¶ 25, 28 (A15-16)*. Retention of an illegal zoning classification that destroys all economically beneficial or productive use of property is the classic definition of a *per se* regulatory taking resulting from an invalid governmental regulation. Clay County, 988 S.W.2d at 106-107. That is

exactly what Chesterfield Village has plead. Chesterfield Village urges this Court to find that under the facts as alleged in this case, it sufficiently stated a cause of action for temporary regulatory taking in Count I of its First Amended Petition and, as a result, the trial court erred in dismissing the First Amended Petition.

C. Public Policy Concerns Support Chesterfield Village’s Cause of Action for Temporary Regulatory Taking.

As this Court has noted in past decisions, the right to own private property is a bedrock principle in American law. Odegard v. Board of Zoning Adjustment, 6 S.W.3d 148, 149 (Mo. banc 1999). “The importance of this right is reflected in the federal and Missouri constitutional provisions that protect private property, even against taking by the government without just compensation.” Id. The government may regulate the use of private property but such regulation must be a reasonable exercise of its police power or it may effect a taking. Id.

Zoning law developed during the early part of this century as a method for channeling growth. Matthew v. Smith, 707 S.W.2d 411, 412 (Mo. banc 1986). Zoning acts authorize municipalities to pass ordinances, which designate the boundaries for districts and which define the allowable land uses in such districts. Id. at 412-13. Thus, municipalities derive their authority to establish land use regulations through the state's police power delegated through enabling statutes. State ex rel. Casey’s General Store v. City of Louisiana, 734 S.W.2d 890, 895 (Mo. App. E.D. 1987); Heidrich v. City of Lee’s Summit, 916 S.W.2d 242, 248 (Mo. App. W.D. 1995).

Under Missouri’s zoning enabling statutes, municipal legislative bodies are empowered to create zoning districts and to regulate items such as the size of buildings, lots and the density of the population, but such regulation must only be for the purpose of “promoting health, safety, morals or the general welfare of the community.” R.S.Mo. §§ 89.020 and 89.030. Moreover, the zoning regulations must “encourage the **most appropriate use** of land throughout [the] municipality.” R.S.Mo. § 89.040 (emphasis added). Missouri courts recognize that the legislative body has a duty to determine the reasonable use classification for any particular area. Loomstein v. St. Louis County, 609 S.W.2d 443, 446 (Mo. App. E.D. 1980) (citing Vatterott v. City of Florissant, 462 S.W.2d 711, 713 (Mo. 1971)).

In enacting the zoning enabling statutes, the Missouri legislature did not intend for zoning categories to remain static. Indeed, the enabling statutes specifically provide that the legislative bodies of municipalities “shall provide the manner in which such [zoning] regulations and restrictions and the boundaries of such [zoning] districts shall be determined, established, and enforced, **and from time to time amended, supplemented, or changed.**” R.S.Mo. § 89.050 (emphasis added); see also R.S.Mo. § 89.060 (stating that zoning regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed and providing for protest procedures with respect to such changes).

It is clear that municipalities and other local governmental bodies must follow certain established principles in exercising their police power with respect to zoning and that municipalities’ zoning decisions must comply with Missouri law. Zoning ordinances

must comply with constitutional requirements or they may effect a taking of private property. For example, in order to avoid violation of constitutional provisions preventing the taking of private property without compensation, zoning ordinances must permit continuation of nonconforming uses in existence at the time of their enactment. Missouri Rock, Inc. v. Winholtz, 614 S.W.2d 734, 739 (Mo. App. W.D. 1981).

Time and time again, in reviewing the zoning applied by municipal legislative bodies, Missouri courts have held that zoning classifications must be reasonable or they violate the due process clauses of the U.S. and Missouri Constitutions. State ex rel. Barber & Sons Tobacco Co. v. Jackson County, 869 S.W.2d 113, 116-17 (Mo. App. W.D. 1993); Elam v. City of St. Ann, 784 S.W.2d 330, 334 (Mo. App. E.D. 1990). Missouri courts note that a zoning decision “is considered arbitrary and unreasonable if it bears no substantial relationship to the public health, safety, morals, or general welfare.” Heidrich, 916 S.W.2d at 248 (citing State ex rel. Barber & Sons Tobacco Co., 869 S.W.2d at 117). If the public welfare is not served by the zoning or if the public interest served by the zoning is greatly outweighed by the detriment to private interests, then the zoning is arbitrary and unreasonable. Id. at 248-49 (citing Despotis v. Sunset Hills, 619 S.W.2d 814, 820 (Mo. App. E.D. 1981)). Importantly, where a zoning ordinance restricts property to a use for which it is not adapted, the ordinance invades the rights of the property owner and is unreasonable. West Lake Quarry and Material Co. v. City of Bridgeton, 761 S.W.2d 749, 751 (Mo. App. E.D. 1988) (citing Despotis, 619 S.W.2d at 821). Whether the classification of a zoning ordinance is reasonable and therefore constitutional or whether it is arbitrary and unreasonable, and therefore unconstitutional

in its application to a specific property, depends on the evidence and facts of each case. Loomstein, 609 S.W.2d at 446. A reviewing court may reverse a legislative zoning decision if that decision is “not fairly debatable” under the principles of Missouri law. Heidrich, 916 S.W.2d at 248.

Significantly, the Circuit Court in the underlying rezoning action found that “There [was] no public benefit to be derived by a continuance of [the City’s] ‘NU’ Non-Urban zoning of the Propert[y].” *LF at 25, ¶ 41 (A32)*. Further, the Circuit Court concluded that “. . . any public benefit to be derived from a continuation of the present “NU” Non-Urban District zoning classification of the propert[y] is greatly outweighed by the detriment to the interests of Chesterfield Village, Inc. caused by a continuation of said zoning, and . . . the public welfare will not be promoted by a continuation of the present “NU” Non-Urban District zoning classification.” *LF at 27, ¶ 8 (A34)*. In essence, the Circuit Court found that it is the public as a whole that must bear the loss and not Chesterfield Village as an individual property owner. In so finding, the Circuit Court essentially found a taking of Chesterfield Village’s property. See e.g. Clay County, 988 S.W.2d at 106 (noting that when a court finds that a regulation has gone too far and constitutes a taking, it is essentially finding that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest).

The Missouri Court of Appeals has noted that its analysis of due process challenges to the validity of applied zoning ordinances “is virtually indistinguishable from the evaluation of constitutional takings claims.” Elam, 784 S.W.2d at 337. The analysis under the takings clause requires the same weighing of private and public

interests as required in the court’s due process analysis. *Id.* In the instant case, the Circuit Court has already found that the City’s “NU” zoning ordinance as applied to Chesterfield Village’s property violated the due process clauses of both the U.S. and Missouri Constitutions. *LF at 9, ¶ 27 and at 27, ¶ 9 (A16 and A34).* In finding a due process violation, the Circuit Court essentially found a constitutional taking by the City, given that the analysis of those claims is “virtually indistinguishable.”³ Public policy demands that Chesterfield Village be entitled to compensation for the unconstitutional taking of its property by the City’s application of an unreasonable and unconstitutional zoning ordinance.

In the appellate court below, the City incorrectly argued that Chesterfield Village seeks the creation of a “new” cause of action for damages associated with improper zoning and that, for public policy reasons, such a cause of action should not be allowed. As noted, Missouri courts have already recognized a cause of action for a temporary regulatory taking. *See Clay County, supra.* Chesterfield Village merely seeks compensation under that existing doctrine for the City’s illegal act in refusing to follow Missouri law and its failure to place a reasonable zoning classification on Chesterfield

³ As noted in Section IV, *infra*, Chesterfield Village could not have brought its damages claim seeking compensation for the taking of its property at the time it sought the Circuit Court’s review of the “NU” zoning as applied because under Missouri law its damages would have been premature until such time as the City rezoned the property to some classification other than “NU.”

Village's property. The lack of a reasonable and economically viable zoning classification essentially means property has no zoning. The City of Chesterfield, and other municipalities in St. Louis County, consistently seek to avoid having to make unpopular zoning decisions and instead place that burden on the St. Louis County Circuit Courts. Thus, in the underlying rezoning action, it was up to the Circuit Court to determine that the City's existing "NU" zoning no longer met the purposes of Missouri's enabling statutes, which require that zoning districts be established "to promote the health, safety, morals or the general welfare of the community." R.S.Mo. §§ 89.020 and 89.030; *LF at 8-9, ¶ 25 (A15-16)*. The City, when confronted with Chesterfield Village's request for a change of zoning, chose to retain the invalid, unreasonable and unconstitutional "NU" zoning. As the Circuit Court found, the City completely abrogated its duty of promoting health, safety and the general welfare, which is inherent in the creation and application of zoning ordinances under Missouri law. The Circuit Court in the underlying rezoning action noted that the City could have changed the zoning to some reasonable category other than what Chesterfield Village requested in its petition for change in zoning but, instead, the City simply chose to retain the invalid "NU" zoning classification. *LF at 8, ¶ 22 and at 24, ¶¶ 28-29 (A15 and A31)*. When a municipality blatantly ignores the requirements of the Missouri Constitution and zoning enabling statutes and improperly retains an unreasonable and illegal zoning classification that deprives a property owner of all economically beneficial use of his land, the property owner must be entitled to compensation for an illegal taking.

Importantly, in First English, the United States Supreme Court recognized that non-monetary injunctive and declaratory relief are insufficient remedies when a government regulation denies a property owner the use of its land, even when that denial is only temporary. First English, 482 U.S. at 314-319, 107 S. Ct. at 2385-2388. The Court noted that the Just Compensation Clause of the Fifth Amendment to the U.S. Constitution “is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.” Id. at 315, 107 S.Ct. at 2385-86 (emphasis in original).⁴ The Court stated that the Just Compensation provision is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” First English, 482 U.S. at 318-19, 107 S. Ct. at 2388. Therefore, when a burden results from a government action or regulation that amounts to a taking, “the Just Compensation Clause . . . **requires** that the government pay the landowner for the value of the use of the land during this period.” Id. at 319, 107 S. Ct. at 2388 (emphasis added). The Supreme Court clearly recognized that invalidation of the ordinance or regulation is **not** a sufficient remedy to meet the demands of the Just Compensation Clause. Id. Thus, in this case, Chesterfield Village was not made whole by the invalidation of the “NU” zoning ordinance by the Circuit Court in the underlying zoning case. Instead, Chesterfield Village must be compensated for the value of the use

⁴ Missouri courts note that the Missouri Constitution contains a similar Just Compensation clause. Harris, 755 S.W.2d at 729-30; MO. CONST. art. I, § 26.

of its land during the period that the City zoned the property such that Chesterfield Village was denied all economically beneficial or productive use of that property.

Allowing Chesterfield Village and other developers to pursue inverse condemnation or temporary regulatory takings claims would not improperly restrict municipalities with respect to their zoning decisions. If anything, such a remedy forces municipalities to take seriously the mandate in Missouri's zoning enabling statutes requiring them to apply reasonable zoning classifications. In fact, the U.S. Supreme Court recognized that its holding in First English, allowing claims for temporary takings, might restrict local governments with respect to land use planning but found that such a restriction was justified given the property owner's constitutional rights at stake. First English, 482 U.S. at 321-22, 107 S. Ct. at 2389. The public policy goals supported by the U.S. and Missouri Constitutions and the framework of the Missouri zoning enabling statutes demand that Chesterfield Village be compensated for the illegal taking of its property by the City's application of an unreasonable and unconstitutional zoning ordinance.

D. Chesterfield Village Must Be Compensated, as a Matter of Law, for the Taking of Its Property Resulting from the Application of the "NU" Zoning Regulation even though that Regulation Preexisted Chesterfield Village's Ownership of the Property.

At the time Chesterfield Village acquired the property at issue, it was located in an unincorporated portion of St. Louis County and was zoned in St. Louis County's "NU" Non-Urban classification. *LF at 6 (A13)*. The City obtained jurisdiction over the

Property when the City of Chesterfield was incorporated in 1988. Id. At that time, the City adopted the “NU” zoning classification for the Property that had been previously designated by St. Louis County. Id.

In the courts below, the City argued that because the property was zoned as “NU” when Chesterfield Village acquired it, the City committed no affirmative act with respect to the property by retaining that zoning and therefore no taking occurred. The City sought to distinguish the U.S. Supreme Court’s holding in Lucas, supra, which recognized a taking when a government regulation denied a property owner all economically beneficial or productive use of his land, on the basis that the governmental regulatory agency in that case affirmatively changed the zoning regulations after the property owners bought the land and thus prevented them from developing the property. Because Chesterfield Village purchased the property at issue while it was zoned “NU,” the City argues there can be no taking.

It is clear that the takings action recognized in Lucas is not limited to regulations enacted following the purchase of property. Although the U.S. Supreme Court noted that the plaintiff in Lucas bought his property before a change in the governing zoning regulations, the Court did not rest its ruling on that fact. The Court clearly recognized a cause of action for a categorical regulatory taking when a government regulation denies a property owner “all economically beneficial or productive use of land.” Lucas, 505 U.S. at 1015, 112 S. Ct. at 2893.

Moreover, in a recent case, the U.S. Supreme Court made it abundantly clear that regulations in effect prior to the purchase of property may effect a temporary regulatory

taking. Palazzolo v. Rhode Island, ___ U.S. ___, 121 S. Ct. 2448, 2464 (2001). In that case, the plaintiff owned a waterfront parcel of land that was almost completely designated as coastal wetlands under Rhode Island law. Id. at 2454. At the time that title to the property passed to the plaintiff by operation of law, the wetlands regulations limiting development were already in place. Id. at 2462. In deciding plaintiff’s takings claim, the Rhode Island Supreme Court held that a purchaser or a successive title holder is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking. Id. The U.S. Supreme Court, however, reversed the state court and held that “a claim [for compensation] is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.” Id. at 2464. The Court reasoned that:

Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State’s rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, not matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. **Future**

generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 2462-63 (emphasis added). In effect, the Supreme Court held that a state may not avoid paying constitutionally-required just compensation when an unreasonable land use regulation effects a taking of property, simply because the plaintiff had notice of the regulation when the land was acquired. Id. at 2463-64.

Moreover, as in the underlying rezoning case tried to the Circuit Court, circumstances can change over time that cause an arguably once valid zoning ordinance to become unreasonable and arbitrary as applied to the same property in the future. Future generations must be allowed to challenge those types of unreasonable land use regulations even though they take title with notice of the zoning regulation. In this case, the Circuit Court, in the underlying 1996 lawsuit challenging the application of the “NU” zoning classification to Chesterfield Village’s property, specifically found that a development pattern had been established in the area surrounding the property that was inconsistent with any development that would be permitted pursuant to the City’s “NU” classification. *LF at 24, ¶¶33-34 and 36 (A31)*. The court further found that:

[T]he “NU” Non-Urban District zoning classification as applied to the propert[y] [was] unreasonable, arbitrary, capricious and unconstitutional in that it [was] **totally inconsistent with the character of development** in the surrounding area and [was] not required to promote the public

safety, health, convenience, comfort, morals, prosperity or
general welfare of Chesterfield.

LF at 26, ¶ 5 (A33) (emphasis added). The failure of the City to approve Chesterfield Village's request for rezoning of its property to a reasonable zoning classification was an affirmative, invalid act on the part of the City that denied Chesterfield Village the economically viable use of its property. The City's continuation of an improper zoning classification despite the change in development patterns in the neighboring properties resulted in a temporary regulatory taking until such time as the City applied a reasonable zoning classification after being ordered to do so by the trial court. Chesterfield Village is entitled to compensation for that taking as a matter of law.

E. Chesterfield Village Clearly Plead a Denial of All Economically Beneficial or Productive Use of Its Property, and the Trial Court Erred in Dismissing the First Amended Petition.

The City argued in the courts below that Chesterfield Village was not deprived of all use of its land when the City refused to re-zone the land as requested. The test articulated by both the Missouri Court of Appeals and the U.S. Supreme Court is not whether a property owner has been denied "all use" of its property but whether it has been denied "all **economically beneficial or productive** use of [its] land." Clay County, 988 S.W.2d at 107 (citing Lucas, 505 U.S. at 1015, 112 S. Ct. at 2893) (emphasis added). The First Amended Petition clearly alleged a denial of all economically beneficial or productive use of Chesterfield Village's land as a result of the City's refusal to apply a

proper zoning classification to the property. *LF at 8, ¶ 23 and at 11-12, ¶¶ 37-42 (A15 and A18-19).*

Indeed, the Circuit Court in the underlying rezoning action found that houses with 3-acre lots, as required under the NU zoning classification, were impractical for the property owned by Chesterfield Village and would not sell, so it was not economically feasible or productive to develop the property under the “NU” ordinance. *LF at 24, ¶¶ 36, 37 and at 25, ¶¶ 40, 43 (A31-32).* Specifically, the Circuit Court, in deciding that the “NU” zoning violated Missouri law, held that Chesterfield Village’s property was not adaptable for use “in accordance with [the City’s] current ‘NU’ Non-Urban District zoning classification [sic], or for any permitted or conditional use in the classification....” *LF at 26, ¶ 3 (A33).* Thus, a court has already ruled that Chesterfield Village was denied all economic use of its property when the City refused to change the “NU” zoning. Chesterfield Village specifically plead in the First Amended Petition that the City’s failure to place a reasonable zoning classification on the property denied it “all economically beneficial or productive use” of its land. *LF at 8, ¶ 23 and at 11-12, ¶¶ 37-42 (A15 and A18-19).*

The reasonable inferences from the facts plead in the petition that support Chesterfield Village’s allegation regarding its denial of the use of its property must be viewed in a light most favorable to Chesterfield Village. The Court of Appeals below correctly determined that viewing the facts alleged and the reasonable inferences therefrom in a light most favorable to plaintiff, Chesterfield Village plead a cause of action for *per se* temporary regulatory taking. Slip Opinion, at 6 (A7). The Court

correctly noted that whether Chesterfield Village can meet its burden of proof is a question of fact to be tested by summary judgment or trial, and not by a motion to dismiss. Id.

As noted above, the court in Clay County recognized a *per se* cause of action exists for a temporary regulatory taking when all economically beneficial or productive use of land is denied by application of an invalid government regulation. Count I of the First Amended Petition clearly states a cause of action under Missouri law by alleging such a denial of all economically beneficial or productive use of its land, and thus a *per se* temporary regulatory taking. The trial court erroneously applied Missouri law in dismissing Count I of the First Amended Petition. As such, the judgment of the trial court in dismissing the First Amended Petition for failure to state a cause of action must be reversed.

II. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DISMISSING COUNT II OF THE FIRST AMENDED PETITION ALLEGING THAT THE CITY’S FAILURE TO REZONE THE SUBJECT PROPERTY TO A REASONABLE ZONING CLASSIFICATION RESULTED IN AN INVERSE CONDEMNATION OF CHESTERFIELD VILLAGE’S PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF ARTICLE 1, SECTION 26 OF THE MISSOURI CONSTITUTION IN THAT THE EXISTENCE OF SUCH A CAUSE OF ACTION IS RECOGNIZED UNDER MISSOURI LAW AND CHESTERFIELD VILLAGE ADEQUATELY PLEAD FACTS UPON WHICH RELIEF COULD BE GRANTED.

Assuming, *arguendo*, this Court finds that Missouri law does not recognize a cause of action for a temporary regulatory taking, then, alternatively, Count II of the First Amended Petition adequately alleged a cause of action under Missouri law for inverse condemnation as a result of the City’s unreasonable and invalid application of the “NU” zoning classification to the property owned by Chesterfield Village, and the trial court erred in dismissing that count. In reviewing Chesterfield’s Village’s First Amended Petition, the Court of Appeals found that Missouri law supported both a cause of action for a temporary regulatory taking based upon the City’s action in refusing to rezone and a cause of action for inverse condemnation. Slip Opinion, at 8 (A9). The court, however, cautioned that at trial, Chesterfield Village would have to decide which cause of action to pursue. Id.

The Court of Appeals below correctly noted that a claim for compensation for condemnation is predicated on the Fifth and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 10 and 26 of the Missouri Constitution. Slip Opinion, at 6 (A7). The court stated that the Fifth Amendment guarantees that no person shall be deprived of property without due process of law and that private property shall not be taken for public use without just compensation. Id. at 6-7 (A7-8). The Fourteenth Amendment makes the protections of the U.S. Constitution applicable to actions by the states. Id. at 7 (citing Bi-State Development Agency of Missouri-Illinois Metropolitan Dist. v. Nikodem, 859 S.W.2d 775, 778 (Mo. App. E.D. 1993)). The court further noted the Missouri Constitution contains protections similar to those in the U.S. Constitution. Id. Specifically, Article I, Section 10 of the Missouri Constitution provides that “no person shall be deprived of life, liberty or property without due process of law” and Section 26 states that “private property shall not be taken or damaged for public use without just compensation.” Id. (quoting MO. CONST. Art. I, §§ 10 and 26).

Pursuant to those constitutional provisions, Missouri courts have recognized a cause of action for inverse condemnation where private property has been taken or damaged for public use. Schnuck Markets, 895 S.W.2d at 167. Missouri courts hold that under the just compensation provisions of the Fifth and Fourteenth Amendments to the United States Constitution and the similar provision in Article I, § 26 of the Missouri Constitution, a landowner has the right to challenge land use regulations by way of a suit for inverse condemnation. Harris II, 755 S.W.2d at 729.

Under Missouri law, a landowner seeking inverse condemnation “does not have to show an actual taking of property, but must plead and prove ‘an invasion or appropriation of some valuable property right which the landowner has to the legal and proper use of his property, which invasion or appropriation directly and specially affect[s] the landowner his injury.’” Schnuck Markets, 895 S.W.2d at 167 (quoting Harris II, 755 S.W.2d at 729); see Wolfe v. State ex rel. Mo. Hwy. & Transp. Comm’n, 910 S.W.2d 294, 299 (Mo. App. W.D. 1995) (holding that plaintiffs complied with the requirements for an inverse condemnation action by alleging that they owned the property at issue, that it had value and that defendant effected “an unconstitutional taking . . . without formal condemnation or payment of compensation of an interest in plaintiff’s property”).

The Court of Appeals below correctly determined that Count II of Chesterfield Village’s First Amended Petition stated a claim for inverse condemnation under Missouri law. In paragraph 55, Chesterfield Village plead that the City’s refusal to rezone its property “constituted an invasion and/or appropriation of Chesterfield Village and the Sachs’ valuable property rights and its legal and proper right to use and develop its property.” *LF at 15 (A22)*. In paragraph 58, Chesterfield Village plead that it had been damaged as a direct and proximate result of the City’s refusal to rezone the property in that it was unable to develop its property during the takings period. *LF at 15 (A22)*. Thus, Count II of Chesterfield Village’s First Amended Petition clearly alleged facts supporting the elements of a cause of action for inverse condemnation under Missouri law.

The decision of the Court of Appeals is in accord with other state courts recognizing that an inverse condemnation action is a proper method of recovering damages when actions by a governmental body constitute a temporary regulatory taking. In a recent case, a plaintiff sued a municipality for inverse condemnation for a temporary regulatory taking resulting from the city's delay in issuing a demolition permit. Ali v. City of Los Angeles, 91 Cal. Rptr.2d 458, 459 (Cal. Ct. App. 1999), cert. denied, 531 U.S. 827, 121 S. Ct. 77 (2000). After the plaintiff's hotel was substantially destroyed by fire in November 1988, the plaintiff sought to demolish the remains and sell the land. Id. He applied for a demolition permit in January 1989. Id. The city withheld the permit because officials believed the hotel was a single room occupancy ("SRO") hotel, and the city had an ordinance prohibiting demolition of such low income housing. Id. Eventually, but not until August 1990, the city determined that the hotel was not an SRO hotel and permitted demolition. Id. The trial court found in favor of the plaintiff on the inverse condemnation claim, holding that the delay in issuing the demolition permit was a regulatory taking of the plaintiff's property because demolition was the only economically viable option for use of the land, and the delay had thus deprived the plaintiff of the only economically viable use of his property. Id. at 460.

In affirming the trial court's judgment, the appellate court found that the city's wrongful denial of a demolition permit between January 1989 and August 1990 effected a temporary regulatory taking of the plaintiff's property. Ali, 91 Cal. Rptr.2d at 460. The court noted that the main significance of the U.S. Supreme Court's ruling in First English is that a temporary regulatory taking consisting of the temporary deprivation of

all economically viable use of the property requires compensation for the period of time the regulation denied the owner all use of the land. *Id.* at 461. The court emphasized that the failure to issue the permit was a temporary taking and not merely a normal delay in the development process. *Id.* at 462-63. The court concluded that the city's attempt to enforce its SRO ordinance was "'so unreasonable from a legal standpoint' as to be arbitrary, not in furtherance of any legitimate governmental objective, and for no other purpose than to delay any development other than for an SRO hotel." *Id.* at 464 and 465-66. Therefore, the delay in demolition of the hotel was a temporary regulatory taking requiring compensation. *Id.*

Similarly, the City's actions in failing to rezone Chesterfield Village's property to a reasonable zoning classification was "so unreasonable from a legal standpoint" as to be arbitrary and not in furtherance of any legitimate governmental objective. The Circuit Court of St. Louis County found that the "NU" classification served no public benefit and that the "NU" classification was unreasonable, arbitrary, capricious and unconstitutional as applied to Chesterfield Village's 46.3-acre tract because it was "not required to promote the public safety, health, convenience, comfort, morals, prosperity or general welfare of Chesterfield." *LF at 8-9, ¶¶ 21 and 25-27 (A15-16)*. The court further found that the "NU" classification as applied to the tract was illegal and ordered the City to place a reasonable zoning classification on the tract. *LF at 9, ¶ 28 (A16)*. Indeed, when the City rezoned the property as ordered by the trial court, it did so in a manner substantially similar to that proposed by Chesterfield Village in November 1994. *LF at 9-10, ¶¶ 28-33 and at 80, ¶ 34 (A16-17 and A53)*. In doing so, it confirmed that the City

had acted improperly from the time it originally denied the rezoning petition. During all that time, the land owned by Chesterfield Village sat fallow. As in Ali, Chesterfield Village should be allowed to recover damages by way of inverse condemnation for the temporary regulatory taking of its property as a result of the City's illegal act in refusing to rezone the property as required by Missouri law.

Other jurisdictions recognize that inverse condemnation actions for regulatory takings may arise from zoning or rezoning decisions made by local governments. In one such case, the plaintiff was the owner of property zoned RU-2 Residential with a variance for airport use when the county rezoned the property to PA (Private Airport). New Port Largo, Inc. v. Monroe County, 873 F. Supp. 633, 635-36 (S.D. Fla. 1994), aff'd, 95 F.3d 1084 (11th Cir. 1996), cert. denied, 521 U.S. 1121, 117 S. Ct. 2514 (1997). Following suit by the property owner, the state court declared the PA zoning classification invalid and quashed the county's rezoning of the subject property. Id. at 637. The plaintiff then filed suit in federal court seeking damages pursuant to 42 U.S.C. § 1983 for violation of the Fifth Amendment Just Compensation Clause during the time that the property was invalidly zoned by the county. Id. Although it found that the claim was not ripe for federal adjudication, the court, in dicta, stated that a state remedy under the Fifth Amendment to the United States Constitution and Article X of the Florida Constitution was available to the plaintiff for the alleged temporary taking of its property due to the invalidation of the zoning ordinance. Id. at 638. Moreover, the court noted that a line of cases in Florida recognize that Florida law permits a landowner to bring inverse condemnation claims in rezoning cases. Id. at 639.

Importantly, the U.S. District Court for the Eastern District of Missouri has held that Missouri law should allow for recovery of damages by way of a suit for inverse condemnation when a zoning decision effects a taking of property. Wintercreek Apartments of St. Peters v. City of St. Peters, 682 F. Supp. 989, 993 (E.D. Mo. 1988). In that case, the plaintiff challenged a zoning decision of the City of St. Peters by way of an action under 42 U.S.C. § 1983. The court held that the plaintiff's takings claim must first be presented to a Missouri state court in a suit for inverse condemnation before proceeding to federal court for compensation. Id. (citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108 (1985)). The court noted that at that time, in 1988, it was less than clear whether Missouri law provided an inverse condemnation remedy to redress takings allegedly created by application of zoning ordinances. Id. The court, however, cited the decision by the United States Supreme Court in First English, which allowed recovery for temporary regulatory takings, and determined that the inverse condemnation remedy should be available to plaintiffs if they can satisfy the Missouri court that a taking has occurred. Id. Since the District Court's decision in Wintercreek Apartments, the Missouri Court of Appeals has made it clear that Missouri courts allow a cause of action for temporary regulatory takings when all economically beneficial or productive use of property is denied. See Clay County, supra.

As noted above, it is clear that Missouri courts recognize a cause of action for inverse condemnation where private property has been taken or damaged for public use. If the Court finds that a separate cause of action does not exist under Missouri law for a

temporary regulatory taking as alleged in Count I of Chesterfield Village's First Amended Petition, Chesterfield Village may still state a claim upon which relief may be granted under its cause of action for inverse condemnation in Count II. See e.g. Ali, 91 Cal. Rptr.2d at 465-66. Count II of Chesterfield Village's First Amended Petition clearly states a cause of action under Missouri law for inverse condemnation as a result of the City's illegal refusal to rezone the property. As such, the trial court erred in dismissing Count II for failure to state a claim upon which relief may be granted.

III. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DISMISSING COUNT III OF THE FIRST AMENDED PETITION ALLEGING THAT THE CITY'S FAILURE TO REZONE THE SUBJECT PROPERTY TO A REASONABLE ZONING CLASSIFICATION EFFECTED A TEMPORARY REGULATORY TAKING OF CHESTERFIELD VILLAGE'S PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT THE EXISTENCE OF SUCH A CAUSE OF ACTION IS RECOGNIZED UNDER FEDERAL LAW AND CHESTERFIELD VILLAGE ADEQUATELY PLEAD FACTS UPON WHICH RELIEF COULD BE GRANTED.

Assuming, *arguendo*, this Court finds that Missouri law does not support Chesterfield Village's takings or inverse condemnation claims, the First Amended Petition adequately stated a claim for relief under the well-developed body of federal law regarding regulatory takings and the trial court, therefore, erred in dismissing the First Amended Petition. The Court of Appeals below correctly found that Count III adequately stated a cause of action for a temporary regulatory taking under federal law.

Count III of Chesterfield Village's First Amended Petition alleges a cause of action for a temporary regulatory taking under 42 U.S.C. § 1983.⁵ Section 1983 provides

⁵ In its Opinion, the Court of Appeals adopted the discussion of § 1983 actions contained in the appellant's brief submitted to that court by Chesterfield Village.

in pertinent part as follows:

Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress.

42 U.S.C.A. § 1983 (1994). The purpose of § 1983 is to deter or prevent persons with state authority from using that authority to deprive individuals of federally-guaranteed rights. Knapp v. Junior College Dist. of St. Louis County, Mo., 879 S.W.2d 588, 591 (Mo. App. E.D. 1994), overruled on other grounds by, State ex rel. Yarber v. McHenry, 915 S.W.2d 325, 330 (Mo. banc. 1995). Additionally, should such a deprivation of constitutional rights occur, § 1983 provides a means whereby relief may be found to address the deprivation. Id. (citing Wyatt v. Cole, 504, U.S. 158, 161, 112 S. Ct. 1827, 1830, 118 L.Ed.2d 504 (1992)).

Both state and federal courts possess jurisdiction to hear 42 U.S.C. § 1983 cases. Knapp, 879 S.W.2d at 591 (citing Howlett v. Rose, 496 U.S. 356, 358, 110 S. Ct. 2430, 2433, 110 L.Ed.2d 332 (1990)). The elements of a § 1983 claim are: (1) defendant deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and (2) defendant was acting under the color of state law at the time of the conduct constituting the deprivation. Foremost Insurance Company v. Public Service Commission of Missouri, 985 S.W.2d 793, 796 (Mo. App. W.D. 1998).

As noted above, the Just Compensation Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that private property shall not be taken for a public use without just compensation. Harris II, 755 S.W.2d at 729. The United States Supreme Court has often recognized that while property may be regulated to a certain extent, if regulation goes too far, it becomes a taking. First English, 482 U.S. at 316, 107 S. Ct. at 2386. In First English, the Court noted that “temporary” takings, which deny the landowner the use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. Id. at 318, 107 S. Ct. at 2388. The Court thus held that a legally imposed restriction which the government later repeals, rescinds or amends may result in a compensable temporary taking. Id. at 322, 107 S. Ct. at 2389. The Court stated that “where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” First English, 482 U.S. at 321, 107 S. Ct. at 2389; Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 n.17, 112 S. Ct. 2886, 2901 n.17, 120 L.Ed.2d. 798 (1992).

Significantly, the Supreme Court recognized that its holding allowing claims for temporary takings may restrict local governments with respect to land use planning but found that such a restriction was justified. First English, 482 U.S. at 321-22, 107 S. Ct. at 2389. Specifically, the Court noted:

We realize that even our present holding will undoubtedly
lessen to some extent the freedom and flexibility of land-use

planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, ‘a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.’

Id. (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S. Ct. 158, 160 (1922)). In fact, one court has argued that requiring compensation for temporary regulatory takings is a means of “punishing” the government for its “lawless behavior” in order to discourage future unconstitutional regulation as a matter of public policy. Williams v. City of Central, 907 P.2d 701, 706 (Colo. App. 1995) (citing San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 101 S. Ct. 1287 (1981) (Brennan, J, dissenting)).

Regulatory takings ordinarily are identified by a case-specific factual inquiry that weighs competing public and private interests. See Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L.Ed. 106 (1980). The United States Supreme Court, however, has held that regulations which compel owners to suffer a physical invasion or

occupation of their property **or which deny owners all economically beneficial or productive use of the land** are ipso facto, categorical regulatory takings that demand just compensation. Lucas, 505 U.S. at 1015, 112 S. Ct. at 2893. It is clear from Lucas and First English that if a regulatory restriction, enacted as permanent but ultimately invalidated, worked a total deprivation of all economically viable use of property, then the government must pay for this deprivation. Williams, 907 P.2d at 706. That describes exactly the case at bar. Chesterfield Village has alleged that a zoning classification that was invalidated by a court worked a total deprivation of all economically viable use of its property and, indeed, the trial court in the underlying rezoning action so found. *LF at 26, ¶ 3 (A33)*. Thus, Chesterfield Village is entitled to compensation under federal law.

The Court of Appeals below correctly found that the allegations and facts alleged in Count III of Chesterfield Village's First Amended Petition met the liberal test of pleading sufficiency, and the trial court therefore erred in dismissing the federal claim. In Count III, Chesterfield Village clearly plead a cause of action for damages under 42 U.S.C. § 1983 for a temporary regulatory taking. Paragraph 66 alleged that the City's refusal to rezone the tract at issue deprived Chesterfield Village of its right to just compensation for the taking of private property for public use secured to it by the Fifth and Fourteenth Amendments to the United States Constitution. *LF at 17 (A24)*. Paragraph 65 plead that the City's actions were done under the color of state law. *LF at 17 (A24)*. Paragraph 63 plead that the City's actions denied Chesterfield Village all economically viable use of the tract at issue. *LF at 16 (A23)*. Importantly, in its judgment in the underlying lawsuit, the Circuit Court of St. Louis County agreed that the

zoning regulation denied plaintiff all use of its property, concluding that the property was “not adaptable for use under [the] current [“NU”] zoning.” *LF at 26, ¶ 3 (A33)*.

Assuming the truth of the facts as plead by Chesterfield Village, which the trial court was required to do, the First Amended Petition clearly stated a cause of action for damages under 42 U.S.C. § 1983 for the temporary regulatory taking caused by the City’s refusal to rezone the tract at issue to a reasonable zoning category.

As noted above, federal law, in the form of 42 U.S.C § 1983, provides a means of relief to redress the deprivation of constitutional rights by a defendant acting under the color of state law. If, for some reason, this Court should find that Missouri law affords Chesterfield Village no relief on its taking or inverse condemnation claims, Chesterfield Village clearly stated a claim under federal takings law concurrent with its state law claims. Count III of Chesterfield Village’s First Amended Petition sufficiently plead facts supporting a cause of action under § 1983 for the temporary regulatory taking of Chesterfield Village’s property by the City without just compensation. Thus, the trial court erred in dismissing Count III of the First Amended Petition.

IV. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DISMISSING COUNTS I, II, III OF THE FIRST AMENDED PETITION TO THE EXTENT, IF ANY, THAT IT RELIED ON THE DOCTRINE OF *RES JUDICATA* TO BAR THE CLAIMS ASSERTED IN THOSE COUNTS IN THAT CHESTERFIELD VILLAGE COULD NOT HAVE ASSERTED ITS CLAIMS IN THE ORIGINAL ACTION BECAUSE THEY WERE PREMATURE AS DAMAGES COULD NOT BE DETERMINED UNTIL THE CITY PLACED A REASONABLE ZONING CLASSIFICATION ON THE SUBJECT PROPERTY.

In its motion to dismiss submitted to the trial court, the City argued that the doctrine of *res judicata* barred Chesterfield Village from bringing its claims for damages for inverse condemnation, regulatory taking and violation of 42 U.S.C. § 1983 as alleged in its First Amended Petition.⁶ *LF at 61.* The City claimed that the judgment entered in Chesterfield Village’s first lawsuit against the City somehow bars the current suit for damages because Chesterfield Village elected not to pursue monetary damages at that time. In that action, Chesterfield Village sought a declaratory judgment as to the validity of the “NU” zoning classification as applied to Chesterfield Village’s property, an injunction prohibiting the City from applying the “NU” zoning to that property and an injunction ordering the City to rezone the property to a reasonable zoning classification.

⁶ It should be noted that the Circuit Court dismissed Chesterfield Village’s First Amended Petition for failure to state a claim upon which relief could be granted and not on the grounds of *res judicata*. *LF at 115 (A55).*

The Circuit Court granted Chesterfield Village the equitable relief sought and ordered the City to place a reasonable zoning classification on the property.

The doctrine of *res judicata* precludes parties from contesting matters that the parties have had a full and fair opportunity to litigate in a prior action. Lay v. Lay, 912 S.W.2d 466, 471 (Mo. banc 1995). The doctrine of *res judicata* bars a claim if the following elements are satisfied:

- (1) identity of the thing sued for;
- (2) identity of the cause of action;
- (3) identity of the persons or parties to the action; and
- (4) identity of the quality or status of the person for or against the claim is made.

Missouri Real Estate and Insurance Agency, Inc. v. St. Louis County, 959 S.W.2d 847 (Mo. App. E.D. 1997). In the instant case, the first prong of that test is not satisfied as there is no identity of the thing sued for. In the underlying rezoning action, Chesterfield Village sought declaratory and injunctive relief requesting invalidation of the “NU” zoning classification as applied to its property. In its First Amended Petition in the current action, Chesterfield Village seeks relief in the form of damages as compensation for the illegal taking of its property. Indeed, the City concedes that the relief sued for by Chesterfield Village in the current action is not identical to that sought in the prior action. In the Affirmative Defenses plead in its Answer, the City admitted that Chesterfield Village seeks only “approximately” the same relief and not the identical relief. *LF at 51.*

Because there is no identity of the thing sued for, Chesterfield Village's claims in its First Amended Petition are not barred by the doctrine of *res judicata*.

Further, the Court of Appeals below correctly noted that:

[R]es judicata extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of litigants.

Slip Opinion, at 9 (citing Elam v. City of St. Ann, 784 S.W.2d 330, 334 (Mo. App. E.D. 1990)) (A10). In Elam, the Missouri Court of Appeals addressed the issue of whether *res judicata* applied to a lawsuit that challenged the reasonableness of a City's zoning classification, but the court did not specifically address whether *res judicata* would bar a later suit for damages based upon a judicial finding of unreasonable zoning. Elam, 784 S.W.2d 330. In that case, the city, in the original action brought in 1981, sought to enjoin landowners from using their residence as an optometrist office in violation of the property's residential zoning classification. Id. at 333. The appellate court reviewing the suit for injunction found that the landowners were in violation of the city's residential zoning ordinances by using the property for a commercial use. Id. In defending against the city's suit for an injunction, the landowners did not challenge the reasonableness of the city's zoning ordinance on due process grounds and did not claim that the residential ordinance as applied to their property constituted a taking of their property. Id.

Following the judgment against them, the landowners submitted petitions for a special use permit and for rezoning of the property as commercial, both of which the city denied. Elam, 784 S.W.2d at 333. The landowners then instituted a suit for declaratory judgment attacking the reasonableness of the zoning applied to their property under the due process clauses of the U.S. and Missouri Constitutions and alleging that the zoning constituted a taking of their property in violation of the U.S. and Missouri Constitutions. Id. The trial court held that the zoning violated the landowners' constitutional due process rights. Id.

On appeal, the city argued that the landowners' claims in the declaratory judgment action were barred by the doctrine of *res judicata*. Elam, 784 S.W.2d at 333. The appellate court agreed that the second lawsuit was barred because the landowner's claims with respect to the reasonable zoning of the property could have been raised in defense of the City's prior action for injunctive relief or as a counterclaim in that action. Id. at 334. The court noted, however, that *res judicata* extends only to facts in issue as they existed at the time the judgment was entered. Id. Thus, the landowners were free to argue that new facts resulting from changes in the use of surrounding properties that occurred after the original judgment was entered had resulted in an invalidation of the residential classification as unreasonable. Id. It is important to note that in reaching its decision, the court did not have to determine whether a takings claim for damages resulting from a prior judgment finding unreasonable zoning would be barred by *res judicata* because those facts were not presented in the case. There was no finding of unreasonableness in zoning at issue in the prior case.

The Court of Appeals below, citing Elam, correctly found the presence of a “key additional fact that occurred which alter[ed] the legal rights” of Chesterfield Village and the City between the time of the initial litigation and the current claim for compensation. Slip Opinion, at 9 (*A10*). The court reasoned that at the time of the first judgment for injunctive relief and declaratory judgment, Chesterfield Village could not have known when, or even if, the City would rezone the parcel of property at issue. As the Court of Appeals noted, “Chesterfield Village, at the time of the first action, did not know if there would be a permanent taking (resulting from the City’s failure to rezone) or a temporary taking (resulting from the City’s delay in rezoning).” Slip Opinion, at 10 (*A11*). The length of time involved in a temporary taking is clearly a factor in determining the damages available. The Court of Appeals correctly determined that the length of time of the alleged taking was not a fact in issue in the first litigation and, thus, the damages alleged by Chesterfield Village could not have been determined at that time. Due to the presence of this new fact, the court below held that *res judicata* did not bar Chesterfield Village’s claim for damages as a result of the City’s alleged temporary taking and/or inverse condemnation.

Moreover, *res judicata* only applies to “matters which could properly have been raised and determined” in the prior action. Missouri Growth Association v. Metropolitan St. Louis Sewer District, 941 S.W.2d 615, 619 (Mo. App. E.D. 1997). Specifically, it applies:

not only to points and issues upon which the court was required by the pleading and proof to form an opinion and

pronounce judgment, but to every point **properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.**

Lay, 912 S.W.2d at 471 (citing King Gen. Contractors, Inc. v. Reorganized Church, 821 S.W.2d 495, 501 (Mo. banc 1991)) (emphasis added).

In the instant case, Chesterfield Village could not have brought its claims for inverse condemnation, regulatory taking and violations of 42 U.S.C. § 1983 in its original lawsuit because they were not yet ripe. Chesterfield Village had no idea at the time of its original lawsuit that it would eventually obtain zoning substantially similar to that it had requested prior to the original lawsuit. Under Missouri law, the exercise of zoning power is clearly a legislative function. City of Monett, Barry County v. Buchanan, 411 S.W.2d 108, 114 (Mo. 1967); State ex rel. Helujon v. Jefferson County, 964 S.W.2d 531, 535 (Mo. App. E.D. 1998). Courts only have the authority to order a reasonable zoning classification be applied to property in cases where zoning is challenged. West Lake Quarry, 761 S.W.2d at 753. Because zoning is a legislative function, courts do not have the authority to direct a municipality to place any particular zoning classification on any particular piece of property. Lenette Realty v. City of Chesterfield, 35 S.W.3d 399, 408-09 (Mo. App. E.D. 2000); West Lake Quarry, 761 S.W.2d at 753. Thus, the Circuit Court in Chesterfield Village's original lawsuit could have not directed the City **how** to zone the property but could only order the City to rezone the property to a reasonable classification. As a result of this separation of powers under Missouri law, Chesterfield

Village could not have known what zoning classification would eventually be applied by the City when it exercised its legislative zoning function.

Chesterfield Village's damages were not complete until the Chesterfield City Council made its final decision regarding the zoning of the parcels -- a decision only it could make. Chesterfield Village's damages for the temporary regulatory taking were unascertainable until the Court invalidated the "NU" classification as applied to the tract **and** until the City of Chesterfield passed an ordinance re-zoning the tract to a reasonable classification. Until the Chesterfield City Council acted in its legislative function to rezone the property, the Circuit Court could not determine the value of the property. Without proof as to the value of the property, Chesterfield Village's damages would have been speculative at best. Clearly, Chesterfield Village's inverse condemnation claim would not have been ripe for adjudication had it been brought in its original lawsuit. As the Court of Appeals below observed, Chesterfield Village's cause of action for damages depended on actions to be taken in the future.

Although research revealed no Missouri decisions (prior to that issued by the Court of Appeals below) that have specifically addressed the issue of *res judicata* as applied to a takings claim seeking compensation from prior successful challenges to zoning classifications, the Court of Appeals for the Eleventh Circuit has held that claims virtually identical to those presented by Chesterfield Village in its First Amended Petition are not precluded by *res judicata*. Corn v. City of Lauderdale Lakes, 904 F.2d 585 (11th Cir. 1990). In that case, the plaintiff challenged in state court the validity of a city's new zoning ordinance applied to his property and the city's refusal to approve his preliminary

site plans. Id. at 586. The state court entered a writ of mandamus requiring the city to approve plaintiff’s site plan with minor adjustments. Id. The plaintiff then brought suit in federal court seeking just compensation for the temporary taking of his property caused by the ultimately invalidated city zoning ordinances. Id. The defendant city argued that *res judicata* barred the second lawsuit. Id. at 587. The court held that *res judicata* did not apply to bar plaintiff’s claims “because the second cause of action (compensation for taking of property) is different from the first (mandamus, attacking the validity of the ordinance) and none of the issues now presented were actually litigated in earlier state proceedings.” Id. Importantly, the court stated that:

Under both state and federal law, the taking claim is supplemental to the state proceedings on the propriety of the zoning regulation and is not mature until the propriety or impropriety of the zoning regulation has been finally determined. . . . **Until the status of [plaintiff’s] property was finally adjudicated on appeal, the existence and extent of a regulatory taking remained undefined; so, [plaintiff] had no obligation to bring his damage claim earlier.**

Id. at 587-88 (internal citations omitted)(emphasis added). Likewise, Chesterfield Village had no obligation to bring its takings claims in its earlier lawsuit because the status of the City’s zoning ordinance as applied to its property had not been finally adjudicated.

In a recent decision, the Eleventh Circuit again held that a plaintiff may bring a takings claim resulting from a prior zoning challenge free from the application of *res judicata*. Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225 (11th Cir. 1999), cert. denied, 531 U.S. 815, 121 S. Ct. 51 (2000). In that case, the plaintiff originally sued the county in state court after the county revoked the plaintiff's permit for the operation of a waste disposal facility. Id. at 1228. The court affirmed the revocation of the permit and the appellate court denied certiorari. Id. Plaintiff later sued the county in federal court alleging that the permit revocation constituted a taking without just compensation in violation of the Fifth and Fourteenth Amendments. Id. The county moved for summary judgment, contending that *res judicata* barred the takings claim because the claim should have been litigated in the state court proceeding. Id. at 1229.

The court held that the plaintiff did not have an opportunity to present its takings claim in the earlier lawsuit because it could not have done so until judicial review of the zoning board's actions in the circuit court and the appellate court had run its course. Agripost, 195 F.3d at 1233. The court noted that the circuit court's task was limited to the question of whether the board's revocation of plaintiff's permit was justified. Id. at 1232. The court was not called upon to determine whether there had been a Fifth Amendment taking, and a Fifth Amendment takings claim could not have materialized until the circuit court passed on the propriety of the board's revocation of plaintiff's permit. Id. Only after the circuit court affirmed the board's decision could plaintiff have argued that the revocation of the permit rendered its property worthless. Id.

Similarly, Chesterfield Village could not have argued the amount of the damages suffered by it resulting from the taking until after the City of Chesterfield re-zoned the property at issue. Hypothetically, Chesterfield could have rezoned the property as commercial instead of residential and thereby increased Chesterfield Village's damages even more, or it could have rezoned the property to a significantly different residential classification than had been originally sought. Similarly, it could not be determined how long it would take the City to follow the directive of the Circuit Court and rezone the property. The time taken to rezone the property to a reasonable classification affects the amount of damages sustained during the temporary taking.

Arguably, a different result would be merited if the facts presented a case of a improper down-zoning by the City, instead of a refusal to up-zone. In a down-zoning case, a municipality changes the zoning of property from a less restrictive use to a more restrictive use. For example, a down-zoning would occur if a municipality rezoned property from an R-3 designation to an "NU" designation because the property owner would be more restricted in using the property as zoned "NU." Obviously, property with fewer zoning restrictions is more valuable to landowners because of the increased options for development. If a landowner brought a legal challenge to the validity of the down-zoning in the above example, a takings claim could be presented at the same time because the court would be able to determine the value of the property as it was previously zoned as R-3 and currently zoned as "NU." All the facts would be known and before the court and the court could make a determination as to damages sustained by the landowner as

result of the improper rezoning. In the present up-zoning case, all those facts were unknown.

Under Missouri's zoning system, a landowner seeking an up-zoning does not know what ultimate zoning classification will be applied by the local legislative body after a court orders property to be rezoned. The court does not have all the necessary facts to consider a takings compensation claim because the municipality has not yet rezoned the property, and the court cannot determine the values to be attributed the property before and after the rezoning, nor during the period of time of the taking. Thus, under Missouri's system of separation of zoning powers, a takings compensation claim cannot be brought in a case seeking an up-zoning from a more restrictive use of property to a less restrictive use.

In the instant case, it is clear that Chesterfield Village could not have brought its First Amended Petition claims in the original lawsuit because they would have been premature. Chesterfield Village had no idea at the time of its original lawsuit that it would eventually obtain zoning substantially similar to what it had requested in November 1994, prior to the original lawsuit. Chesterfield Village's damages were not complete until the City made its final decision regarding the zoning of the parcel and rezoned the parcel to a reasonable classification. Until the City acted in its legislative function to rezone the property, the Circuit Court could not determine the value of the property. Because the propriety of the zoning regulation had not been finally adjudicated and Chesterfield Village's claims would have been premature, it is clear that Chesterfield Village could not have brought its claims for inverse condemnation and regulatory

takings in its original lawsuit. See Corn, 904 F.2d at 587-88; Agripost, 195 F.3d at 1233. The City's argument that *res judicata* bars the claims in Chesterfield Village's First Amended Petition must fail and the trial court's order of dismissal cannot be upheld on that basis.

CONCLUSION

For the reasons stated herein, the causes of action against the City in the First Amended Petition all assert facts which, if proved, would entitle Chesterfield Village to relief. As determined by the Court of Appeals, it is clear that Counts I and II of Chesterfield Village's First Amended Petition adequately alleged facts supporting its causes of action under Missouri law for a temporary regulatory taking and/or inverse condemnation based upon the City's refusal to zone property to a classification reasonable under Missouri law. Alternatively, Count III adequately alleged a cause of action under federal law for a temporary regulatory taking based upon the City's refusal to rezone the property.

As demonstrated above, the decision reached by the Missouri Court of Appeals, which reversed the trial court's dismissal of this action, displayed sound reasoning and that opinion therefore merits reinstatement. Chesterfield Village urges this Court to use the authority granted it by Missouri Supreme Court Rule 83.09 to determine that the transfer of this cause from the Court of Appeals was improvidently granted. As such, this cause should be retransferred to the Court of Appeals for reinstatement of its prior opinion.

Alternatively, Chesterfield Village prays that the Court enter its own opinion reversing the dismissal by the trial court of Chesterfield Village's First Amended Petition. Because the trial court's dismissal of this action resulted from an erroneous declaration and application of the law, the August 30, 2000 Amended Order and Judgment should be reversed and this case remanded with directions to reinstate Counts I, II, and III of the First Amended Petition.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 84.06(c) and (g)

I, Tammy S. King, hereby depose and state as follows:

1. I am an attorney for Appellant, Chesterfield Village, Inc.
2. I certify that the foregoing Substitute Brief of Appellant, Chesterfield Village, Inc., contains 18,796 words and 1704 lines (including footnotes) and thereby complies with the word and line limitations contained in Supreme Court Rule 84.06(b).
3. In preparing this Certificate, I relied upon the word count function of the Microsoft Word 2000 (9.0.3821 SR-1) word processing software.
4. I further certify that the accompanying floppy disk containing a copy of the foregoing Substitute Brief, required to be filed by Rule 84.06(g), has been scanned for viruses and is virus-free.

Tammy S. King

CERTIFICATE OF SERVICE

I, Tammy S. King, hereby depose and state as follows:

1. I am an attorney for Appellant, Chesterfield Village, Inc.
2. On September 17, 2001, I served two copies of the foregoing Substitute Brief of Appellant Chesterfield Village, Inc. upon Douglas R. Beach by hand-delivering same to Douglas R. Beach, BEACH, STEWART, HEGGIE & MITTLEMAN, LLC, 222 South Central Avenue, Suite 900, St. Louis, Missouri 63105, attorney for Respondent City of Chesterfield.

3. At that time, pursuant to Supreme Court Rule 84.06(g), I further served upon Mr. Beach one copy of a floppy disk containing the foregoing Substitute Brief.

Tammy S. King

APPENDIX