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INTRODUCTION

Respondent City of Chesterfield (“the City”) argues the trial court properly sustained the City’s motion to dismiss the First Amended Petition of appellant Chesterfield Village, Inc. (“Chesterfield Village”) for failure to state a cause of action. In doing so, the City completely misconstrues Missouri and federal law with respect to temporary regulatory takings. It is abundantly clear under First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), and Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), that a cause of action exists when a government regulation denies a landowner all economically beneficial or productive use of its land. Chesterfield Village pled in its First Amended Petition that the City’s “NU” zoning regulation denied it all economically beneficial or productive use of its land during the period that the City refused to place the property into a reasonable zoning category. The facts, as pled by Chesterfield Village, clearly allege a temporary regulatory taking or, alternatively, inverse condemnation, and thus sustain a cause of action for violation of both federal and Missouri law.

The City uses much of its brief to argue that no Missouri court has recognized a cause of action for temporary regulatory takings or inverse condemnation when a government regulation temporarily denies the landowner all economically beneficial or productive use of its land. Notwithstanding that the Missouri Court of Appeals in Clay County v. Harley and Susie Bogue, Inc., 988 S.W.2d 102 (Mo.App.W.D. 1999), **did** recognize a cause of action under Missouri law for a total temporary regulatory taking, if this Court finds that for some reason Missouri law does not support such a cause of

action, it is abundantly clear that the well-developed body of federal law allows Chesterfield Village's temporary regulatory taking claim to withstand the motion to dismiss. See generally, First English and Lucas, supra.

Here, Chesterfield Village had to first pursue its claims under Missouri law to determine whether a state law remedy exists in order to satisfy the ripeness requirement under federal law. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-197 (1985). The U.S. Supreme Court has held that before a landowner may seek relief under federal takings law, it must first exhaust any state remedies available to compensate the owner for the taking, including inverse condemnation. Id. State courts hold concurrent jurisdiction with federal courts to determine whether a plaintiff's federal constitutional rights have been violated. 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). Accordingly, Chesterfield Village filed one lawsuit in state court seeking relief under Missouri law and, alternatively, under federal law should there be no remedy under state law. As fully demonstrated in Chesterfield Village's substitute brief and in the *amicus curiae* brief submitted by the Pacific Legal Foundation, numerous cases decided under the U.S. Constitution support the allegations of temporary regulatory taking pled in the First Amended Petition. See generally, First English and Lucas, supra. For that reason, Chesterfield Village's cause of action in Count III of its First Amended Petition should be allowed to proceed regardless of whether this Court finds a cause of action exists under Missouri law.

Many of the arguments raised by the City should be rejected simply due to the standard of review on a motion to dismiss. In considering a motion for dismissal for failure to state a claim, the trial court is required to assume that all of the plaintiff's averments are true, and to liberally grant to plaintiff all reasonable inferences therefrom. Nazeri v. Missouri Valley College, 860 S.W.2d 303, 306 (Mo.banc 1993). If the allegations contained in the petition invoke principles of substantive law that, 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). It is important to note that First English, the seminal temporary regulatory takings case decided by the U.S. Supreme Court, was determined on the pleadings where the owner alleged a denial of economically viable use – exactly as the issue before this Court must be decided. The First English Court noted that “We also point out that the allegation of the complaint **which we treat as true for purposes of our decision** was that the ordinance in question denied appellant all use of its property.” First English 482 U.S. at 321 (emphasis added). Similarly, the allegations pled in Chesterfield Villages' First Amended Petition must be taken as true and viewed in the light most favorable to Chesterfield Village.

While the City pays lip service to this standard of review in its brief (p. 21), the majority of the arguments made by the City would require this Court to ignore that standard and instead view Chesterfield Village's factual allegations in a light most favorable to the City or consider additional facts not a part of the record. As is clear in Chesterfield Village's substitute brief, the allegations in Counts I, II, and III of Chesterfield Village's First Amended Petition, assumed as true, and with Chesterfield

Village receiving the benefit of all reasonable inferences, clearly state causes of action for temporary regulatory taking under Missouri law, inverse condemnation under Missouri law and temporary regulatory taking under federal law. As such, the trial court erred in dismissing Chesterfield Village's First Amended Petition.

Alternatively, the City asserts the trial court's dismissal of the First Amended Petition can be supported by the application of *res judicata* and because Chesterfield Village lacks standing to bring its claims, although the trial court did not cite either of those reasons as justification for the dismissal. Here, too, the City has misconstrued the applicable law as *res judicata* does not bar any of the claims made in the First Amended Petition. Further, Chesterfield Village clearly has standing to bring this takings action as it was the owner of the property at the time of the taking.

REPLY TO STATEMENT OF FACTS

Chesterfield Village does not contest the statement of facts presented by the City, except to the extent that some of the City's "facts" are not properly before this Court for consideration. See e.g., Respondent's brief at 10, where reference is made to negotiations between the City and Chesterfield Village, a fact that does not appear in the First Amended Petition or attachments thereto. The First Amended Petition and the attachments thereto are the only source of facts in the record before this Court.

REPLY TO ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING CHESTERFIELD VILLAGE’S FIRST AMENDED PETITION BECAUSE COUNT I ADEQUATELY PLED A CAUSE OF ACTION UNDER MISSOURI LAW FOR TEMPORARY REGULATORY TAKING.

Count I of Chesterfield Village’s First Amended Petition alleged that, under Missouri law, the City effected a temporary regulatory taking of Chesterfield Village’s property when it refused to apply a reasonable zoning classification to that property. As demonstrated in Chesterfield Village’s substitute brief, Missouri recognizes a cause of action for per se temporary regulatory taking that entitles a property owner to compensation when a government regulation denies “all economically beneficial or productive use of land.” Clay County, 988 S.W.2d at 106-07 (citing Lucas, 505 U.S. at 1015). Chesterfield Village pled in Count I that the City denied it “all economically beneficial or productive use” of its property when it refused to apply a reasonable zoning classification.

The City argues that a regulatory taking action is inapplicable to the facts of this case because “mere governmental *inaction* by refusal to rezone property . . . does *not* give rise to a claim for either taking or inverse condemnation.” (Respondent’s brief at 23) (emphasis in original). In support, the City primarily cites Marvin E. Nieberg Real Estate Company v. St. Louis County, 488 S.W.2d 626, 631 (Mo. 1973). That case, however, is distinguishable because the plaintiff there failed to challenge the reasonableness of the zoning order at issue prior to seeking damages for inverse

condemnation. Id. at 630-31. Because of that failure, the court refused to rule on the merits of the inverse condemnation action. Id. In the case at bar, not only did Chesterfield Village challenge the underlying zoning prior to seeking damages, but the original zoning was in fact found to be unreasonable by the St. Louis County Circuit Court, and the City eventually rezoned the tract to classifications substantially similar to what Chesterfield Village requested prior to the lawsuit.

The City also relies on Ressel v. Scott County, 927 S.W.2d 518, 520 (Mo.App.E.D. 1996), for the proposition that government inaction does not give rise to a claim of inverse condemnation or taking. (Respondent's brief at 23). That case, however, holds that damage to property resulting from *natural forces*, and not a government act, does not give rise to an inverse condemnation action. Id. at 521 (emphasis added). The case has nothing to do with a municipality that refuses to apply proper zoning.

No land use case, and certainly no case cited by the City, supports the contention that government inaction can never amount to a taking. In fact, courts have found that the refusal of a government to act, such as the refusal to issue a permit, can result in a temporary regulatory taking. See e.g., Ali v. City of Los Angeles, 91 Cal.Rptr.2d 458, 460 (Cal.Ct.App. 1999). Moreover, even if there were such a distinction, Chesterfield Village is challenging the affirmative act of the City in refusing to apply proper zoning. 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 “NU” classification. *LF at 24, ¶¶33-34 and 36 (A31)*. The court further found:

[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). The retention by the City of the improper and illegal “NU” zoning while permitting development in the surrounding areas was an affirmative, deliberate and invalid act on the part of the City that denied Chesterfield Village the economically viable use of its property and resulted in a temporary regulatory taking.

The City cites Lucas, supra, and Palazzolo v. Rhode Island, 121 S.Ct. 2448 (2001), contending that because the “NU” zoning ordinance would have permitted a maximum of fifteen homes on Chesterfield Village’s property, Chesterfield Village was not deprived of all economically beneficial use of its land when the City refused to rezone the property as requested. (Respondent’s brief at 24-25). The City further argues that this Court should not accept Chesterfield Village’s “mere conclusions or speculation” as to its allegation of a denial of all economically beneficial or productive use of the property. (Respondent’s brief at 21, 38-39, 43). The allegation of denial of all economic use, however, is not merely a conclusion on the part of Chesterfield Village but is in fact the

ultimate issue to be determined at trial. The First Amended Petition and the attachments thereto, particularly the Order and Judgment of the Circuit Court in the underlying rezoning case, clearly state facts that support the cause of action for a temporary regulatory taking because the trial court in the underlying cause found and Chesterfield Village 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-A19)*. The reasonable inferences from the facts pled in the petition that support this allegation must be viewed in a light most favorable to Chesterfield Village.

The procedural status of this case is more akin to First English than Palazzolo or Lucas. Like the instant case, First English reached the U.S. Supreme Court on the pleadings and the Court was required to accept as true the fact that the plaintiff was denied all economic use of its property. First English, 482 U.S. at 321. In contrast, Palazzolo was decided following a bench trial on the merits where there was undisputed evidence that \$200,000 in development value remained in a portion of the property. Palazzolo, 121 S.Ct. at 2456-57. Similarly, in Lucas, the trial court determined, following trial, that the property was rendered valueless by the application of the government regulation at issue. Lucas, 505 U.S. at 1009. Whether an economically viable use did in fact exist for the property as zoned "NU" is clearly a fact issue for trial, and should not be considered with respect to the motion to dismiss at issue here.

Regardless, the First Amended Petition and attachments support Chesterfield Village's allegation that the City's application of the "NU" zoning ordinance denied all

economically beneficial use of the property. Chesterfield Village did not plead it could actually build fifteen houses but alleged that the “‘NU’ classification would have allowed only a maximum of fifteen homes to be built on the 46.3-acre tract.” *LF at 6, ¶10 (A13)*. The evidence presented at the trial of Chesterfield Village’s challenge to the City’s “NU” zoning demonstrated that the economic market would not have supported construction of those fifteen homes. Despite the City’s unsupported factual claim that “houses [in Chesterfield] on three-acre lots routinely sell for more than half a million dollars” (p. 24), the Circuit Court, after hearing expert testimony, found that houses with three-acre lots are impractical, so it was not economically feasible or productive for Chesterfield Village to develop the property under the “NU” ordinance. *LF at 24, ¶¶36, 37 and at 25, ¶¶40, 43 (A31 and A32)*. The Circuit Court noted that “Chesterfield presented no evidence at trial that any development of the Propert[y] under its current “NU” zoning is economically feasible.” *LF at 25, ¶39 (A32)*. In fact, the Circuit Court noted that the City’s own expert witness had opined at trial that the property could not feasibly be developed for three-acre residential use, or for any permitted or conditional use in the NU zoning district. *LF at 25, ¶43 (A32)*. Specifically, the Circuit Court, in deciding that the “NU” zoning violated Missouri law, held:

...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). 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. Clearly, Chesterfield Village pled 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-A19)*. Viewing the facts alleged and the reasonable inferences therefrom in a light most favorable to plaintiff, Chesterfield Village clearly pled a cause of action for per se temporary regulatory taking under Clay County, Lucas and First English.

The City correctly notes that the U.S. Supreme Court has indicated that a takings claim would not apply in cases of “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.” (Respondent’s brief at 28-29). However, the action complained of by Chesterfield Village was not such a “normal delay.” First English, 482 U.S. at 321. The “normal delay” referred to in that case was the time involved in the administrative decision-making process, not time spent in litigation over unreasonable and arbitrary zoning decisions. See e.g., Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803 (Fed. Cir. 1993); McCutchan Estates v. Evansville-Vanderburgh County Airport Authority District, 580 N.E.2d 339, 342-43 (Ind.App. 1991).

In this case, during the “normal administrative review” portion of Chesterfield Village’s rezoning request, every level of review from the City’s Planning Department

staff to the Planning & Zoning Committee of the City Council recommended approval of that request. *LF at 7, ¶¶11-14 (A14)*. It was not until the rezoning reached the City Council (and the elected members of that Council bowed to public pressure urging limits on the density of future residential development) that the request was denied. Obviously, had Chesterfield Village's request been approved at that time, it would not have had a cause of action for a temporary taking for the amount of time the decision took because that was part of the normal process. However, when the City Council illegally denied the request and forced Chesterfield Village to resort to the judicial system to obtain the zoning to which it was entitled under Missouri law, the request for rezoning was taken out of the "normal zoning process." See e.g., *Ali*, 91 Cal.Rptr.2d at 462-64.

A municipality's refusal to apply a reasonable zoning classification to property within its jurisdiction is not part of the normal zoning process, nor would it place a burden on zoning authorities to require them to reasonably zone property in the first instance, without requiring resort to litigation. In fact, as noted in Chesterfield Village's initial brief, Missouri statutes and case law place an affirmative duty on municipalities to apply reasonable zoning classifications to property. R.S.Mo. § 89.040 and *Loomstein v. St. Louis County*, 609 S.W.2d 443, 446 (Mo.App.E.D. 1980). Cities are required to develop comprehensive master zoning plans to determine what zoning is appropriate for the areas within that municipality. R.S.Mo. § 89.340. Landowners should not be required to resort to court intervention and litigation in order to obtain zoning that is reasonable and proper as already required by law. Here, the City's refusal to reasonably

zone the property resulted in a temporary regulatory taking of Chesterfield Village's property.

Contrary to the arguments of the City, allowing landowners and developers to pursue claims for temporary regulatory takings based upon improper and unreasonable zoning would not "raise the specter of litigation for a 'temporary regulatory taking' and monetary damages, against every community, every time a landowner does not obtain the exact zoning classification, permits and conditions the landowner desires," (Respondent's brief at 29, 36-37), nor would cities be exposed to damages for "guessing wrong" or turning down "grandiose development proposal[s]." (Respondent's brief at 30). Instead, damages would **only** be awarded when the municipality acts unlawfully, arbitrarily, capriciously and unreasonably in applying zoning classifications. The potential of monetary damages would make municipalities take seriously the requirement of applying reasonable zoning when they are confronted with requests to rezone. Although the City attempts to characterize its decision to deny Chesterfield Village's rezoning request as a simple "mistake," (Respondent's brief at 33), the Circuit Court in the underlying action used particularly strong language to find that the City's retention of the "NU" classification was unreasonable, arbitrary, capricious and unconstitutional and "indeed borders on being confiscatory." *LF at 9, ¶27 and 25, ¶46 (A16 and A32)*. In this action, Chesterfield Village merely seeks compensation for the City's illegal act in refusing to follow Missouri law and its failure to place a reasonable zoning classification on the property.

The City states in its brief (without any support in the record) that Chesterfield Village and the City engaged in “lengthy negotiations” regarding the number of homes that should have been allowed on Chesterfield Village’s property prior to the City’s complete denial of the request for rezoning. (Respondent’s brief at 31). Despite this alleged negotiation, the City clearly refused to even meet Chesterfield Village halfway. As the Circuit Court noted in its Order and Judgment, the City, as part of its consideration of Chesterfield Village’s rezoning petition, could have rezoned the property to a classification other than the “R-3” classification requested by Chesterfield Village. *LF at 24, ¶28 (A31)*. Instead, the City chose to do nothing and improperly retained the “NU” zoning. *Id.* at ¶29.

Moreover, there was ample opportunity for the City to review the “NU” zoning and change that zoning to something reasonable under Missouri zoning principles even before the time that Chesterfield Village requested a rezoning. The City obtained jurisdiction over the property when it was incorporated as a third class city in June 1988. *LF at 6, ¶6 (A13)*. At that time, the City adopted the “NU” zoning classification for the tract that had been previously designated by St. Louis County. *Id.* In February 1990, the City adopted a Comprehensive Plan as a recommendation for the general property uses and densities within its jurisdiction, a plan which was subsequently revised in 1991 and 1992. *LF at 21-22, ¶11 (A28-A29)*. The Comprehensive Plan designated Chesterfield Village’s property to be within an area denoted as the “I-64/40 Corridor” but failed to contain a density recommendation for property located in that corridor. *Id.* 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. Thus, the City by its continuing course of conduct refused to apply reasonable zoning to this property and chose to retain the improper and illegal “NU” zoning, leaving the property economically idle, which forced Chesterfield Village to resort to the courts to obtain proper zoning.

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.

II. THE TRIAL COURT ERRED IN DISMISSING CHESTERFIELD VILLAGE'S FIRST AMENDED PETITION BECAUSE COUNT II ADEQUATELY PLED A CAUSE OF ACTION FOR INVERSE CONDEMNATION UNDER MISSOURI LAW.

In its second point, Chesterfield Village argued that the trial court erred in dismissing Count II of its First Amended Petition because that count adequately alleged facts supporting, alternatively, a cause of action under Missouri law for inverse condemnation when the City refused to apply a proper and reasonable zoning classification to the property.

The City does not clearly respond to Chesterfield Village's arguments supporting its claim of inverse condemnation. Instead, the City's brief simply rehashes some of the arguments made in response to Chesterfield Village's first point relied on, which dealt with the temporary regulatory takings claim. This reply brief will not respond to those repetitive arguments but instead refers the Court to Section I, supra. The City's brief also contains certain arguments with respect to the ascertainment of damages and election of remedies that seem more appropriate to the City's *res judicata* argument rather than a discussion of whether the facts alleged in the First Amended Petition support a cause of action for inverse condemnation. Those arguments are therefore addressed in Section IV, infra, of this reply brief.

As noted in Chesterfield Village's initial brief, Count II of the First Amended Petition clearly pled facts supporting a claim of inverse condemnation under Missouri

law. The City’s brief does nothing to demonstrate that Chesterfield Village failed to meet the pleading requirements for such claim.

III. THE TRIAL COURT ERRED IN DISMISSING CHESTERFIELD VILLAGE’S FIRST AMENDED PETITION BECAUSE COUNT III ADEQUATELY PLED A CAUSE OF ACTION FOR TEMPORARY REGULATORY TAKING UNDER FEDERAL LAW.

Count III of Chesterfield Village’s First Amended Petition alternatively sought relief under the well-developed body of federal law with respect to temporary regulatory takings.¹ The City argues that the allegations set forth in the First Amended Petition cannot support a claim for a deprivation of constitutional rights under 42 U.S.C. § 1983. (Respondent’s brief at 48). As support for its proposition, the City cites Scott v. City of Sioux City, Iowa, 736 F.2d 1207, 1217 (8th Cir. 1984), and Kaiser Development Company v. City and County of Honolulu, 649 F.Supp. 926 (D. Hawaii 1986), affirmed 898 F.2d 112 and 913 F.2d 573 (9th Cir. 1990), cert. denied, 471 U.S. 947, 954 (1991). Neither of those cases is applicable to the instant situation. In Scott, the court denied a takings claim where the city’s action merely diminished the land’s value. Scott, 736 F.2d at 1217. In the case at bar, Chesterfield Village has alleged that the City’s actions denied it **all** economically viable use of the tract at issue. *LF at 16, ¶63 (A23)*. In Kaiser

¹ By arguing in its brief that Count III is “superfluous” of the claims in Counts I and II (p. 49), the City obviously does not understand Count III is pled in the alternative and Chesterfield Village only seeks relief under Count III should its state law claims fail.

Development Co., the court refused to allow a takings claim because the claim was not yet ripe as the plaintiff had failed to obtain a final ruling from the zoning body and failed to first seek compensation in a state court action. Kaiser Development Co., 649 F.Supp. at 938. In contrast, Chesterfield Village obtained a final ruling from the Chesterfield City Council denying its rezoning application and, as noted above, is seeking compensation under Missouri law, while alternatively seeking compensation under federal law. See Introduction, supra. Thus, Chesterfield Village's claims are ripe for review under federal law, should the Court find no cause of action under Missouri law.

As demonstrated in Chesterfield Village's substitute brief and in the *amicus curiae* brief submitted by the Pacific Legal Foundation, it is abundantly clear that federal law allows a cause of action for a categorical temporary regulatory taking when a government regulation denies a landowner all economically beneficial or productive use of its property. Lucas, 505 U.S. at 1015; First English, 482 U.S. at 321. Should this Court find Missouri law affords Chesterfield Village no relief, it should still be allowed to proceed with its federal claim. First English, 482 U.S. at 312 n.6. Chesterfield Village clearly pled a cause of action under federal law in Count III of its First Amended Petition.

IV. THE TRIAL COURT ERRED IN DISMISSING THE FIRST AMENDED PETITION TO THE EXTENT, IF ANY, IT RELIED UPON THE DOCTRINES OF *RES JUDICATA* OR STANDING.

A. Res Judicata Does Not Bar Chesterfield Village’s Claims Raised in its First Amended Petition.

The City argues that the trial court properly dismissed Chesterfield Village’s First Amended Petition because the doctrine of *res judicata* bars the current suit for damages as Chesterfield Village elected to pursue declaratory and injunctive relief, and not monetary damages, in its underlying rezoning case. (Respondent’s brief at 52). In the underlying action, Chesterfield Village sought a declaratory judgment as to the validity of the “NU” zoning, an injunction prohibiting the City from applying the “NU” zoning to its property and an injunction ordering the City to rezone the property to a reasonable zoning classification. The Circuit Court granted Chesterfield Village the equitable relief sought and ordered the City to place a reasonable zoning classification on the property.

The City cites Greene v. St. Louis County, 327 S.W.2d 291 (Mo. 1959), to argue that Chesterfield Village’s claim for damages is barred because it already elected the different remedies of declaratory and injunctive relief in its prior lawsuit. (Respondent’s brief at 45-46 and 52). In Greene, the Missouri Supreme Court noted the usual remedy for a physical taking of property by the government for public use is monetary damages but stated that in unusual cases, a plaintiff may have an election of remedies and may proceed by way of an injunction to restrain the trespass on his property. Id. at 299. The factual situation of Greene has absolutely no bearing on the facts of this case. Nowhere

in Greene does the court state that seeking injunctive relief to require a city to change its zoning on certain property bars money damages for the refusal to rezone. As noted above, damages are available for temporary regulatory takings under both Missouri and federal law. As determined by the Court of Appeals below, any election of remedies would require Chesterfield Village to choose between pursuing its temporary regulatory takings claim or its inverse condemnation claim at trial, but election of remedies does not bar the current claim for damages. Chesterfield Village, Inc. v. City of Chesterfield, Missouri, No. ED 78444, slip op. at 8 (Mo.App.E.D. May 9, 2001) (“Slip Opinion”) (A9). It is unclear how Greene, a factually distinguishable eminent domain case, helps the City’s argument in this instance.

In its brief, as an aside to the *res judicata* and election of remedies arguments, the City bizarrely attempts to theorize that its amendment of the zoning ordinance that applied to Chesterfield Village’s property – an amendment that followed the Circuit Court’s Order requiring the City to rezone the property to a reasonable zoning classification – somehow resulted in a “settlement” of Chesterfield Village’s claims with regard to the property which should bar Chesterfield Village’s current claim for damages in this lawsuit. (Respondent’s brief at 53). The City rests this claim on its unsupported allegation that Chesterfield Village and the City had an “agreement” with regard to the ordinance that rezoned the property following the judgment. Once again, the City resorts to allegations outside of the factual record, and indeed to facts that do not even exist, in what can only be considered a desperate attempt to find support for the trial court’s

dismissal of Chesterfield Village’s claims. There is absolutely no evidence of any settlement or release of claims by Chesterfield Village against the City.

Moreover, the arguments presented in the *amicus curiae* brief submitted by the Missouri Municipal League and the St. Louis County Municipal League (collectively “Municipal League”) in support of the City’s position on the *res judicata* issue do not support the dismissal of the First Amended Petition on that ground. The Municipal League argues that Elam v. City of St. Ann, 784 S.W.2d 330 (Mo.App.E.D. 1990), precludes Chesterfield Village’s current claims on the grounds of *res judicata*.

(Municipal League brief at 13). To the contrary, as noted by the Court of Appeals in its decision below, that case actually **supports** Chesterfield Village’s position that *res judicata* does not bar its claims. Slip Opinion, at 9 (A10). Because Supreme Court Rule 84.04(g) prohibits Chesterfield Village from rearguing points covered in its initial brief, Chesterfield Village refers the Court to its substitute brief for a thorough discussion of the Elam case and why it supports Chesterfield Village’s claims in this action. Significantly, the Elam 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 there was no prior finding by the first Elam trial court of any unreasonableness in the zoning at issue. In contrast, the zoning in the instant case was found to be unreasonable by the Circuit Court in the underlying proceeding and the City was required to rezone the property. The Municipal League takes language from the Elam case out of context when it claims in its brief that “the Elam court acknowledged the skepticism that there could ever be a compensable inverse condemnation claim from a typical failure to

rezone because such zoning is unauthorized in Missouri (and therefore would always be enjoined).” (Municipal League brief at 17). The court actually stated “It is difficult to imagine how a zoning ordinance **which complies with Missouri’s interpretation of substantive due process requirements** could nonetheless amount to a taking.” Elam, 784 S.W.2d at 337 (emphasis added). In Elam, there was **no** finding of unreasonable zoning and thus the court was merely recognizing that zoning that complies with Missouri’s due process standards would probably never be compensable as a taking. In the instant case, the trial court clearly found that the “NU” zoning did **not** comply with constitutional requirements.

Chesterfield Village argues, and the Court of Appeals below agreed, that because its damage claim could not be determined until the City acted in its legislative capacity to rezone the property, that damage claim could not have been brought in the underlying rezoning action. The Municipal League responds by citing a non-zoning case to argue that rental value and not market value is used to determine damages in takings cases. (Municipal League brief at p. 18, citing Kimball Laundry Co. v. U.S., 338 U.S. 1 (1949)). In Kimball, the U.S. Government condemned a laundry plant for use by the army during a time of war. Kimball, 338 U.S. at 3. The Supreme Court found that the proper measure of damages for that taking would be the rental value of the property rather than the difference between the market value of the fee on the date of the taking and its market value on the date of its return. Id. at 6-7. Zoning cases, however, have clearly stated that courts must look to the market value of the parcel of land to determine the proper measure of just compensation for a taking. Nemmers v. City of Dubuque, 764 F.2d 502,

504 (8th Cir. 1985); Wheeler v. City of Pleasant Grove, 896 F.2d 1347, 1351 (11th Cir. 1990). The Municipal League ignores the fact that the zoning classification applied to property clearly affects the rental value, as well as market value, and thus even using rental value as the measure of damages, the amount of just compensation could not be determined until the ultimate zoning classification was placed on the property by the City following the order by the Circuit Court to rezone.

Although the Municipal League purports to cite to numerous cases from Missouri and other jurisdictions where it alleges that takings claims were brought simultaneously with zoning challenges (pp. 21-23), the majority of those cases do not present the precise issue before this Court – whether *res judicata* bars a takings claim for damages resulting from a prior judgment finding that the zoning as applied to the property is unreasonable **and** ordering the municipality to place a new and different zoning classification on the property. Most of the cases cited were not rezoning cases and thus there was no order requiring the municipality to rezone the property to a more dense zoning classification. See e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (site plan review); Johnson v. City of Glencoe, 722 F.2d 432 (8th Cir. 1983) (injunction against enforcement of new zoning ordinance); Ward v. Village of Ridgewood, 531 F.Supp. 470 (D.N.J. 1982) (site plan and building permit approval); Tensor Group v. City of Glendale, 17 Cal.Rptr.2d 639 (Cal.Ct.App. 1993) (issuance of building permit); Clark v. Yosemite Community College, 785 F.2d 781 (9th Cir. 1986) (employment action); Cimasi v. City of Fenton, 838 F.2d 298 (8th Cir. 1988) (validity of liquor license ordinance); Minneapolis Auto Parts v. City of Minneapolis, 739 F.2d 408 (8th Cir. 1984)

(issuance of business license); Stericycle, Inc. v. City of Delavan, 120 F.3d 657 (7th Cir. 1997) (validity of medical waste ordinance).

One of the cases cited by the Municipal League actually demonstrates the problems inherent with a requirement that takings claims be brought with rezoning challenges. In Wells & Highway 21 Corp. v. Yates, 897 S.W.2d 56, 58 (Mo.App.E.D. 1995), the plaintiff sought in separate counts a declaratory judgment on the validity of zoning applied to its property and damages for the regulatory taking of the property. The trial court did not rule on the damage claim but certified its invalidation of the zoning as final for the purposes of an appeal. Id. Bringing the two claims together worked out for the plaintiff in that case only because the trial court agreed, exercising its discretion pursuant to Missouri Supreme Court Rule 74.01(b), to retain jurisdiction of the damage claim for a subsequent proceeding while allowing the zoning claim to be appealed. However, there is no absolute right to an interlocutory appeal under Missouri law. What would have happened had the trial court **denied** the interlocutory appeal or if its certification had been challenged in the appellate court? The plaintiff would not have been able to present evidence of the value of the property in the evidentiary portion of the case because the City had yet to apply the final zoning. Had the court refused to certify the zoning decision for appeal, the plaintiff would have been left without proof of its damages sustained as a result of the taking. The procedural morass of Wells demonstrates that the damage claim should not have been brought in the same case. If landowners are forced to bring takings claims in the same lawsuit as zoning challenges, they will be at the whim and mercy of the trial court's discretion to allow interlocutory

appeals. Under these circumstances, without an interlocutory appeal, the landowner's takings claim would be lost for failure of proof. Conversely, in the event an interlocutory appeal is permitted, judicial economy would not be furthered but actually frustrated.

Under Missouri's separation of powers system, the trial court cannot order the municipality to zone to a specific category but can only determine whether the existing zoning is unreasonable. The municipality must then act in its legislative capacity to rezone the property. As Wells demonstrates, in an up-zoning case, there must be two trials - one on the reasonableness of the zoning and one on damages **after** the property is rezoned by the municipality. The case herein is in the same posture. Judicial economy would be thwarted by requiring a plaintiff to bring its takings claim with the zoning challenge when the damages have to be decided in a later proceeding after the municipality has accomplished the court-ordered rezoning. The purposes of the rules against splitting a cause of action and *res judicata* are not fulfilled by **requiring** a plaintiff in an up-zoning case to risk bringing its takings claim with its zoning challenge, only to have the trial court refuse to permit an interlocutory appeal of the latter or refuse to retain jurisdiction over the takings claim for a later proceeding on the merits.

Moreover, in the cases cited by the Municipal League where takings claims were brought simultaneously with rezoning challenges, none of the cases stand for the proposition that a takings claim seeking damages **must** be brought with the zoning challenge. That issue was not examined by either the trial court or the appellate court in those cases. See e.g., Lenette Realty v. City of Chesterfield, 35 S.W.3d 399 (Mo.App.E.D. 2000); Hoffman v. City of Town and Country, 831 S.W.2d 223

(Mo.App.E.D. 1992). It is clear that *res judicata* does not bar a subsequent suit for damages when those damages could not have been quantified at the time injunctive relief was sought in a prior lawsuit. Creek v. Village of Westhaven, 80 F.3d 186, 190 (7th Cir. 1996).

B. Chesterfield Village Has Standing to Bring the Claims Raised in its First Amended Petition.

The City correctly notes that standing requires a “direct, personal stake in the outcome of the action.” (Respondent’s brief at 56). As the owner of the property **at the time the injury occurred**, Chesterfield Village clearly has standing, despite the City’s argument that any damage claim for the taking passed to Taylor-Morley, the subsequent buyer of the property **after** the zoning was changed. (Respondent’s brief at 57). The Missouri Court of Appeals has noted that any damage suffered as a result of a taking is sustained by the owner **at the time of the taking**, and the damage claim does not pass to the grantees of the land. Rose v. City of Riverside, 827 S.W.2d 737, 738-39 (Mo.App.W.D. 1992); Barr v. KAMO Electric Corp, 648 S.W.2d 616, 619 (Mo.App.W.D. 1983). Chesterfield Village (and Louis and Nancy Sachs) were clearly the owners of the 46.3-acre tract during the time of the taking. *LF at 5-6, ¶¶4-5 (A12-A13)*. The Sachses assigned their causes of action to Chesterfield Village prior to the filing of the First Amended Petition. *Id.* Thus, Chesterfield Village clearly has standing.

The City also makes the strange claim that because Chesterfield Village did not plead it lost money on the sale to Taylor-Morley, it has no cause of action for damages for the taking. (Respondent’s brief at 56). Chesterfield Village clearly pled that it was

forced to leave the property economically idle during the time it sought the rezoning from the “NU” classification. *LF at 12, ¶41, at 14, ¶53 (A19 and A21)*. The City, in making its argument regarding proof of damages, is asking the Court to once again consider facts outside the First Amended Petition. It is clear that the question of a person’s legal standing to apply for judicial relief does not touch the merits of the suit but merely the authority of the court to entertain the action. *City of Eureka v. Litz*, 658 S.W.2d 519, 523 (Mo.App.E.D. 1983). Whether Chesterfield Village can ultimately prove its alleged damages is not a proper consideration on a motion to dismiss or in a standing inquiry.

Further, the City’s argument with respect to Chesterfield Village’s lack of standing cannot be heard by this Court because the City failed to raise that issue before the Court of Appeals. A party’s substitute brief in this Court may not “alter the basis of any claim that was raised in the court of appeals brief” Missouri Supreme Court Rule 83.08(b).

CONCLUSION

For the reasons stated herein and in Chesterfield Village’s initial brief, the causes of action against the City in the First Amended Petition all assert facts which, if proved, would entitle Chesterfield Village to relief. 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 Reply Brief of Appellant Chesterfield Village, Inc., contains 7739 words (including footnotes but excluding the cover page, certificate of service, Rule 84.06(c) compliance certificate and signature block) and thereby complies with the word 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 Reply 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 October 29, 2001, I served two copies of the foregoing Substitute Reply Brief of Appellant Chesterfield Village, Inc. upon Douglas R. Beach and Robert M. Heggie by hand-delivering same to them at BEACH, STEWART, HEGGIE & MITTLEMAN, LLC, 222 South Central Avenue, Suite 900, St. Louis, Missouri 63105, attorneys 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 Reply Brief.

4. On October 29, 2001, I served two copies of the foregoing Substitute Reply Brief of Appellant Chesterfield Village, Inc. upon Daniel G. Vogel, Paul A. Campo and Leslye M. Winslow by hand-delivering same to them at STINSON, MAG & FIZZELL, P.C., 100 South Fourth Street, Suite 700, St. Louis, Missouri 63102, attorneys for Amici Curiae Missouri Municipal League and St. Louis County Municipal League.

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

6. On October 29, 2001, I served two copies of the foregoing Substitute Reply Brief of Appellant Chesterfield Village, Inc. upon Alan Kohn by hand-delivering same to him at KOHN, SHANDS, ELBERT, GIANOULAKIS AND GILJUM, LLP, One Firststar Plaza, Suite 2410, St. Louis, Missouri 63101, and upon James S. Burling by overnight delivery via Federal Express at PACIFIC LEGAL FOUNDATION, 10360 Old Placerville Road, Suite 100, Sacramento, California 95827, attorneys for Amici Curiae Pacific Legal Foundation.

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

Tammy S. King