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**SC88437**

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**IN THE SUPREME COURT OF MISSOURI**

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**MAURICE AND NANCY GASH**  
**Appellant/Respondent**

**vs.**

**LAFAYETTE COUNTY and the**  
**LAFAYETTE COUNTY COMMISSION**  
**Respondent/Appellant**

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**On Appeal from the Circuit Court of Clay County**  
**Case No. CV104-819CC**  
**The Honorable Larry D. Harman**  
**Circuit Judge on Assignment**

**BRIEF OF APPELLANT/RESPONDENT**  
**MAURICE AND NANCY GASH**

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a final judgment of the Circuit Court of Clay County, Missouri which entered a Judgment finding that the zoning of Appellant/respondent property was arbitrary and capricious and void. This appeal does not concern any of the issues reserved for the exclusive jurisdiction of the Missouri Supreme Court under Art. V, Sec. 3 of the Missouri Constitution. Jurisdiction was therefore vested in the Western District under Sec. 477.060, R.S.Mo 1994.

On May 29, 2007 on motion of the appellant the matter was transferred to the Missouri Supreme Court.

The original Judgment was entered on February 23, 2005 L.F. 132), Appellant/respondent filed their notice of appeal on June 10, 2005, (L.F. 146) and respondent/appellant timely filed their Notice of Appeal on June 3, 2005. (L.F. 149).

## **STATEMENT OF FACTS**

The original appeal in this matter was lodged by Lafayette County which was followed by a cross appeal by Maurice and Nancy Gash, under Western District court rule these cases have been consolidated under one number. The Appellant/Respondents, Gash will be referred to in this brief as Gash or the Gashes for the sake of clarity.

On October 27, 2003 Plaintiffs Maurice and Nancy Gash filed a Petition in the Circuit Court of Lafayette County alleging that on July 31, 2001, the Maurice L. Gash and Nancy L. Gash Revocable Trusts purchased a tract of land approximately 20 acres in size in Lafayette County, Missouri (L. F. 23). Lafayette County has zoning and this tract was in the Agricultural Zone (A). (L.F. 8). that zoning basically allows agriculture one house and an accessory dwelling (L.F. 8). Lafayette County has a Comprehensive Land Use Plan which specified that land in the area of Appellants' land was designated for Potential Higher Intensity Uses (L.F. 8); and in fact during the years after zoning was instituted in 1985, numerous

tracts had been rezoned to higher intensity uses, (L.F. 9). In January 2002 Gash sought to have their land rezoned to General Business (B2) to develop a convenience store, a garage to service the weight scales, and machine sales, (L.F. 10). On February 7, 2002 a hearing was held before the Planning and Zoning Commission which because of alleged zoning violations tabled the re-zoning request (L.F. 10). The Planning and Zoning Commission refused to reconsider the matter for over one year (L.F. 10). During that year it approved a rezoning request in the Higginsville Highway 13 Corridor without controversy. Also during that year, Lafayette County agreed to abate the alleged violations if the Gashes would make a payment in lieu of a fine in the amount of \$10,000. Their Petition alleged that Gashes refused to pay the \$10,000 in lieu of a fine, (L.F. 10). Further Gashes alleged that had the zoning request to B2 been granted all of the remaining violations would have automatically abated, (L.F. 10).

The Gashes in Count I of their petition alleged that the zoning did not advance a legitimate interest of Lafayette County, that it did not bear a substantial, rational and/or reasonable relationship to the public health, safety, morals or general welfare, that it did not have a rational basis of classification, that the restriction to Agriculture usage was irrational and unreasonable because there is no existing foreseeable use of the property as

agricultural land, that the Agriculture restriction for the 17 acre parcel was not rational nor reasonable classification in light of the unsuitability and/or unadaptability for Agriculture usage, that the Agriculture zoning of the property restricted Gashes property to a use for which it is not adapted (L.F. 12). It further alleged that the Lafayette County Zoning Regulation invades the property rights of Gashes by restricting the use of the property to Agriculture when it is not suitable nor adaptable for Agricultural use; that the Lafayette County Zoning Regulations destroy the use and value and will continue to destroy all or substantially all economically viable use and value of Appellants' real property; that the regulation was detrimental and damaging to the interest and rights of Gashes while little or no benefit to the county or general public existed for restricting Gashes property to a use for which it is neither adapted nor suitable, that changing to B2 would have little or no detrimental or adverse effect on the other properties within Lafayette County. The petition further alleged that the zoning regulation and A zoning of the property are unreasonable and confiscatory because it denies Gashes reasonable and/or beneficial use of the property and restriction of Gashes property to unsuitable and unadaptable use has destroyed all economically and viable and value of respondent's real property, that the regulation is irrational in light of the Comprehensive

Land Use Plan for the I-70 corridor, that the zoning was unreasonable in light of recent rezoning of other properties to B2 which had previously been zoned Agricultural. The petition further alleged that it was irrational and unreasonable in light of there being no market for the property as it was zoned. Count I requested a declaratory judgment that the zoning was illegal, arbitrary, capricious, unreasonable, unconstitutional and void in its application to Gashes' property and requested an injunction against Lafayette county enforcing its zoning regulations against Appellant's property (L.F. 6).

In Count II the Gashes alleged that their right to substantive due process under the Missouri Constitution had been violated by the zoning classification (LF. 16). They alleged that they had been injured and damaged by the acts of defendants and requested a judgment that was reasonable and proper (L. F. 17).

In Count III they alleged that their right to Equal Protection under the Missouri Constitution had been violated (L.F. 17). They alleged that the Agriculture zoning was selective and discriminatory legislation and an inappropriate and unconstitutional consideration of land use and planning decisions and a demonstration of bad faith and improper purpose and an unconstitutional and illegal act (L.F. 18).

In Count IV the Gashes as plaintiffs alleged inverse condemnation under the Missouri Constitution, Article I, Sec. 10 and 26.

Specifically they re-alleged the common allegations in Paragraphs 1-19 and Count I, Paragraphs 1-4.

They cited the provision of Article I, Sec. 10 that provided “That no person shall be deprived of life, liberty or property without due process of law and Article I, Sec. 26 which provides: “That private property shall not be taken or damaged for public use without just compensation” (L.F. 20).

They further alleged that they have been denied their right to just compensation, under the Missouri Constitution in that Lafayette County had deprived them of all reasonable, viable and economically feasible use of their property, (L.F.20).

They further alleged that Lafayette County have so severely limited and restricted reasonable and viable and economically feasible use of Gashes’ property so as to damage and destroy their property rights and deny them the reasonable investment-backed expectations and all economically viable use of their real property.

By limiting and restricting the use of respondent’s property and destroying Gashes’ property rights in such real property Lafayette County has taken respondent’s real property for public use without formal

condemnation proceeding. And there is no indication that they are willing to institute a formal condemnation proceeding to acquire the property, (L.F. 20).

Further they alleged that Lafayette County had failed to provide just compensation for taking the respondent's real property as required by Article I, Sec. 26 of the Missouri Constitution. They alleged they are entitled to damages caused by Lafayette County's "inverse condemnation" of respondent's real property, interest, loss of profits and appreciation, attorney's fees costs and expenses (L.F. 21).

The Gashes prayed for damages for loss of use, loss of appreciation and profits for costs expenses and attorney fees.

This petition was met by an Answer and Counterclaim which asked for back permit fees for the agricultural buildings that respondent had put up on the property (L.F. 37). Lafayette County further requested an injunction prohibiting the construction of any new building without a permit.

Lafayette County filed a Motion to Dismiss Counts II and III as to damages and Count IV in its entirety (L.F. 46).

The Motion to Dismiss stated there is no common law right to sue for constitutional violations under state law. That can only be done for violations of the federal constitutional rights under the Statute 42 U. S.C.

Sec. 1983. (L. F. 46). Since claims of constitutional violations sound in tort, the county has sovereign immunity from tort liability (L.F. 47).

The inverse condemnation claim, Lafayette County alleged, was not ripe until a final decision was made regarding the use of the property. Since they did not seek any of the other eight alternatives between A and B-2, and because they had not sought a partial rezoning of the property or any zoning less than B-2, they alleged the only final determination is that Lafayette County will not rezone to B-2 (L.F. 48). Further, Lafayette County alleged that the petition for inverse condemnation should be dismissed because the Gashes had not sought a conditional use permit (L.F. 48). They alleged that determining what would be permitted was necessary for a taking claim to ripen (L.F. 48). The county further requested dismissal because no partial rezoning was requested and because no variance from the Board of Zoning Adjustment had been requested (L.F. 49). Lafayette County asserted that by filing the action for inverse condemnation prematurely the court is not in a position to know what Lafayette County might do on another request. Lastly, in light of the fact that plaintiff has two residences on the property the county suggested that the property was not economically idle (L.F. 50).

On May 6, 2004 by docket entry, the court dismissed the claim as to damages in Counts II and III and dismissed Count IV, the inverse condemnation claim. The trial of the case was held on January 19, 2005.

Harold Franklin Riekhof (incorrectly spelled Ridahol in the transcript) was called by the plaintiff. He owns some pieces of property in the I-70 corridor that he had rezoned commercially (Tr. 18). He had three tracts left all zoned commercial (Tr. 19). He had asked for rezoning four or five times and had never been refused (Tr. 20). The building on his property on Highway 13 was already built when he asked for rezoning (Tr. 20-21). He was told by Planning and Zoning that he did not have to have a permit to put a building on property that was still zoned agriculture (Tr. 21). He put up the building which was of the same general type as Gashes (Tr. 22). After he had the building built he sought rezoning to commercial (Tr. 23). His 50 acre tract was rezoned without any trouble (Tr. 24). That farm was a viable agricultural enterprise when he had it rezoned (Tr. 24). He had it rezoned to sell in the future or to build another building (Tr. 26). He had another three acre tract rezoned and put in a building and sold it to Mahindra, for \$300,000 after putting up a \$75,000 building (Tr. 28). He testified that land zoned commercial was worth a lot more than land zoned agriculture (Tr. 29). Agricultural land is going for a little higher than \$2,000 an acre (Tr. 29). He

stated that the I-70 corridor had always been reserved for higher intensity uses (Tr. 31). On one occasion Lafayette County had rezoned a tract for him on the possibility that someone would buy it in the future (Tr. 33). He admitted that the comprehensive plan designates this area as potential higher intensity uses mixed, and that appellant's property was approximately five miles away (Tr. 34-35).

On cross-examination Riekhof admitted that he had been developing on the north side of the interstate and the properties keep on moving one more property out each time you get any new business in there building on an existing commercial area (Tr. 40-41). In recent years, the zoning board has expected a little more detail on what your were planning to do (Tr. 42).

James Rehmsmeyer testified that he has been employed as a Natural Resource Conservationist with the U. S. Department of Agriculture for 28 years (Tr. 44). He farms 500 acres on land in Lafayette County. A 15 acre farm cannot be farmed economically as a stand alone unit (Tr. 45). A 15 acre farm is not an economically viable farm or agricultural enterprise (Tr. 46). Cash rents average \$100 per acre in Lafayette County (Tr. 46). Pasture rent averages \$30 to \$35 an acre (Tr. 47). On cross-examination he stated that 15 acres would be a hobby farm (Tr. 48).

Walter Kramer testified that he is a certified real estate appraiser (Tr. 51). And he had testified on many occasions as an appraiser (Tr. 51). He opined that the value of respondent's land as agricultural land was \$2,000 per acre (Tr. 59). One of his comp sales was \$9,091 per acre for 55 acres. Another was \$9,000 an acre and \$6,000 per acre (Tr. 60-61). In 2001 Riekhof had sold three acres to McCarter for \$300,000. He got \$100,000 for the building and \$200,000 for the land ( $\$200,000/3 = \$66,000$  per acre) (Tr. 60). He had noticed the higher intensity commercial uses along the I-70 corridor since he has been appraising real estate in Lafayette County. He testified that the best use of the Gashes' property would be a commercial property (Tr. 62). It would not be economically viable to farm a 15 acre tract (Tr. 63). He opined that by using a standard rule of thumb in determining the value of rental property, the 10 to 1 rule (i.e. 10 times the annual rent) he came up with a value of \$780,000.

He admitted that hardware, farm supplies, fertilizer sale, farmer's market, selling grain daycare retail pharmacy, retail steak and seafood, retail dairy products and a garden supply store would be commercial (Tr. 66). He was not necessarily saying that's what would be permitted in B-2 by the Lafayette County Zoning Ordinance (Tr. 67). He did not think being three miles from the city limits of Odessa would have a negative impact on the

value of the land (Tr. 70). He did not feel he had to consider the two residences separately on the property (Tr. 73).

On re-cross examination the attorney for Lafayette County characterized the tract of land across the street zoned B-2 as a shack labeled a flea market to which the witness agreed (Tr. 78). And he did not see any business going on at the flea market.

David Goodlow testified that for four years he was the zoning administrator for Lafayette County (Tr. 81). He had prepared a staff report on September 29, 1993 which was admitted into evidence concerning a property east of the location of respondent's property. There was no commercial use of the Lesure property when it was rezoned in 1993 (Tr. 85-86). This property was a couple of miles from Gashes' property on the same side of I-70 (Tr. 86). The attorneys agreed that the property was actually eight miles east of respondent's property (Tr. 87). There were no long range plans for the property when it was zoned and it was re-zoned for speculative purposes (Tr. 88). The re-zoning of that 12 acres went right through. He adverted that the master plan addressed the I-70 corridor turning into a commercial usage in the future (Tr. 88). The master plan was in place when he was the zoning administrator (Tr. 88). When he was the zoning administrator he tried to make his staff reports consistent with the master

plan (Tr. 89). The master plan he used was the one in effect when respondent made his zoning request (Tr. 90). His report at the time stated that commercial zoning is expected to generate westward from the Higginsville junction (Tr. 90). The comprehensive plan shows the junction near respondent's property as higher intensity mixed use (Tr. 91). Exhibit 3A showed that the area along I-70 from Bates City to Mayview was designated for potential higher intensity (Tr. 95). On inquiry from the County's attorney, Goodlow stated that the map was guidance to where you expect development may occur (Tr. 96). The policies of the plan are supposed to be taken into account when looking at particular requests, one of which was that proponents of urban development must provide reasonable documentation to show that similar comparable sites are not available within the current corporate limits of the county. The intent of the plan was to have a gradual spread out from the city along I-70 (Tr. 98). He also said that the clear policy of Lafayette County Planning and Zoning for the I-70 Corridor was to encourage development in that corridor (Tr.102).

William Meyer was the former county surveyor (Tr. 106) and he was the zoning administrator from 1986 to 1990. Presently he is the Presiding Commissioner for the Higginsville Planning and Zoning Commission (Tr. 108). He participated in making the Master Plan (Tr. 109). The I-70

Corridor was earmarked for the highest and best use along the east side of I-70 and then especially at the interchanges. He did survey work on the respondent's property (Tr. 112-113). The marks on the map contained in the Master Plan showed that the area was for higher use in rezoning (Tr. 113). It was always reserved for higher intensity use (Tr. 114). He was asked his opinion of what was the best use for respondent's tract, to which he replied, "Given the size of the tract and its location, the best use that I would've recommended would have been to rezone it to commercial" (Tr.114). He would have recommended B-2 zoning (Tr. 115). It is one of the few interchanges on that end of the county that has complete access from east and west lanes (Tr. 115). He was not aware that the property across Route M had been re-zoned by Lafayette County to B-2 but he would not have disagreed with zoning the property B-2 (Tr. 119). He recalled the re-zoning of a tract between Route O and Odessa because the Master Plan map showed it commercial even though if you applied the set back lines they overlapped in the middle (Tr. 122). When he administered the zoning they would wait until someone requested re-zoning and if it was in the I-70 Corridor it was looked at for its highest and best use, if the property would support a higher use in the way of industrial or commercial zoning it would be rezoned to that pretty much on demand (Tr. 127). The area was reserved for commercial

and industrial (Tr. 127-128). The property along I-70 to the North was generally more suitable for farming and the property on the south side was generally more suitable for residential use or higher development (Tr. 128). He was unable to think of any way that keeping Gash's property zoned agricultural promotes the health, safety, morals and general welfare of the citizens of Lafayette County (Tr. 129-130).

On cross examination he indicated one concern was for premature rezoning, before an area was ready (Tr.130). Most of the development in Odessa has been west of Odessa (Tr. 131). Concordia and Higginsville have economic development directors (Tr. 131-132).

Les Mitchell testified he lived near respondent (Tr. 136), he has 10 acres zoned industrial, and he lives on 30 acres next to it. Right next door the county zoned commercial so we could have a storage area on Norman Williams place (Tr. 138). The storage place was in the Williams' backyard, (Tr. 139). The B-2 rezoning was about a mile from respondent's property (Tr. 40). He also knew that Bonnie Keyserling who owned the property right across Route O from respondent got her property zoned commercial for a farmers market (Tr. 141). Across the interstate highway is a race track which had to be commercial, on the same side there is Dick's Junk Yard,

Rainey's Junk Yard and a car sales. When he had his property rezoned he had little trouble getting it rezoned to heavy industry (Tr. 143).

Ida Elaine Brown was on the zoning commission when the Gash request was turned down (Tr. 149). She thought the Master Plan was outdated immediately. She did not like it and did not think the people that drew it up put any thought locally into it (Tr. 150). She only paid attention to parts of the master plan (Tr. 151). She agreed that one of the purposes of zoning is to promote the health, safety, moral, and general welfare of its citizens (Tr. 152). She did not think the 10 to 15 acres could support a big commercial venture. She was asked how keeping it zoned Agg would promote the health of the citizens of Lafayette County, to which she replied "I don't think I could support a big commercial venture and that more sewage would be created", (Tr. 153). Traffic would be the only safety problem; any moral issue would depend on what else went in (Tr. 154). She was asked how keeping appellant's property zoned agricultural would promote the general welfare and she thought there could be some undesirable development in other zones (Tr. 155). She admitted Mrs. Keyserling who owned the property across the road did not have any trouble getting her property zoned B-2 (Tr. 155). She admitted that the Planning and Zoning Commission rezoned Ron Williams' property which was near-

by so he could put a storage facility in his mother's back yard (Tr. 162). She felt that in that instance the placement of a storage facility in the back yard of a residence did not hurt the health safety, moral, and general welfare of the citizens of Lafayette County, (Tr. 164). The Gash property was one-half mile from the Williams' property, (Tr. 165). When asked to distinguish the difference between the Williams request and the Gash request, she said that they had a empty building that was just falling apart and it would be better to have a business in it which was not going to have a negotiate (sic) or positive effect on the community (Tr. 167). Gash's place had a lot of new buildings on it and it is pretty well built up with new buildings along with two homes. When asked if she knew that Gash wanted to rent those for storage and other types of business, she denied knowing what he wanted to do with them (Tr. 168).

She was familiar with Farm Watch that opposes rezoning in that area of the county and they sent a letter in opposition (Tr. 170). There was a zoning request for M-1 at the Mayview exit which they turned down, (Tr. 171). And there was a Residential Agriculture request south and west of Gash which was turned down (Tr. 171). The Gary Wayne Zisk request was turned down because he simply refused to provide enough information (Tr. 173). The I-70 Speedway in the area was turned down on its expansion

request (Tr. 174). They had repeatedly had concerns about sewage, traffic and run-off that would be raised if it was rezoned to B-2 (Tr. 174).

There was no concern about Ron Williams having run-off no concern about Keyseling having run-off. She did not recall all of the rezoning requests that the Planning and Zoning Commission has approved for Mr. Riekhof (Tr. 175).

Larry Shutt is a realtor and an appraiser (Tr. 178). He sold the property to Gash and had called the Zoning Administrator Lisa Eaton to check on the possibilities concerning planning and zoning (Tr. 179). She gave him the indication that this property was ideal for commercial use (Tr. 180). Gash paid \$151,000 which is a little over \$10,000 an acre which is sure not agricultural or residential. Agricultural land is \$2,000 to \$3,000 per acre. (Tr. 181) He opined that the highest and best use of the land on all four corners of that intersection is commercial (Tr. 182-183). The whole intersection is prime for development (Tr. 183). Odessa is not that desirable because you have to get off on one exit and get on at another (Tr. 183). He could not see any reason for Lafayette County to keep it zoned agricultural (Tr. 184).

Shutt admitted that in the contract Gash did not ask for a clause about having to apply for zoning prior to the sale (Tr. 185). The closest business on the south outer road of I-70 was two miles (Tr. 185-186).

Gilbert Allengood testified that they tabled the Gash request because of some violations and they tabled it until they were resolved (Tr. 190). The zoning violations needed to be resolved before it could be rezoned (Tr. 191).

Robert Stockman testified that he is a farmer the cash rent per acre is \$110 per acre (Tr. 200). He is also on the Planning and Zoning Commission (Tr. 200). He was familiar with the Gash property (Tr. 201). The Comprehensive Plan reserves the area along I-70 for commercial development (Tr. 202). He felt it was susceptible for commercial development and the best use was commercial (Tr. 203). He had heard about a payment of \$10,000 by Gash to Lafayette County. Gash's request was never given serious consideration when he was at the meetings. It is not economically feasible to farm 15 acres of land (Tr. 205).

Thomas Lee Davis was on the Planning and Zoning Commission. He visited the site during the rezoning issue (Tr. 210). He was not sure what the best use of the property was (Tr. 210). He felt that the B-2 was the best use Keyserling property across the road which they zoned B-2 (Tr. 212). When asked if he did not think the best use of Gash's property was

commercial he made no response (Tr. 215). He felt the best use was commercial until Gash built two houses on it (Tr. 215). He agreed that the houses could be torn down or converted to businesses (Tr. 215). He had a problem with the alleged violations in approving the zoning (Tr. 216). He was aware that all of the violations were abated (Tr. 216). He admitted that they rezoned a nearby half of a farm plat B-2 (Tr. 220) and he would not have done that unless he felt like it promoted the health, safety, and welfare of the people of Lafayette County (Tr. 220). In fact having a house next to a storage facility provides an additional element of security (Tr. 221). He felt like the Keyseling property next door to Gash was appropriately zoned B-2 (Tr. 223). Mr. Gash never gave them a line that would have excluded the residence and the stable from the area being zoned (Tr. 225). The property in the general area of the Gash property is zoned agricultural (Tr. 231). Gash was not the only rezoning request that was denied (Tr. 232). Davis cataloged nine rezoning requests that were turned down, of which two were along the I-70 Corridor (Tr. 237). He acknowledged that the I-70 Corridor is special because of the intensive use and people needing to get off to buy gas and supplies, and he liked the idea of the money being spent in Lafayette County (Tr. 242). He recalled the Planning and Zoning Commission rezoning to B-2 a 15 acre plot at Highway 20 and 23 for a

convenience store (Tr. 243). He acknowledged that the staff report Plaintiffs' Exhibit 5 said the proposed zoning appears to be consistent with the comprehensive land use plan (Tr. 245, Pls Ex. 5) Fn. 1. On cross-examination it was brought out that a company called Planning Works did the staff report and the zoning board decided they did not need them anymore (Tr. 247).

Jim Strodtman testified he is the Presiding Commissioner of Lafayette County (Tr. 254). He said the Gash Zoning Request was denied by the County Commission (Tr. 255). You cannot make a living on 15 acres, you can rent it out to a farmer who will take an extra 15 acres (Tr. 256). He thought he saw the letter offering to allow Gash to settle the violations for a payment of \$10,000 in lieu of a fine before it was sent out (Tr.257). He did not know if the zoning would have gone on through if Gash had paid the \$10,000 to abate the zoning violations (Tr. 259).

The plaintiff, Maurice L. Gash, told the court he was a developer of building projects, owns a convenience store and commercial rental properties (Tr. 268). In 2001 he located the property which is the subject of this action which was prime for development (Tr. 271). He contacted a realtor and wanted some assurance that he could get it rezoned commercial.

Fn. 1 the transcript says inconsistent, but Exhibit 5 says consistent

The realtor reported back that in probability there would be no problem getting it rezoned commercial. And specifically he mentioned they had rezoned the tract across the road. He then bought the property (Tr. 272). He had seen every other tract along the I-70 Corridor get rezoned (Tr. 273). His property is 4 ½ miles from the Lasure 12 acres that was rezoned and it is halfway between the Highway 13 Exit and Highway H. He had notice that Riekhof had several tracts rezoned for speculative purposes (Tr. 274). It appeared that Lafayette County was freely rezoning property in that area upon request. The piece of land across the street was changed to B-2 commercial (Tr. 275). There are several non-conforming uses in the area (Tr. 276). No one had any problem rezoning along the I-70 Corridor. Based on his analysis of the area, the traffic on I-70, the terrain the roads and everything his opinion that this is a very good location for commercial use and is prime land for development (Tr.278). He prepared Exhibit 1 a zoning district map from the Higginsville Junction to the Jackson County line and pictures of the associated properties. At the end of the exhibit are pictures of his property (Tr. 278-282). The only difference between his property and the Keyseling property next door is the size, his is 15 acres and hers is five acres. The County recently rezoned Ron Williams property which is one-half mile away. It is zoned B-2. Williams had a dairy farm

converted to row crops and cattle. The storage sheds he built looks just like Gash's buildings, only smaller. He examined the consultant's reports for Williams, Lasure and the one for his property and each determined the best use was B-2. The only real difference between his property and Williams was his is bigger and right at an exit (Tr.285). Lasure's have a house on their property. The staff report done by Lafayette County indicated his request would be appropriate (Tr. 286). He went in and told the Zoning Administrator he wanted to rezone the property and wanted to put in a convenience store, storage buildings and self-storage. He had one barn he wanted to use as a stable until he converted it to something else. And then he wanted to use the property for machinery sales, construction and farm machinery and a business to service the scales. Then the Zoning Administrator suggested that the proper way to go would be B-2 like the Keyserling Property adjoining. (Tr. 287).

At the present time he could only use it as a residence (Tr.287). He had one building rented for a year to a man who makes organic garden fertilizer (Tr. 288). The Planning and Zoning Administrator told the man that would fit in just fine (Tr. 288). He rented it for one-half what he had figured on charging i.e. \$750. All of the buildings were farm buildings metal pole barns, none were finished out for commercial use. His projected

rent for five buildings was \$6,500 per month (Tr. 289). He was not in the farming business, he had never farmed the property. It was not suitable for agriculture. The taxes are \$4,900 per year (Tr. 290). The most rent he could get for crops couldn't be more than \$100 per acre per year (Tr. 291). The land has no base acres for the farm program (Tr. 291). The land had not been in the farm program for years (Tr. 292). The previous gentleman kept cattle there for 25 years and had paid \$250 per year rent (Tr. 292).

He applied for zoning in late November 2001 (Tr. 292) while he was finishing up construction on his house and buildings. When he went to his hearing he explained what he wanted to do; build a convenience store, build several buildings for different types of businesses (Tr. 293). The buildings were already built but not finished out. He wanted to lease them out to people to run a business like an auto repair shop, a truck repair shop to get work from the new scale for a farm and construction machinery sales yard (Tr. 294). He thought they would act on his request that night. He had one building rented to Mr. Carter of Mahindra Tractors who when he told him there was going to be a little problem went on down and rented from Frank Riekhof at the Higginville Junction, who later sold the property to Carter for \$300,000.

At his hearing when they asked for comments from the audience it turned into a malay (sic) it was shameful the way they acted they were just talking about beer joints, strip joints and slum housing (Tr. 296). None of his property had ever degenerated to that sort of use. All he had done was develop convenience stores, storage sheds, garages and residence (Tr. 296-297). The Farm Watch group was there. Two of the immediate neighbors supported his request (Tr. 297). He built the buildings before he got the property rezoned, because he wanted to get them done before winter. He figured the houses would serve as security for the buildings. The houses he built could be converted into businesses or duplexes (Tr. 299). Or if the right tenant came along it would not be unreasonable to tear the houses down and replace them. If Shell or BP would put in a big one he would tear the houses down in a minute (Tr. 300). He had only spent \$120,000 on one house and \$90,000 on the other (Tr. 300).

A week later he went to another Planning and Zoning meeting where he wanted to rebut some of the things that had been said about slum housing and strip joints and they were talking about the telephone tower falling on one of the houses (Tr. 302). He had checked with the tower company before he built the house and learned it was designed to collapse down, and not fall over (Tr. 302). At the second meeting he was not allowed to speak

(Tr. 304). He was asked what they did with his application, and said the Commission discussed the way to table it. They were discussing how long they could table it among themselves, they said they could table it for a week, table it for a year and then they came up with the idea that they could table it indefinitely. Then the next thing he heard was that Lisa Eaton the Zoning Administrator had found three violations on the property (Tr. 304). She said both houses were short the 50 foot setback requirement, and one house was not twice as big as the other. He appealed that to the Board of Zoning Adjustment, they dismissed the first allegation found against him on the other two (Tr. 305). He then appealed that by Certiorari and Judge Harvey ruled the one house being bigger than the second house was dismissed. He found for Lafayette County on setback, but he had it surveyed which clearly showed that the house was 63 feet from the property line. The county appealed that ruling and in the meantime he abated the problem that they appealed (Tr. 307) by doubling the size of the main house. Ultimately the county denied his zoning request, by which time he had abated all violations (Tr. 309). Along the line they asked him to pay \$10,000 to abate the violations, Exhibit 31 (Tr. 309). He did not pay the \$10,000. In the meeting when they denied his motion, the rezoning request, he heard one of the members say that Gash should not be able to get away

with this without paying a fine (Tr. 310). That member was Gilbert Allengood (Tr.311). At the same meeting Mrs. Brown said “Gash built both houses and he knew they were in violation and he built them anyway” (Tr. 311). Gash said he did not know they would allege them to be in violation when he built those houses (Tr. 311). When he applied for his building permits he asked about the farm buildings and was told he did not need a permit to build a farm building. Several exhibits were admitted with the explanation why applicants wanted their property rezoned (Tr. 312-318).

On cross examination the County’s attorney admitted an Exhibit R that showed the land value as \$9,017. The main portion of the taxes is figured on homes and improvements put on the property (Tr. 333). The zoning application was introduced and the statement on the back read into the record (Tr. 334). It is up to the applicant to provide information to justify the change (Tr. 336). He admitted that he put on his application that he’d like to build a convenience store and lease out the other buildings (Tr. 337). The main house was used as a residence but it would be an accessory to the convenience store or rent to or furnish to the manager or an employee (Tr. 338). Gash drew a diagram of the buildings for the County’s attorney. Building one was being used for personal storage (Tr. 339). Building one could be an automobile repair garage (Tr. 340). Building two is a pole

barn. He kept tractors and equipment in it at the time (Tr. 341). His proposed use would be second hand merchandise, machinery, construction equipment and machinery sales and used tools (Tr. 341). Building three was empty but it could be used for retail farm equipment, machinery, convenience store equipment secondhand merchandise and construction equipment (Tr. 342). Building four is leased out for wholesale fertilizer, (Tr.343). The other house could provide security for building four or five; the manger of one of those businesses might be able to live in it (Tr. 344). He did not put any uses for B-1 zoning. His plan called for B-2. B-1 zoning uses would not fit (Tr. 346). Every one of his plans has to have B-2 in it. B-1 is designated to be in a downtown area (Tr. 346). There is only one B-1 zoned parcel in Lafayette County (Tr. 347). The board of planning and zoning rejected his request without suggesting he try B-1 instead of B-2 (Tr. 348).

At the time of the hearing Gash had two residences on the property, they are not accessory uses in B-2. They would be non-conforming uses (Tr. 353). He felt that the houses would be very necessary to be there in B-2 for security reasons (Tr. 353). The stables were to board horses (Tr. 354). Most of the buildings were started in September of 2001 (Tr. 354). The buildings were to be agricultural until they were converted to commercial

use. The intent was that for eventual use as commercial structures (Tr. 355). By starting the construction before he applied for rezoning he avoided the permit fees. By starting construction before applying for rezoning he managed to build two houses. He was asked if he wanted the County to allow these as non-conforming uses on the property to which he replied, "Yes" (Tr. 356). He didn't look at any other B-2 property (Tr. 356). No other locations had the commercial possibilities that this location had (Tr. 357). He did not present any information to the Planning and Zoning Board with his application as to why other B-2 properties were unsuitable (Tr. 357). Gash was very dissatisfied that they held up the application so long (Tr.358). No assistance was ever given, he was just trying to get help (Tr. 359). When he sent them a letter requesting that it be taken off the table it was scheduled for a decision the next meeting (Tr. 359). There was a fire at his residence after the rezoning had been denied in June of 2003. After that he filed this suit and never applied for rezoning (Tr. 371). He did not apply for a rezoning for part of the property as B-2. He never asked Planning and Zoning to zone part of the property Residential-Agriculture or something and leaving the front commercial. He wanted the whole lot (Tr. 371). Gash has three to four businesses within a mile of his property (Tr. 376). He was asked if he supplied any other supporting

documents to the Planning and Zoning office. He said that the one meeting was all I was allowed to speak. I feel like I didn't have a chance to even ask? All he provided was that basic one page application (Tr. 378). A couple of minutes of testimony was all he was allowed (Tr. 379). He was asked if "No one told you were out of time,"to which Gash replied they would not recognize me when I tried to rebut what they were saying (Tr. 379). He was told by the County's attorney that the things that the opposition brought up like beer joints and strip clubs were conditional uses in B-2. He said he had not researched that (Tr. 380). Gash did not know that strip clubs were retail businesses. Gash admitted that he might sell the property in the future to an owner who would be free to put in any B-2 use they wanted to (Tr. 380). Based on the way he was treated Gash did not think they would ever approve one of his zoning requests (Tr. 381).

## **POINTS RELIED ON**

### POINT I

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLAIM IN COUNT IV ALLEGING A TAKING AND INVERSE CONDEMNATION BECAUSE THE PETITION PLEADED SUFFICIENT FACTS TO SUPPORT A CAUSE OF ACTION FOR TAKING AND INVERSE CONDEMNATION IN THAT APPELLANT ALLEGED THAT THE PROPERTY WAS TAKEN OR DAMAGED BY THE STATE WITHOUT JUST COMPENSATION.

**First English Evangelical Lutheran Church of Glendale v. Los Angeles**

482 U.S. 304, 318 S. Ct. 2378 96 L. Ed 2d 250 (1987).

**Lucas v. South Carolina Coastal Council** 505 US 1003, 1015 at 112 S.

Ct. 2886 120 L. Ed 798 (1992)

**Nazeri v. Missouri Valley College** 860 S.W. 2d 303, 306 (Mo. Banc 1993).

**Penn Central Transportation Co. v. New York City** 438 U.S. 104, 124 98

S. Ct. 2646, 57 L. Ed. 2d (1978)

## POINT II

THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIM FOR TAKING AND INVERSE CONDEMNATION ON THE GROUND OF RIPENESS BECAUSE THE CLAIM WAS RIPE FOR DETERMINATION IN THAT THE PLANNING AND ZONING COMMISSION HAD ISSUED ITS FINAL DETERMINATION DENYING THEIR REZONING REQUEST AND THERE WAS NO OTHER ADMINISTRATIVE PROCEDURE OR STATE LAW ALLOWING FOR JUST COMPENSATION FOR THE DEPRIVATION OF THE USE OF APPELLANT'S LAND OTHER THAN INVERSE CONDEMNATION

**CIS Communications, L.L.C v. County of Jefferson** 2005 WL 3046343

(Mo. E.D.)

**Owens v. City of St. Louis** 2005 W.L. 2033425 (E.D. Mo. Aug 18, 2005)

**Suitum v. Tahoe Regional Planning Commisision** 117 S. Ct. 1659

(1997).

**Williamson Planning Commission v. Hamilton Bank**, 473 U.S. 172

(1985)

## POINT III

THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIM FOR TAKING AND INVERSE CONDEMNATION ON THE GROUND OF RIPENESS BECAUSE THE CLAIM WAS RIPE FOR DETERMINATION IN THAT THE PLANNING AND ZONING COMMISSION HAD ISSUED ITS FINAL DETERMINATION DENYING THEIR REZONING REQUEST AND AN APPLICANT DOES NOT HAVE TO REQUEST EVERY POSSIBLE TYPE OF ZONING AND BE DENIED TO ACCRUE A CAUSE OF ACTION FOR TAKING OR INVERSE CONDEMNATION AND PLAINTIFF'S DISTINCT INVESTMENT BACKED EXPECTATIONS WERE INTERFERED WITH.

**First English Evangelical Lutheran Church v. 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,

2894 (1992).

**Palazzolo v. Rhode Island**, 533 U.S. 606 (2001)

**Penn Central Transportation Co. v. New York City** 438 U.S. 104, 124 98

S. Ct. 2646, 57 L. Ed. 2d (1978)

## **ARGUMENT**

### **POINT I**

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLAIM IN COUNT IV ALLEGING A TAKING AND INVERSE CONDEMNATION BECAUSE THE PETITION PLEADED SUFFICIENT FACTS TO SUPPORT A CAUSE OF ACTION FOR TAKING AND INVERSE CONDEMNATION IN THAT APPELLANT ALLEGED THAT THE PROPERTY WAS TAKEN OR DAMAGED BY THE STATE WITHOUT JUST COMPENSATION.

### **Standard of Review**

The trial court entered its Order on May 6, 2004 dismissing Counts II and III as to damages, and Count IV entirely. Although failure to state a claim was not alleged in the Motion to Dismiss, the court could have *sua sponte* dismissed on that ground. When the trial court sustains a motion to dismiss without specifying grounds the appellate court will sustain the judgment if any of the asserted grounds are proper. **Sullivan v. Pulitzer Broadcasting, Co.** 709 S.W.2d 475, 476 (Mo. Banc 1986). In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, the following standard of review applies:

“A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No 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. **Nazeri v. Missouri Valley College** 860 S.W. 2d 303, 306 (Mo. Banc 1993)”.

In Count IV of its original Petition (L.F.6) - Gash alleged:

- That Plaintiff's property shall not be taken or damaged without just compensation Art. 1 Sec. 26 Missouri Constitution .
- That Plaintiff's have been denied their right to just compensation in that the Lafayette County Zoning Regulation deprived (them) of all reasonable viable and economically feasible use of the real property.
- That defendant's have so severely limited and restricted, reasonable viable and economically feasible use of Plaintiff's property so as to damage and destroy Plaintiff's property rights and deny Plaintiff reasonable investment backed expectations and all reasonable viable and economically feasible use of Plaintiff's real property. (L.F. 20).
- By limiting and restricting the use of Plaintiff's property and destroying Plaintiff's property rights in such real property (Defendants) have taken Plaintiff's real property for public use without formal condemnation proceedings.
- There is no indication Defendant Lafayette County intends or is willing to institute and prosecute a formal condemnation proceeding to acquire Plaintiff's real property described above.
- That defendant's have failed to provide Plaintiff's with just compensation for taking Plaintiff's real property as requested by Art. I Sec. 26 of the Missouri Constitution.

- Plaintiff's are entitled to all damages caused by inverse condemnation including any and all interest loss of profits and appreciation, attorney fees and other costs and expenses. (L.F. 21)

In **Chesterfield Village Inc. v. City of Chesterfield**, 2001 WL 88070 2001 Mo Sup Ct. (Aug. 21, 2001) reversed on other grounds 64 S. W. 3d 315 (Mo. Banc. 2002) the court recognized a cause of action for temporary taking and inverse condemnation. The Western District held that a regulatory taking is a cause of action in Missouri, **Harris v. Missouri Dept of Conservation** 755 S.W. 2d 726 (Mo. App. W.D. 1988). Missouri has long recognized a cause of action for taking **Hamer v. State Highway Commission**, 304 S.W. 2d 869 (Mo . 1957).

In **First English Evangelical Lutheran Church of Glendale v. Los Angeles** 482 U.S. 304, 318 S. Ct. 2378 96 L. Ed 2d 250 (1987) the United States Supreme Court in analyzing the Fifth Amendment taking clause required the government to pay for a temporary taking. **Harris v. Missouri Department of Conservation** at p. 729 acknowledged that the Missouri Constitution Art. 1 Sec. 26 and the Fifth Amendment of the United States Constitution are virtually the same, so that Missouri should follow the precedent of the United States Supreme Court in interpreting the taking clause.

The Supreme Court has recognized two situations when a taking has occurred as a matter of law; one is where there is an actual physical invasion of the property, the other is where the regulation denies all economically beneficial productive use of the land. Other alleged takings are determined on a case by case basis., **Harris v. Missouri Department of Conservation**, 755 S.W. 2d 726, 730 ( Mo App. W.D. 1998).

**Lucas v. South Carolina Coastal Council** 505 U.S. 1003, 1015 at 112 S. Ct. 2886 120 L. Ed 798 (1992) held that denial of reasonable viable and economically feasible use was alleged by Plaintiff's. (L.F. 20).

The Supreme Court in **Penn Central Transportation Co. v. New York City** 438 U.S. 104, 124 98 S. Ct. 2646, 57 L. Ed. 2d (1978) set out certain taking factors.

These factors are the:

1. Economic impact of the regulation on the claimant.
2. The extent to which the regulation has interfered with distinct investment backed expectations.
3. The character of the governmental action.

Plaintiff's alleged in paragraph 4 of Count IV that the regulation had so severely limited and restricted reasonable viable and economically feasible use as to damage and destroy property rights and deny them their

investment backed expectations and an economically viable use.

(Paragraph 4, L.F. p. 20).

This was caused by Lafayette County's failure to rezone from Agriculture to B2 commercial zoning and the delay from February 7, 2002 forward. See allegations common to all counts Paragraphs 13, 14, 15, 16, 17, 18 and 19. (L.F. 7-11) Plaintiffs made all of the proper allegations to state a claim for taking under the principles articulated in **First English Evangelical Lutheran Church v. Los Angeles, Lucas v. S. Carolina and Penn Central**.

In **Chesterfield Village** the Eastern District also addressed the claim for inverse condemnation "to recover for a claim of inverse condemnation, Plaintiff must show the government appropriated without formally condemning some valuable property right which the landowner has acquired." **Ressel v. Scott County** 527 SW 2d 518, 520 (Mo. App. E. D. 1996) "to state a claim for inverse condemnation a Plaintiff must allege his property was taken or damaged by the State for public use without just compensation. **Harris** at p. 729.

This is precisely what the plaintiffs alleged in paragraph 3 of Count 1V (L.F. p. 20).

The landowner does not have to show a physical taking. **Harris** at p. 729.

In paragraph 5, Plaintiff's alleged that the county took the property for public use without just compensation (L.F. 20). The inverse condemnation claim was clearly alleged.

Since the clearest precedent analogous to plaintiff's situation **Chesterfield Village** was reversed on other grounds, i.e. *res judicata*, it has not become part of the relevant binding precedent in this State. Thus, it is necessary to turn to the key cases in this area as an aid in interpreting the Missouri Constitution Art. 1 Sec. 26. Rather than having two separate and distinct causes of action taking and inverse condemnation they are two sides to the same coin. The following relevant principles govern a regular taking analysis under the Fifth Amendment of the United States Constitution and Art. 1 Sec. 26 of the Missouri Constitution.

The "just compensation clause" of the Fifth Amendment "is designed not to limit governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to taking" **First English Evangelical Lutheran Church Of Glendale v. County of Los Angeles, California** 482 U.S.304, 315, 107 S.Ct. 2378, 2386, 96 L.Ed. 2d 250 (1987). The typical taking

occurs when government acts to condemn property in an exercise of imminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.

“Temporary takings which, as here, deny a landowner all the use of his property are not different in kind from a permanent taking for which the Constitution clearly requires compensation” **First English Evangelical Lutheran Church Of Glendale v. County of Los Angeles, California** 482 U.S.304, 318, 107 S.Ct. 2378, 2388, 96 L.Ed. 2d 250 (1987).

“The Just Compensation Clause of the Fifth Amendment requires that the government pay the land owner for the value of the use of the land during this period, **First English Evangelical Lutheran Church Of Glendale v. County of Los Angeles, California** 482 U.S.304, 319, 107 S.Ct. 2378, 2388, 96 L.Ed. 2d 250 (1987) one remedy for taking is:

“Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a ‘temporary’ one is not a sufficient remedy to meet the demands of the Just Compensation Clause, *Id.*” Under the just compensation clause where government has taken property by land use regulation landowner may recover damages for the time before it is finally determined that the regulation constitutes taking of property. *Id.* at 319. “Once a court determines a taking has occurred the government

retains the whole range of options already available-- amendment of the regulation, withdrawal of the invalid regulation or exercise of eminent domain. **First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California** 482 U.S.304, 321, 107 S.Ct. 2378, 2389, 96 L.Ed. 2d 250 (1987). The Supreme Court held that “where the government’s activities have already worked a taking of all use of the property, no subsequent action by government can relieve it of the duty to provide compensation for a period for which taking was effective. **First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California** 482 U.S.304, 321, 107 S.Ct. 2378, 2389, 96 L.Ed. 2d 250 (1987).

The principals articulated by United States Supreme Court in **First English Evangelical Lutheran Church of Glendale, Lucas v. South Carolina Coastal Council, and Penn Central** are the principals by which Art. 1 Sec. 26 should be governed. Plaintiffs clearly pleaded a cause of action under the just compensation clause. Call it “taking” or inverse condemnation,” the fact remains the Plaintiffs pleaded a viable cause of action that the Court should not have dismissed. The fact also remains that for a three year period of time until the Gashes were able to get their case to court they were temporarily deprived of the use of their land and their

distinct investment backed expectations were blocked by Lafayette County. These damage issues should not have been dismissed by the trial court and should have been litigated as part of the trial in this case.

## POINT II

THE TRIAL COURT ERRED IN DISMISSING APPELLANTS CLAIM FOR TAKING AND INVERSE CONDEMNATION ON THE GROUND OF RIPENESS BECAUSE THE CLAIM WAS RIPE FOR DETERMINATION IN THAT THE PLANNING AND ZONING COMMISSION HAD ISSUED ITS FINAL DETERMINATION DENYING THEIR REZONING REQUEST AND THERE WAS NO OTHER ADMINISTRATIVE PROCEDURE OR STATE LAW ALLOWING FOR JUST COMPENSATION FOR THE DEPRIVATION OF THE USE OF APPELLANT'S LAND OTHER THAN INVERSE CONDEMNATION

The trial court erred in dismissing plaintiffs claim for inverse condemnation on ripeness grounds which may have been based on the argument that no final determination had been made under state law.

The standard of review is the one articulated in **CIS Communications, L.L.C v. County of Jefferson** 2005 WL 3046343 (Mo. E.D.) requiring *de novo* review.

In Lafayette County's Motion to Dismiss it cited **Williamson Planning Commission v. Hamilton Bank**, 473 U.S. 172 (1985) for the proposition that a "taking" claim must be ripe for adjudication. In **Williamson** the court held that a claim that the application of government regulations effects a taking of property is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of regulations to the property. **Williamson** at p. 186 It went on to say that " if the government has provided adequate process for obtaining compensation for taking of property and if resort to that process yields just compensation then a property owner has no claim against the government for taking, Id at 194. In **Williamson** the court held that the Tennessee jury had determined that the respondent had been denied the "economically viable" use of the property and awarded damages of \$350,000 for the temporary taking of their property, Id at 183. The Supreme Court held that if the state has a procedure for seeking just compensation then the property owner cannot claim a violation of the just compensation clause until it has used the state procedure and been denied

just compensation. *Id.* at. 194. In effect if the state has an inverse condemnation remedy then the claimant has to exhaust it before going to Federal Court. By not utilizing the Tennessee procedure for inverse condemnation the plaintiff in that case could not go to Federal Court. The court also held that when the plat was turned down the plaintiff had not sought a variance. In *Gashes*' case they were seeking rezoning of the whole tract to B-2 not a plat approval. There was no variance that they could have obtained from agriculture zoning that would have allowed them to utilize the economic potential of their property. And they were not allowed to litigate that point because their claim for inverse condemnation was dismissed. What the appellants were trying to do was pursue their inverse condemnation claim under state law and the trial court precluded that by dismissing the claim.

A similar move was made in ***Suitum v. Tahoe Regional Planning Commission*** 117 S. Ct. 1659 (1997). One has to bear in mind that the issue in the United States Supreme Court involves what hurdles a litigant must get over to stay in Federal Court. The ripeness requirement requires two things, 1) the plaintiff must demonstrate he or she has received a final decision regarding the application of the challenged regulations. 2) and he or she sought compensation through the procedures the state has provided

for doing so. Appellants meet the primary test, they have been turned down in their request to zone the property they bought for development for Commercial B-2 zoning. The seeking of just compensation is exactly what they were attempting in Count IV of this lawsuit that was dismissed by the trial court.

In effect Lafayette County is saying Gashes' claim must be dismissed for not seeking inverse condemnation when that is precisely what the County asked to have dismissed. Relying upon a series of cases that set out the hurdles for keeping in Federal Court is not an obstacle to litigating inverse condemnation in State Court. Gashes alleged and were prepared to prove all that they had to allege and prove: that they were denied proper zoning; they were deprived of any economically viable use of their land; and that their reasonable investment backed expectations were interfered with; (L.F. 20), that Lafayette County had refused to rezone to B-2 . and that Lafayette County contended that the Agricultural zoning applicable to Gash's property was reasonable, proper and constitutional (LF 14). In **Suitum** the court reversed holding that there had been a final determination like the situation in Gash—they had been turned down. The trial court ultimately found the zoning was unreasonable; arbitrary and capricious

which accentuates the fact that the Gashes have been financially damaged by Lafayette County.

Whether to bring the inverse condemnation claim in State Court or Federal Court has plagued litigants for years, particularly in light of

**Williamson**. The better view has become that it is premature to bring the claim in Federal Court if it could have been brought in State Court.

Recently, in **CIS Communications, L.L.C v. County of Jefferson** 2005 WL 3046343 (Mo. E.D.) the court held that if CIS has asserted a Fifth Amendment taking claim in the Federal Lawsuit, it would not have been ripe in that CIS had not yet sought just compensation through a state inverse condemnation claim. (Id. at p. 2) The Eastern District Court pointed out that the United States District Court in **Owens v. City of St. Louis** 2005 W.L. 2033425 (E.D. Mo. Aug 18, 2005) had dismissed as not ripe for federal adjudication an inverse condemnation because “state law requires that this claim must be exhausted in state court.” Id at 3.

The law is that there has to be a final decision, which there is; and exhaustion in state court, which is what the appellant is trying to do before the claim is ripe for federal review. Appellants are not seeking federal review, thus what is required is that there be a final decision denying the

appellant the economically feasible use of this property or the reasonable investment backed expectations.

All of which are present in the case; the trial court should not have dismissed Gash's claim for inverse condemnation.

### POINT III

THE TRIAL COURT ERRED IN DISMISSING APPELLANTS CLAIM FOR TAKING AND INVERSE CONDEMNATION ON THE GROUND OF RIPENESS BECAUSE THE CLAIM WAS RIPE FOR DETERMINATION IN THAT THE PLANNING AND ZONING COMMISSION HAD ISSUED ITS FINAL DETERMINATION DENYING THEIR REZONING REQUEST AND AN APPLICANT DOES NOT HAVE TO REQUEST EVERY POSSIBLE TYPE OF ZONING AND BE DENIED TO ACCRUE A CAUSE OF ACTION FOR TAKING OR INVERSE CONDEMNATION AND PLAINTIFF'S DISTINCT INVESTMENT BACKED EXPECTATIONS WERE INTERFERED WITH.

The trial court erred in dismissing plaintiffs claim for inverse condemnation on ripeness grounds which may have been based on the argument that the appellants had not requested every possible type of rezoning prior to making their taking and inverse condemnation claim.

The standard of review is the one articulated in **CIS Communications, L.L.C. v. County of Jefferson** 2005 WL 3046343 (Mo. E.D.) requiring *de novo* review.

The plaintiffs bought this land to develop it and paid a commercial price of \$10,000 per acre for the land. They tried to get it zoned commercial B-2 which under Lafayette County's regulations is the appropriate zoning as was ultimately found by the trial court, (see Judgment L.F. 132).

For the three year period from February 7, 2002 when the Lafayette County Planning and Zoning Commission tabled the appellant's request to February 23, 2005 when the trial court found that the zoning was arbitrary, capricious, unreasonable and void as applied to appellant's property the appellants were denied the economic use of their land. (L.F. 140). The plaintiffs sought in Count IV compensation for the taking of their property or inverse condemnation, which was dismissed before trial.

In its Motion to Dismiss that was granted, Lafayette County laid out a series of obstacles to that claim. Since the trial court did not address why he dismissed Count IV, he may have done so for the reasons cited in the Motion to Dismiss.

Without citing any authority to the trial court Lafayette County posited a series of obstacles to the taking or inverse condemnation claim.

1. That a final decision has to be made concerning the use of the property.
2. If a proposed use is only permissible as a conditional use or as part of a planned group development an appropriate application must be made.
3. Third, if a proposed use is not permissible under any circumstances in the specific zoning a variance must be sought, (L.F. 47).

Lafayette County complained that plaintiff sought to have the property zoned B-2 and was turned down, (L.F.47). Plaintiff had not sought any of the 8 categories between Agricultural and B-2, (L.F. 47). So the only determination was that Lafayette County would not give the plaintiff, B-2, (L.F. 48). The motion alleged, that furthermore, plaintiffs had not asked for a conditional use permit or a variance, (L.F. 48). The motion alleged that partial zoning had not been rejected by Lafayette County, (L.F. 49). Further, the Board of Zoning adjustment “might” give them a variance assuming their factual allegations are correct, (L.F.49). In summing up its motion Lafayette County, directed the court to **Palazzolo v. Rhode Island**, 533 U.S. 606 (2001) for the proposition that a regulation allowing an owner to

build a substantial residence on an 18 acre tract did not leave it economically idle.

On one level, the trial court cut through all of this when it found that the Agricultural zoning in place was arbitrary, capricious, unreasonable and void.(L.F.140) But, before entering that judgment it had already dismissed the Inverse Condemnation claim. (L.F. 3 Supplemental L.F. 1)

The argument advanced by Lafayette County in its motion to dismiss suggests that if the state delays a determination that it cannot be sued for its delay. And a successful claimant has to beg for every possible zoning option and be turned down before their cause of action ripens. That is not the state of the law. Lafayette County sat on the application from February 2002, to July 12, 2003 when it for no good reason rejected the zoning change and then it was another year and a half until plaintiffs obtain a judgment that Lafayette County's zoning was invalid as applied to their property. During that period of time plaintiffs lost \$6,500 (L.F. 133) per month rent multiplied by 36 months is \$234,000.

To state a claim for inverse condemnation a plaintiff must allege his property was taken or damaged by the state without just compensations, there does not have to be an actual physical taking, an invasion or appropriation of a valuable property right must be pleaded and

proved, **Chesterfield Village Inc. v. City of Chesterfield**, 2001 WL 488070, p. 4 (2001) reversed on other grounds 64 S.W. 3d 315, citing **First English Evangelical Lutheran Church v. Los Angeles**, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed. 2d 250 (1987).

Under “the just compensation clause” of the United States Constitution where government has taken property by land use regulation landowner may recover damages for the time before it is finally determined that the regulation constitutes taking of property. Once taking has occurred, State has a whole range of options: Amendment of the regulation, withdrawal of the invalid regulation or exercise of eminent domain. However when the government’s activities have already worked a taking of all use of the property, no subsequent action by government can relieve it of the duty to provide compensation for a period for which taking was effective. Although there is a line of cases that are predicated on the deprivation of all economically viable use of the land; there can be compensation for less than that as Justice Scalia articulated in **Lucas v. South Carolina Coastal Council** 505 U.S. 1003, 112 S.Ct. 2886, 2894 (1992). wherein he wrote:

“As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate

state interests *or denies an owner economically viable use of his land.*"

Citing [Agins, supra, 447 U.S., at 260, 100 S.Ct., at 2141](#)

Lafayette County contended to the trial court that it had to deprive the plaintiff of all economically viable use of the land, that is simply not true as Justice Scalia answered Justice Blackman in Lucas at FN7:

“We will not attempt to respond to all of Justice BLACKMUN's mistaken citation of case precedent. Characteristic of its nature is his assertion that the cases we discuss here stand merely for the proposition "that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial takings challenge" and not for the point that "*denial* of such use is sufficient to establish a takings claim regardless of any other consideration." *Post*, at 2911, n. 11. The cases say, repeatedly and unmistakably, that " [t]he test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property *effects a taking if it "denies an owner economically viable use of his land."* ' ' " [Keystone, 480 U.S., at 495, 107 S.Ct., at 1247](#) (quoting [Hodel, 452 U.S., at 295-296, 101 S.Ct., at 2370](#) (quoting [Agins, 447 U.S., at 260, 100 S.Ct., at 2141](#))) Cited in **Lucas** at 112 S.Ct. 2894.

The County in its argument to the trial court misplaced its reliance on **Palazzolo v. Rhode Island**, 533 U.S. 606 (2001), In that case the Supreme Court actually held:

“The court did not err in finding that petitioner failed to establish a deprivation of all economic value, for it is undisputed that the parcel retains significant worth for construction of a residence. The claims under the **Penn Central** analysis were not examined, and for this purpose the case should be remanded” Id. at 632.

The **Penn Central** case required the court to analyze the “distinct investment backed expectations”

“In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.” **Penn Central Transportation Company v. City of New York**, 438 U.S. 104, 124 98 S.Ct. 2646, 2659, (1978).

Art. 1 Sec. 26 of the Missouri Constitution should be interpreted consistently with the principles articulated by United States Supreme Court in **First English Evangelical Lutheran Church of Glendale, Lucas v.**

**South Carolina Coastal Council, and Penn Central,** These principles which plaintiff clearly pleaded a stated a cause of action under “the just compensation clause” of the Missouri Constitution, whether it be called a “taking” or inverse condemnation, the fact remains the Plaintiff pleaded a viable cause of action that the Court should not have dismissed. The fact also remains that for a three year period of time until the trial court entered its judgment plaintiffs were deprived temporarily of the economic use of their land and their distinct investment backed expectations were blocked by Lafayette County’s refusal to allow a reasonable commercial zoning of plaintiff’s property.

### CONCLUSION

For the reasons stated above the Appellants respectfully request this court to reverse the pre-trial order of the Circuit Court of Clay County and reinstate their claim for inverse condemnation and temporary taking.

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CERTIFICATE OF MAILING

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06 (b) and contains 12,377 words, excluding cover, this certification and the appendix as determined by Word software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That two true and correct copy of the above and foregoing document and a floppy disk containing a copy of this brief were mailed/hand delivered this \_\_\_\_\_ of June 2007 to: Terrence Messonier, Lafayette Hall, 10<sup>th</sup> and Franklin, Lexington, Missouri 64067.

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J. ARMIN RUST, #28156

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