
S.C. 88437

IN THE SUPREME COURT OF MISSOURI

MAURICE AND NANCY GASH TRUST
Appellant/Respondent

vs.

LAFAYETTE COUNTY and the
LAFAYETTE COUNTY COMMISSION
Respondent/Appellant

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

REPLY BRIEF OF APPELLANT/RESPONDENT
MAURICE AND NANCY GASH TRUST

J. Armin Rust #28156
108 North College
Richmond, MO 64085
(816)776-6300
(816)776-6305 Fax
For Appellant/
Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2

JURISDICTIONAL STATEMENT.....5

POINTS RELIED ON.....8

ARGUMENT REPLY POINTS.....17

ARGUMENT RESPONSIVE POINTS.....27

CONCLUSION.....56

CERTIFICATE OF MAILING.....57

TABLE OF AUTHORITIES

CASES

Adams v. Board of Zoning Adjustment 241 S.W. 2d 35 (Mo. App. 1951).....5

Asaro v. Cardinal Glennon Mem’l Hosp. 799 S.W. 2d 595 (Mo 1990).....21,23

Blair v. Blair 147 S.W.3rd 882 (Mo. App. W.D. 2004).....34

Brain Trust Inc. v. City of Raytown, 523 S.W. 2d 156 (Mo. App. W.D. 1975).....34

Chesterfield Village Inc. v. City of Chesterfield, 2001 WL 488070 2001 to Mo. Sup. Ct. (Aug. 21, 2001).....25

City of Richmond Heights v. Richmond Heights Memorial Post Benevolent Assn. 358 Mo. 70, 213 S.W. 2d 479, (Mo. 1948).....54

Clay County v. Bogue, 988 S.W. 2nd 102, 106 (Mo. App W.D. 1999).....7,31

Cotner Productions, Inc. v. Snadon, 990 S.W. 2d 92, (Mo. App. S.D. 1999).....38

Elam v. City of St. Ann 784 S.W. 2d 330, (Mo App. E. D. 1990)42

Fairview Enterprises Inc. v City of Kansas City, 62 S.W. 3rd 71 (Mo. App. W.D. 2001)41, 45, 47

Flora Realty v. City of Ladue 246 S.W. 2d 771 (Mo. 1952).....24

Gray v. White 26 S.W. 3rd 806 (Mo App. E.D. 1999)36

Hamer v. State Highway Commission, 304 S.W.2d 869, 871 (Mo.1957).18

Harris v. Missouri Department of Conservation, 755 S. W. 2d 726
(Mo.App.1988)18

Home Building Company V. City of Kansas City 666 S.W. 2d 816 (Mo.
App. W.D. 1984)34.

Lenette Realty and Investment Co. v City of Chesterfield, 35 S.W. 3d
399 (Mo App. E.D. 2000).....36,51

Life Medical System, Inc. v. Franklin County Commission , 810 S.W.
2d 554 (Mo. App. E.D. 1991).....6

Lochner v. New York 198 U. S. 45 (1905).....53

Loomstein v. St. Louis County 609 S.W. 2d 443 (Mo. App
E.D.1980).....36,42, 50.

Murphy v. Carron 536 S.W. 2d 30 (Mo. 1976).....30,35

McAllister v. McAllister 101 S.W. 3d 287 (Mo. App. E.D. 2003).....30

McKeown v. Jon Nooter Boiler Works 237 S.W. 2d 217 (Mo. App.
1951).....39

Milligan v. Helmstetter, 15 S.W. 3d 15 (Mo. App. W.D. 2000).....31

Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447 (1928).....25

Owen v. Owen 642 S.W. 2d 410 (Mo. App. S.D. 1982).....39

Salameh v. County of Franklin 767 S. W. 2d 66 (Mo App E.D. 1989)..6

State Ex rel. Kramer v. Schwartz 336 Mo. 932, 82 S.W. 2d 63, (Mo. 1935).....6

State ex. rel Oliver Cadillac Co. v. Christopher 317 Mo. 1179, 298 S.W. 720, (Mo. 1927).....54

State ex rel. Barber and Sons Tobacco Company v. Jackson County 869 S.W. 2d 113 (Mo. App. W.D. 1993).....26

Tobin v. State Highway Commission, 697 S.W. 2d, 183, (Mo. App. W.D.1985).....39

West Lake Quarry v. City of Bridgeton 761 S.W.2d 749 (Mo. App 1988).....42

Williams v. Barnes and Noble Inc. 174 S.W. 3rd 556 (Mo. App. W.D. 2005).....21

Williamson Planning Commission v. Hamilton Bank 473 U.S. 172, 191 (1985).....50

Watson v. City of St. Louis, 956 S.W. 2d 920 (Mo. App. E.D. 1997)..18

Women’s Kansas City St. Andrew Soc. v. Kansas City, 58.F.2d 599 (1931).....55

Welch v. Swasey, 214 U.S. 91, 105, 29 S.Cts 567, (1909).....54

STATUTES

Sec. 64.865 RSMo.....27

Sec. 64.890 RSMo.....27

Sec. 64.895 RSMo.....22

RULES

[Rule 55.05](#).....20

Rule 83.08 (b)17

JURISDICTIONAL STATEMENT

The Western District Court of Appeals dismissed this appeal for failure of the appellant’s Gash to exhaust their administrative remedies.

The reason for the application for transfer was a split between the Eastern District and the Western District appellate courts on whether a litigant challenging their zoning from a second or third class county had to first go to the Board of Zoning Adjustment.

The Board of Zoning Adjustment does not have the authority to determine that a particular zoning classification is arbitrary, capricious and void. In **Adams v. Board of Zoning Adjustment** 241 S.W. 2d 35 (Kansas

City Court of Appeals 1951) the court ruled that the Board of Zoning Adjustment cannot modify, amend or repeal what the ordinance designates as general rules and regulations, the BZA is an administrative body without a vestige of legislative power. The Board of Zoning Adjustment can only rule on administrative decisions of the zoning officer and the Planning and Zoning Commission. In dismissing this appeal, the Western District appellate court failed to distinguish between the functions of the Planning and Zoning Commissions and County Commissions regarding zoning. There are administrative decisions and legislative decisions; adverse administrative decisions appeal via the Board of Zoning Administration and then by way of Certiorari to the Circuit Court. Zoning categories are legislative decisions over which the Board of Zoning Adjustment has no power under Sec. 64.870. It is clear from the statute that they can only adjudicate administrative decisions. In dismissing this appeal for failure to exhaust administrative remedies the court disregarded the established precedent in this state to wit: **Salameh v. County of Franklin** 767 S. W. 66 (Mo. App. E.D. 1989 application for Transfer Denied April 18, 1989). In that case the Eastern District Court held that zoning and rezoning determinations are legislative functions and judicial review of legislative zoning actions is accomplished through an action for declaratory judgment.

Which is exactly what the appellants did in this case. The facts of this case is precisely on point with **Salameh v. County of Franklin** which held that the appellant's action was not an appeal from a denial of a rezoning application and was not governed by the 30 day limitation for filing a review from a zoning order. The appellate court also disregarded the established precedent in **Life Medical System, Inc. v. Franklin County Commission** 810 S.W. 2d 554 (Mo. App. E.D. 1991 transfer denied July 23, 1991) which held that petitioners did not have to appeal to the Board of Zoning adjustment before bringing suit in Circuit Court. The appellate court disregarded **State Ex rel. Kramer v. Schwartz** 336 Mo. 932, 82 S.W. 2d 63, 69 (Mo. 1935) which held "that a party challenging a governmental entity's authority to enact regulations pursuant to the statutes granting it the power to zone need not exhaust its administrative remedies." Cited in **Clay County by and Through the County Commission of Clay v. Bogue**, 988 S.W. 2nd 102, 106 (Mo. App W.D. 1999).

The Supreme Court should issue its opinion on the jurisdictional issue to resolve the conflict between the Eastern District and the Western District. The position taken by the Western District is causing a lot of confusion among the zoning bar in the Western District who try to advise clients in rural counties that are adopting zoning.

POINTS RELIED ON

REPLY TO RESPONDENT-

APPELLANTS' POINT I

THE TRIAL COURT ERRED IN DISMISSING THE CLAIM FOR INVERSE CONDEMNATION BECAUSE THE APPELLANTS PLEAD SUFFICIENT FACTS TO STATE A CLAIM FOR INVERSE CONDEMNATION AND TEMPORARY TAKING AND AT THE PLEADING STAGE THE APPELLANT DID NOT HAVE TO ELECT WHICH THEORY HE WOULD ULTIMATELY ASSERT.

Watson v. City of St. Louis, 956 S.W. 2d 920 (Mo. App. E.D. 1997)

Harris v. Missouri Department of Conservation, 755 S. W. 2d 726, 729 (Mo.App.1988).

Hamer v. State Highway Commission, 304 S.W.2d 869, 871 (Mo.1957)

REPLY TO RESPONDENT-

APPELLANTS' POINT II

THE TRIAL COURT ERRED IN DISMISSING THE CLAIM FOR INVERSE CONDEMNATION BECAUSE THE CLAIM WAS RIPE IN THAT LAFAYETTE HAD MADE A FINAL DECISION AND THERE WAS NO INDICATION THAT IT WOULD REZONE THE PROPERTY TO A REASONABLE USE.

Chesterfield Village Inc. v. City of Chesterfield, 2001 WL 488070 2001 to Mo Sup Ct. (Aug. 21, 2001).

Williamson Planning Commission v. Hamilton Bank 473 U.S. 172, 191 (1985).

RESPONSE TO RESPONDENT-

APPELLANTS' POINT I

THE TRIAL COURT DID NOT ERR IN DENYING LAFAYETTE COUNTY'S CLAIM FOR JUDGMENT ON ITS COUNTERCLAIM FOR FAILURE TO OBTAIN A BUILDING PERMIT BECAUSE THE BUILDINGS WERE FARM BUILDINGS UNTIL SUCH TIME AS THE APPELLANT'S PROPERTY WAS REZONED COMMERCIAL OR THE ZONING WAS INVALIDATED.

Blair v. Blair 147 S.W.3rd 882 (Mo. App. W.D. 2004)

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

McAllister v. McAllister 101 S.W. 3d 287, 290 (Mo. App. E.D. 2003).

Milligan v. Helmstetter, 15 S.W. 3d 15, 24 (Mo. App. W.D. 2000))

RESPONSE TO RESPONDENT-

APPELLANTS' POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND EXCEED ITS JURISDICTION IN GRANTING AN INJUNCTION THE PETITION ASKED FOR A DECLARATION THAT THE REGULATIONS AS APPLIED TO APPELLANT'S LAND WERE

**VOID AND THAT THE COUNTY BE ENJOINED FROM
ENFORCEMENT UNTIL IT REZONED TO A REASONABLE
CATEGORY.**

**Brain Trust Inc. v. City of Raytown, 523 S.W. 2d 156 (Mo. App. W.D.
1975)**

**Home Building Company V. City of Kansas City 666 S.W. 2d 816 (Mo.
App. W.D. 1984)**

RESPONSE TO RESPONDENT-

APPELLANTS' POINT III

**THE TRIAL COURT DID NOT ABUSE HIS DISCRETION IN
GRANTING AN INJUNCTION PRECLUDING THE
ENFORCEMENT OF ALL ZONING UNTIL THE PROPERTY WAS
REZONED B-2, BECAUSE THE JUDGMENT ONLY PRECLUDED
ENFORCEMENT UNTIL IT REZONED TO A REASONABLE USE
WHICH THE COURT SUGGESTED WOULD BE B-2.**

Brain Trust v. City of Raytown 523 S.W. 2d 156 (Mo. App. 1975)

**Lenette Realty and Investment Co. v City of Chesterfield, 35 S.W. 3d
399 (Mo App. E.D. 2000)**

Loomstein v. St. Louis County 609 S.W. 2d 443 (Mo. App E.D.1980)

RESPONSE TO RESPONDENT-

APPELLANTS' POINT IV

THE TRIAL COURT DID NOT ERR IN ADMITTING PLAINTIFF'S EXHIBIT 31 BECAUSE THE EXHIBIT WAS NOT A SETTLEMENT OFFER, IT WAS NOT MADE IN THIS CASE, AND IT WAS AS THE TRIAL COURT FOUND EVIDENCE THAT THE DEFENDANT WAS NOT CONCERNED WITH THE HEALTH SAFETY AND WELFARE OF THE PEOPLE.

McKeown v. Jon Nooter Boiler Works 237 S.W. 2d 217 (Mo. App. 1951)

Owen v. Owen 642 S.W. 2d 410 (Mo. App. S.D)

Tobin v. State Highway Commission, 697 S.W. 2d, 183, 186 (Mo. App. W.D. 1985).

RESPONSE TO RESPONDENT-

APPELLANTS' POINT V

THE TRIAL COURT DID NOT ERR IN FINDING ZONING DISTRICT A WAS NOT REASONABLE BECAUSE THE ONLY EVIDENCE WAS THAT THE ZONING OF A 15 ACRE TRACT FOR AGRICULTURE WAS UNREASONABLE AND THERE WAS NO CONTRARY EVIDENCE THAT SOME OF THE POSSIBLE USES IN THE AGRICULTURAL ZONE COULD BE MADE USE OF BY THIS PLAINTIFF WHO HAD PAID ALMOST \$10,000 AN ACRE FOR THIS LAND WHICH WAS AT A MAJOR INTERSECTION ALONG I-70 AND BY ALL TESTIMONY WAS NOT SUITED FOR AGRICULTURE AND WAS IDEALLY SUITED FOR BUSINESS.

Flora Realty v. City of Ladue 246 S.W. 2d 771 (Mo. Banc 1952).

Loomstein v. St. Louis. 609 S.W. 2d 440 (Mo. App. E.D. 1980).

City of Richmond Heights v. Richmond Heights Memorial Post

Benevolent Assn. 358 Mo. 70, 213 S.W. 2d 479, (Mo. 1948)

State ex rel. Barber and Sons Tobacco Company v. Jackson County 869

S.W. 2d 113 (Mo. App. W.D. 1993).

RESPONSE TO RESPONDENT-

APPELLANTS' POINT VI

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE CONTINUED ZONING OF THE PLAINTIFF'S PROPERTY AS AGRICULTURAL WAS NOT FAIRLY DEBATABLE BECAUSE THE COUNTY DID NOT PRODUCE SUFFICIENT TESTIMONY AND EVIDENCE WHICH DEMONSTRATED THAT THE CURRENT ZONING WAS FAIRLY DEBATABLE IN THAT 1) THE ALLEGED ZONING VIOLATIONS NEVER MATERIALIZED, 2) THE PROPOSED ZONING WAS CONSISTENT WITH THE

MASTER PLAN 3) CONCERNS ABOUT SEWAGE, RUNOFF AND TRAFFIC WERE SPECULATIVE, 4) REZONING TO COMMERCIAL WAS CONSISTENT WITH THE OTHER USES IN THE AREA AND 5) WHETHER OTHER B-2 PROPERTY WAS UNDERUTILIZED OR WHETHER B-2 AT THE LOCATION WAS VIABLE IS NOT A PROPER CONSIDERATION.

Loomstein v. St. Louis. 609 S.W. 2d 440 (Mo. App. E.D. 1980).

West Lake Quarry v. City of Bridgeton 761 S.W.2d 749 (Mo. App 1988)

RESPONSE TO RESPONDENT-

APPELLANTS' POINT VII

THE TRIAL COURT DID NOT ERR IN ENTERING ITS JUDGMENT INVALIDATING THE ZONING OF PLAINTIFF'S PROPERTY BECAUSE THE COURT FOLLOWED MISSOURI LAW WHICH REQUIRES THAT ONCE THE PLAINTIFF SHOWS THE EXISTING ZONING UNREASONABLE THE BURDEN SHIFTS TO THE GOVERNMENTAL BODY TO SHOW IT IS FAIRLY DEBATABLE AND THE COUNTY FAILED TO DO SO, THE IMPOSITION OF A RATIONAL BASIS TEST WOULD REVERSE

**MISSOURI PRECEDENT AND DESTABILIZE THE
ESTABLISHED LAW.**

Flora Realty v. City of Ladue 246 S.W. 2d 771 (Mo. banc 1952).

Loomstein v. St. Louis. 609 S.W. 2d 440 (Mo. App. E.D. 1980).

Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447 72 L.Ed 842,

State ex. rel Oliver Cadillac Co. v. Christopher 317 Mo. 1179, 298 S.W.
720, 726.

ARGUMENT

REPLY TO RESPONDENT- APPELLANTS POINT I

THE TRIAL COURT ERRED IN DISMISSING THE CLAIM FOR INVERSE CONDEMNATION BECAUSE THE APPELLANTS PLEAD SUFFICIENT FACTS TO STATE A CLAIM FOR INVERSE CONDEMNATION AND TEMPORARY TAKING AND AT THE PLEADING STAGE THE APPELLANT DID NOT HAVE TO ELECT WHICH THEORY HE WOULD ULTIMATELY ASSERT.

This is an entirely new claim of error. This point is not the same point that was asserted in the Respondent-Appellant's brief in the Western District Court of Appeals. Point I in the Court of Appeals Brief is the same as Point II in the Substitute Brief filed in the Supreme Court.

This Court's rules provide that the Substitute Brief "shall not alter the basis of any claim that was raised in the court of appeals brief" Rule 83.08 (b). The claim in the court of appeals brief was ripeness.

That being said, the elements of inverse condemnation are: that appellants must have alleged that their property was taken or damaged by public use without just compensation. **Watson v. City of St. Louis** 956 S.W. 2d 920, 922, (Mo. App. E.D. 1997), citing **Mattingly v. St. Louis County**, 569 S.W. 2d 251, 252 (Mo. App. 1978). That case elaborated that litigants “need not plead an actual physical taking of property, but must have plead an invasion of a valuable property right and consequential damage. **Hamer v. State Highway Commission**, 304 S.W.2d 869, 871 (Mo.1957); **Harris v. Missouri Department of Conservation**, 755 S.W. 2d 726, 729 (Mo.App.1988). Respondent complains in this point that appellants pleading consists of legal conclusions. Plaintiff did plea sufficient facts to assert a claim for inverse condemnation.

Appellants alleged in paragraph 4 (L.F. 20) that the county “so severely limited and restricted reasonable, viable and economically feasible use of Plaintiff’s property to damage and destroy Plaintiff’s property rights”. In paragraph 5 (L.F. 20) appellants alleged that the county “have taken Plaintiff’s real property for public use.

In the component of the petition entitled Allegations Common to All Counts (L.F. 7-11) appellants laid out the factual basis for the facts constituting the inverse condemnation and taking claims. In that section of

the pleading appellants plead they own the property (L.F. 7) , that it was zoned Agricultural and set out the uses and those that were prohibited, (L.F. 8), that the Comprehensive Plan designated the area for potentially higher use (L.F. 8), that several parcels from 1985 to 2002 had been rezoned, (L.F. 9) and by December 2002 by approving so many non-residential land uses along the I 70 corridor Lafayette County had *de facto* made the area no longer conducive to Agricultural zoning, (L.F. 9), in January of 2002 plaintiffs sought a rezoning to B-2 General Business District to develop a convenience store and a garage to service the weight scales and machine sales. (L.G. 9-10). They further alleged that on February 7, 2002 the Planning and Zoning Commission held a hearing and tabled indefinitely, (L.F. 10). During the time between the application and the hearing the Zoning Administrator had inspected the property and located some alleged violations. It is important to note that the quality of the violations were such that had the re-zoning been approved these violations would have automatically abated. Two of them were set back violations which would have been compliant in B-2 zoning. Thereafter, the Planning and Zoning Commission refused to reconsider the issue for over a year, (L.F. 10). On July 12, 2003 appellants requested a vote and the Planning and Zoning Commission rejected the request because they had not cleared the violations,

one of which had been cleared by the appeal to the Board of Zoning Adjustment, one of which was ultimately cleared by the Certiorari Action to Judge Harvey. All of which would have been cleared by granting B-2 zoning. Plaintiffs also alleged in the common allegations that Lafayette County had sent them a letter and agreed to abate the alleged violations if appellants would “make a payment in lieu of a fine in the amount of \$10,000 which plaintiffs refused to pay.” (L.F. 10). They further alleged that the Comprehensive Plan showed the property scheduled for commercial development, the land across Highway M was identical and it was rezoned B-2 for a flea market. Further, the land consisting of approximately 17 acres had not been in agriculture for many years and is not suitable for agriculture, (L.F. 11).

In **Williams v. Barnes and Noble Inc.** 174 S.W. 3rd 556 (Mo. App. W.D. 2005) A petition is to "contain a short and plain statement of the facts showing that the pleader is entitled to relief." [Rule 55.05](#). A petition need not plead evidentiary or operative facts showing an entitlement to the relief sought, it must plead ultimate facts demonstrating such an entitlement., Williams at P. 560 . The plaintiff cannot merely assert conclusions. Id. Conclusions not supported by facts are disregarded, in determining whether a petition states a cause of action. Id. The allegations by plaintiff are

construed to determine whether they invoke principles of substantive law and inform defendant of what plaintiff will attempt to establish at trial." *Id.* citations omitted. A plaintiff's petition states a cause of action where "its averments invoke principles of substantive law which may entitle the plaintiff to relief." **Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595, 597 (Mo. banc 1990).**

The respondent claims that all is stated is a general conclusion that there has been an inverse condemnation, and suggests that factual pleading is entirely absent from the petition. This is not correct as is reflected above, a series of facts coupled with ultimate facts i.e. denial of just compensation and deprivation of all reasonable, viable and economically feasible use for the real property (L.F. 20); county so severely limited and restricted viable and economically feasible use of the property so as to damage and destroy property rights, and deny plaintiffs their reasonable investment backed expectations and all economically viable use of the property, (L.F. 20); and limiting and restricting user of property rights and have taken real property for public use without formal condemnation; and failed to provide just compensation for taking in violation of Article 1 Sec. 26 Missouri Constitution, (L.F. 21.)

Appellants told a pretty concise story, they bought the land for a commercial purpose, they tried to get it rezoned, the county claimed some zoning violations, the county held it up for over a year before they voted on it, the county offered to allow them to abate by paying \$10,000 in lieu of a fine which they declined to do and their property and their economic investment backed expectations were held up.

None of this would have happened if the county had followed the Comprehensive Plan and rezoned the tract. The obvious circumstantial inference is that they held it up because appellants would not pay the money.

In fact that is the conclusion that the trial judge reached in his findings.

7. The court finds that Lafayette County Planning And Zoning Administrator wrote a letter which offered to resolve all pending violations with plaintiff for the sum of \$10,000 which evinces that the County's interest was not in promoting the health safety and welfare of its citizens. If the health welfare and safety of its citizens was involved under no circumstances would payment in lieu of a fine suffice to resolve the alleged violations. (L.F. 137-138).

Appellants, went way farther in their fact pleading than was probably necessary, but this is an unusual situation. Their zoning was held up for

over a year and then denied, and the only reason that makes any sense was that they would not pay the money, why should they pay \$10,000 in lieu of a fine when the maximum fine under Sec. 64. 895 was a mere \$1,000.

Justice requires that appellants claim for inverse condemnation and taking be reinstated and that they be allowed to prove their case.

REPLY TO RESPONDENT- APPELLANTS POINT II

THE TRIAL COURT ERRED IN DISMISSING THE CLAIM FOR INVERSE CONDEMNATION BECAUSE THE CLAIM WAS RIPE IN THAT LAFAYETTE HAD MADE A FINAL DECISION AND THERE WAS NO INDICATION THAT IT WOULD REZONE THE PROPERTY TO A REASONABLE USE

The standard for review for this point is *de novo*, [Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595, 597 \(Mo. banc 1990\)](#) Lafayette County had made its final decision on the zoning of this property in June of 2003. There is nothing in the record which would support Lafayette County's assertion that it might have allowed some other type of zoning on

the property. Gash testified he did not think they would ever approve one of his zoning request and that in a letter from Lafayette County he was told he should or could not expect a different outcome out of a different board, (Tr. 381). Lafayette County bases its ripeness argument to a large extent upon the allegation that there were zoning violations. This is essentially a misstatement of the evidence, there is nothing in the record to support the fact that there were zoning violations. There were “alleged” zoning violations. None of the alleged zoning violations ever matured into a “zoning violation”. If the court will refer again to the Exhibit 31 the letter admitted that the alleged violations would automatically abate if the property was rezoned to B-2. If these alleged zoning violations were of such importance to Lafayette County in the context of this case they should have put on some evidence as to them, in the absence of evidence we are left with counsel’s bald statements that Lafayette County was justified in denying the request because of zoning violations that never materialized. The court can conclude from the facts and circumstances of the defendant’s refusal to pay the demanded \$10,000 in place of a fine, that appellant’s zoning request was being denied and in effect held hostage unless they agreed to pay and did pay the \$10,000.

The simple facts are that zoning had been denied, there was no hope of rezoning on the horizon, and appellant Gash had no alternative remedy as contemplated in legal or administrative to rectify the situation. The inverse condemnation claim predicated on a temporary taking was the only remedy. The Eastern District got the approach correct in its decision in **Village Inc. v. City of Chesterfield**, 2001 WL 488070 2001 to Mo Sup Ct. (Aug. 21, 2001). There was a temporary taking here, and the reasonable investment backed expectations of the appellants had been thwarted.

There is not one iota of evidence in the record that would suggest that the plaintiffs might have gotten the zoning they desired twelve months earlier. All the court has to do is re-read the testimony of Elaine Brown, Commissioners Meiser and Strodtman to conclude that voluntary re-zoning of this tract was not forthcoming.

If this court ventures into the pleadings of WD 63689 “the violations case”, the court should find that the first alleged violation that the main house was less than 50’ from the fence was found in favor of plaintiff, the second violation that the main house was not 50% bigger than the auxiliary house was thrown out by the trial court and the third violation that the auxiliary house was 13 ft too close to the back property line was the only one that the county prevailed upon. The case was put up on appeal by

Lafayette County. During that time it became apparent from a survey that the auxiliary house was over 50 feet from the property line and the main house burned and was rebuilt to a size which was 50% bigger than the auxiliary house. Lafayette County calls that an abatement. What really happened was that plaintiff won in the trial court on that issue, but the rebuilding of the house at a size 50% bigger rendered the decision by the court in WD 63689 moot. Because had the Western District court reversed Judge Harvey, which appellant thinks was unlikely, the house was compliant in its dimensions. What Lafayette County calls an abatement plaintiff calls the rendering of the issue moot.

In its desperate attempt to avoid the ramifications of the reinstatement of the inverse condemnation claim Lafayette County is trying to divert this court from the fact that inverse condemnation was clearly plead, the claim was ripe when the zoning was denied without any hope of future success and this plaintiff was deprived for over two years rents in the amount of \$6500. The county had “arrived at a final, definitive position” and by its refusal to rezone, **Williamson Planning Commission v. Hamilton Bank** 473 U.S. 172, 191 (1985), thus rendering the matter ripe for litigation.

RESPONSE TO RESPONDENT-

APPELLANTS POINT I

THE TRIAL COURT DID NOT ERR IN DENYING LAFAYETTE COUNTY'S CLAIM FOR JUDGMENT ON ITS COUNTERCLAIM FOR FAILURE TO OBTAIN A BUILDING PERMIT BECAUSE THE BUILDINGS WERE FARM BUILDINGS UNTIL SUCH TIME AS THE APPELLANT'S PROPERTY WAS REZONED COMMERCIAL OR THE ZONING WAS INVALIDATED.

Our law provides for the institution of building permits in counties with zoning Sec. 64.865 RSMo. It further provides that land use restrictions do “not apply to the erection, maintenance, repair, alteration or extension of farm buildings,” Sec. 64.890 RSMo.

Consistent with that section Lafayette County does not require building permits for agricultural type buildings on land zoned agricultural. The experience of Frank Reikhof (called Ridahol in the transcript) is typical of the fact that building permits are not required in the A district

When he told the Zoning Administrator Lisa Eaton that he wanted to build an agriculture building she told him, “Well you don’t---zoning doesn’t have anything to do with an agriculture building, you don’t need a permit to put a building on it. At that time the property was still zoned agriculture. (Tr. 21)

Reikhof did not have to have a permit. The building he put up was pretty close to the type of buildings that are on plaintiff’s property. (Tr. 21-22). The type of building he put up appear on the outside to be a pole barn, but it is actually a Wick building. (Tr. 22) Later he had the property rezoned commercial. (Tr. 23).

Gash testified on direct that the buildings on his property are: “Metal farm buildings, pole barns, (Tr. 289). None of them were finished out for commercial use (Tr. 289). When he went to his hearing for rezoning the pole barns were built, but they had not been finished,” (Tr. 294)¹

In his testimony when questioned by the attorney for Lafayette County, he was posed the question:

“And, of course by starting the construction before you applied for rezoning, you avoided having to pay permit fees for those?” (Tr. 355-356).

¹ Exhibit 31 which was written after the first hearing on rezoning which outlined three possible violations was sent after the first three metal buildings were built and no mention was made by the Zoning Administrator Lisa Eaton that Gash needed to buy building permits.

Counsel's own question, posed to plaintiff was predicated on the assumption that you do not need a permit to construct an agricultural building in the agricultural zone.

Just because the landowner wants to get the property rezoned commercial down the line, and rent out agricultural building for a commercial purpose does not mean that the county can come back several years later and charge him for a permit.

Frank Reikhof did not have to pay for a permit when he built his barn on his property, which was in reliance on what the zoning administrator told him.

Maurice Gash went to the same zoning administrator purchased two building permits for his houses, and there is no indication that she tried to sell him building permits for his five barns or four buildings and one barn as counsel for Lafayette County would have it. In paragraph 2 of its counter-claim (L.F. p. 38) the defendant admitted that Gash applied for permits for the two residences, and no permit was sought for the other buildings, which are clearly shown in the pictures in Exhibit 1 (packet of photos labeled East End of Property).

The trial court made detailed findings on the counter claim, (L.F. 139). Consistent with the above testimony the trial court made the following findings:

“The Court further finds on the counter-claim of Lafayette County that the Lafayette County Zoning Ordinance does not require a building permit for the construction of agricultural buildings in the Agricultural Zone. When constructed the plaintiffs buildings are nothing more than common pole barns. That plaintiff would like to improve them for commercial use if the zoning issues are resolved does not alter their character when built. Frank Reikhof testified that he did not have to obtain a building permit when he constructed his agricultural building before his property was re-zoned B-2 from A.” L.F. 139

The standard of review on this point is the one articulated in **Murphy v. Carron** 536 S.W. 2d 30 (Mo. Banc 1976). However, unlike some of the other issues in this appeal that are subject to de novo review, this point is not. In a court tried case the appellate court will “defer to the trial court where there is conflicting evidence, and will affirm the judgment even if there is evidence which would support a different conclusion.” **McAllister v. McAllister** 101 S.W. 3d 287, 290 (Mo. App. E.D. 2003). Since “ the trial court is in a better position to assess such factors as sincerity, character, and

other intangibles that are not apparent in a trial transcript, (the appellate court) must defer to the trial court's determinations related to the credibility of the witnesses. [Id. at 290- 91.](#) Further, “The trial judge has absolute discretion as to the credibility of witnesses and the weight of their testimony is a matter for the trial court, and its findings on witness credibility are never reviewable by the appellate court.’ ” [Id. at 291](#) (quoting **Milligan v. Helmstetter**, 15 S.W. 3d 15, 24 (Mo. App. W.D. 2000)). "The trial court is free to accept or reject all, part, or none of the testimony of a witness. And, it may disbelieve testimony even when it is uncontradicted." [Id.](#) See also, **Blair v. Blair** 147 S.W.3rd 882 (Mo. App. W.D. 2004).

It is assumed that the trial court knows the law, in this instance the trial court is no stranger to this issue. In **Clay County v. Bogue Inc.** 988 S.W. 2d 102 (W.D. 1999) Judge Harman ruled that the buildings in which the Bagues were conducting their hog farming operations were farm buildings or structures within the meaning of Sec. 64, 620 which is identical to Sec. 64.890. In **Premium Standard Farms v. Lincoln Twp** 946 S.W. 2d 234 (Mo. Banc 1997) the Supreme Court of Missouri ruled in interpreting a similar statute that as a matter of law “livestock finishing buildings at issue were farm “structures” within the meaning of section 65.677 and that the townships attempt to impose its regulations on those

structures was not permissible”. at p. 240. As a matter of law the township and county cannot regulate them.

Judge Harman obviously denied this counterclaim as a matter of law, because he was the judge in the leading case on this issue. In addition to that Lafayette County did not require building permits for farm buildings on land zoned agricultural, as was shown by the testimony of Frank Reikhof who was in the same situation had not been required to buy a building permit. The fact that the first letter alleging violations there was no mention of the fact that Gash had not obtained a building permit argues that the zoning administrator was cognizant of this interpretation of the law.

Rule 55.08 lists a number of affirmative defenses and an exemption under Sec. 64.890 is not one of them. The rule says “a pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statements of the facts showing that the pleader is entitled to the defense or avoidance. The rule does not require the pleader to plead the law as an affirmative defense. Gash as a matter of law did not have to get a building permit to put up these pole barns on his land that was at the time zoned agriculture. Obviously, appellant wanted to get the land rezoned B-2 and then remodel them to rent them as commercial structures, but that does not

change the fact that they were common pole barns when built on land zoned agricultural.

This point should be denied.

RESPONSE TO RESPONDENT-

APPELLANTS POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND EXCEED ITS JURISDICTION IN GRANTING AN INJUNCTION THE PETITION ASKED FOR A DECLARATION THAT THE REGULATIONS AS APPLIED TO APPELLANT'S LAND WERE VOID AND THAT THE COUNTY BE ENJOINED FROM ENFORCEMENT UNTIL IT REZONED TO A REASONABLE CATEGORY.

This is not an action to appeal the fact that Lafayette County refused to rezone the plaintiff's property. This is a declaratory judgment action, to have the zoning declared unreasonable, arbitrary and capricious. Attendant to that is the request for injunctive relief.

The standard of review is “whether the judgment is supported by substantial evidence.” **Brain Trust Inc. v. City of Raytown**, 523 S.W. 2d 156 , (Mo App. W.D. 1975)

In its prayer plaintiffs asked the court to declare Lafayette County’s zoning regulations to be illegal, arbitrary, capricious, unreasonable, unconstitutional, invalid and void in its application to plaintiff’s real property described therein, and that Lafayette County its agents and employees be permanently restrained from enforcing or attempting to enforce the regulations against plaintiff’s real property, and that they rezone the property to a reasonable zoning classification. (L.F. 66-67).

All the court did was what the plaintiffs asked enjoin the county from enforcing its zoning on the property until it was rezoned to a reasonable classification, which has now been done. (See. Defendant’s Appendix A 38). The court went on to indicate that the best use was B-2 stopping short of ordering the county to rezone to B-2. In **Brain Trust Inc. v. City of Raytown**, 523 S.W. 2d 156 (Mo. App. W.D. 1975) this court affirmed the Circuit Court of Jackson County’s injunction and order that the property be rezoned from R-2 to C-0. Closer to the result in this case is the case of **Home Building Company V. City of Kansas City** 666 S.W. 2d 816 (Mo. App. W.D. 1984) which held that the zoning classification was

unreasonable and that some variant of multi-family structure be accepted by the city or a re-zoning as the facts may indicate, Id. at 821.

In conclusion, the injunction was proper and it was not so broad as to require to county to do anything. The trial court merely suggested that the evidence pointed to B-2 being the proper zoning. By so suggesting the judgment may have avoided a rezoning to B-1 which had only been used one time in Lafayette County, and a subsequent challenge to that classification.

RESPONSE TO RESPONDENT-

APPELLANTS POINT II

THE TRIAL COURT DID NOT ABUSE HIS DISCRETION IN GRANTING AN INJUNCTION PRECLUDING THE ENFORCEMENT OF ALL ZONING UNTIL THE PROPERTY WAS REZONED B-2, BECAUSE THE JUDGMENT ONLY PRECLUDED ENFORCEMENT UNTIL IT REZONED TO A REASONABLE USE WHICH THE COURT SUGGESTED WOULD BE B-2.

When injunctive relief is sought and the case is presented to the trial court the proper scope of appellate review is that for a court-tried case as set forth in [Murphy v. Carron, 536 S.W.2d 30](#) (Mo. Banc 1976).

The judgment of the trial court will be affirmed unless it is not supported by substantial evidence, unless it is against the weight of the evidence, or unless it erroneously declares or erroneously applies the law, **Gray v. White** 26 S.W. 3rd 806 (Mo App. E.D. 1999)

The trial court after finding that the Agricultural Zoning of plaintiff's property was unreasonable and void enjoined the enforcement of that order. The law of this state is not without precedent that suggests that a court may not order the rezoning of property, **Lenette Realty and Investment Co. v City of Chesterfield**, 35 S.W. 3d 399 (Mo App. E.D. 2000) wherein the court ordered rezoning but did not specify a time. Presumably the City complied in a reasonable time. **Loomstein v. St. Louis County** 609 S.W. 2d 443 (Mo. App E.D.1980) involved a declaratory judgment wherein the plaintiff wanted the court to specify C-3. The court declined to do so saying "it is not our function to prescribe what commercial shall be permitted on this parcel." Id at p 451. In **Brain Trust v. City of Raytown** 523 S.W. 2d 156 (Mo. App. 1975) the illustrious members of this court Somerville, Pritchard and Turnage affirmed the Circuit Court of Jackson County wherein the court ordered the rezoning from R-2 to C—0. Thus, it is not without precedent for a court to go so far as ordering rezoning.

The trial court in this case did not go so far as to order specific rezoning, it merely indicated that if the clear evidence of the case was that the only reasonable category was B-2. That stops short of ordering a particular rezoning. The county had a choice, it could either leave things as they were a 15 acre tract with no zoning, or re-zone it to what they should have zoned it to initially. Lafayette County ultimately chose the later, but only their lawyer suggests the county has been coerced. There is no evidence in the record at any location that would suggest that the county was coerced.

RESPONSE TO RESPONDENT-

APPELLANTS POINT IV

THE TRIAL COURT DID NOT ERR IN ADMITTING PLAINTIFF'S EXHIBIT 31 BECAUSE THE EXHIBIT WAS NOT A SETTLEMENT OFFER, IT WAS NOT MADE IN THIS CASE, AND IT WAS AS THE TRIAL COURT FOUND EVIDENCE THAT THE DEFENDANT WAS

**NOT CONCERNED WITH THE HEALTH SAFETY AND WELFARE
OF THE PEOPLE.**

The standard of review is abuse of discretion , respondent has the burden to show abuse of discretion and prejudice, **Cotner Productions, Inc. v. Snadon**, 990 S.W. 2d 92, 1000 (Mo App. S.D. 1999).

In Exhibit 31 the Lafayette County Zoning Administrator offered to essentially overlook three alleged zoning violations if Plaintiff would pay the county “in place of a fine” the sum of Ten Thousand Dollars (\$10,000). This letter was written on April 29, 2002, purportedly in response to Gash’s request for a disposition of his violations. There is nothing in the record other than the self-serving assertion in the letter to suggest that Gash had requested an offer. He asked for meetings to get help (Tr. 358)

This letter was written eighteen (18) months before the filing of the lawsuit that is the basis of this appeal. It involved another case. The letter did admit that Gash’s “application to rezone if granted would resolve the violations.”

The defendant’s attorney objected to this letter as being a separate proposal in a companion case and therefore not admissible as evidence. (Tr. 330).

Now, the evidence is allegedly inadmissible because it was a settlement offer in this case, but that is contrary to the statement by counsel in his objection.

Counsel wants the appellate court to reverse the trial court for a claim of error that was not asserted to the trial court when the evidence, to wit: Exhibit 31 was proffered. That is not fair to the trial court.

Assuming arguendo the proper objection was made. What was contained in the letter was an offer in another case.

It is well established law that settlement offers are not admissible, **Tobin v. State Highway Commission**, 697 S.W. 2d, 183, 186 (Mo. App. W.D. 1985). One exception is where there is an independent fact in the settlement offer **McKeown v. Jon Nooter Boiler Works** 237 S.W. 2d 217 (Mo. App. 1951) in that case it was determined that the statement was not a settlement offer. In **Owen v. Owen** 642 S.W. 2d 410 (Mo. App. S.D. 1982) the brother in law offered to dismiss his lawsuit if the brother's wife would accept \$50,000 in settlement of her dissolution claims. That settlement offer was deemed admissible in the wife's suit for abuse of process.

Clearly, this was an offer in another matter. But, it became relevant in this case because it showed the judge the prejudice the county had against

plaintiff, because he did not pay it \$10,000. Additionally, it tended to show that Lafayette County did not care about the health safety and welfare of its citizens as much as getting \$10,000.

This letter was apparently written after consultation with counsel, and nowhere in the letter does it say it is a settlement offer like the one in Tobin did three times.

This exhibit was not properly objected to, it raises the inference of relevant circumstantial facts, it was written in another case and was admissible for those reasons.

In addition Lafayette County has made no showing that it was prejudiced by the admission of the Exhibit #31 which was well within the sound discretion of the trial judge. This Exhibit was quite important because it illuminated the animus that Lafayette County apparently had against this applicant who resisted paying the money. Demanding a payment in lieu of a fine of \$10,000 when the maximum fine as provided by law is \$1,000 was not proper.

RESPONSE TO RESPONDENT-

APPELLANTS POINT V

THE TRIAL COURT DID NOT ERR IN FINDING ZONING DISTRICT A WAS NOT REASONABLE BECAUSE THE ONLY EVIDENCE WAS THAT THE ZONING OF A 15 ACRE TRACT FOR AGRICULTURE WAS UNREASONABLE AND THERE WAS NO CONTRARY EVIDENCE THAT SOME OF THE POSSIBLE USES IN THE AGRICULTURAL ZONE COULD BE MADE USE OF BY THIS PLAINTIFF WHO HAD PAID ALMOST \$10,000 AN ACRE FOR THIS LAND WHICH WAS AT A MAJOR INTERSECTION ALONG I-70 AND BY ALL TESTIMONY WAS NOT SUITED FOR AGRICULTURE AND WAS IDEALLY SUITED FOR BUSINESS.

Declaratory judgment actions involving challenges to zoning classifications are reviewed de novo, **Fairview Enterprises Inc. v City of Kansas City**, 62 S.W. 3d 71, 76 (Mo. App. W.D. 2001) The trial court's assessment of the credibility of the witnesses is accorded due deference, Id.

The basic framework in Missouri anticipates a two step process. First the court must determine whether Plaintiff has rebutted the presumption that continuance of the existing zoning on parcel is reasonable . The government is entitled to the presumption that the existing is reasonable. In order to make their case the plaintiffs must put on evidence to show that it is

not reasonable. **Elam v. City of St. Ann** 784 S.W. 2d 330, 334 (Mo App. E. D. 1990)

Once the plaintiff has produced evidence showing that the existing zoning is not reasonable then the burden shifts to the county to produce evidence that continuance of the present classification is fairly debatable, Id.

Zoning is only lawful when it bears a substantial relation to the public welfare.

If the public welfare is not served or if the public interest served by the zoning is greatly outweighed by detriment to the owner's private interest then the zoning is considered to be arbitrary and unreasonable. The determination whether it is arbitrary and unreasonable requires the weighing of detriment to the private interest against the benefit to the general public. **Loomstein v. St. Louis.** 609 S.W. 2d 443 (Mo. App. E.D. 1980). In effect the most succinct statement requires the court: "To determine the reasonableness of a zoning ordinance the detriment to the private interest is weighed against the public benefit." **West Lake Quarry v. City of Bridgeton** 761 S.W.2d 749 (Mo. App 1988).

The trial courts detailed findings in its Judgment (L.F. 132-139) are condensed are as follows: a) a 15 acre tract could not be farmed

economically. b) a 50 acre tract which was zoned agricultural and a building similar to plaintiffs was granted to B-2 with out any problem c) plaintiff's expert testified that the best use of plaintiff's property was commercial. That the 15 acres had a value of \$1800 to \$2000 per acre as agricultural land. Comparable sale data indicated that the value as commercial land was \$6,500 to \$66,666.00 per acre. The property had rental value of \$6500 monthly resulting in a fair market value of \$780,000 if allowed as commercial use. The property would be underutilized as agricultural land.

d) Another expert was the first Zoning Administrator and that the best use of plaintiff's property was B-2 commercial. He was particularly familiar with other re-zonings that had followed the master plan and rezoning this was in the master plan. e) another expert who was the realtor who sold plaintiff's the property which is the subject of this matter. He testified that the best use of the property was commercial and that the plaintiffs had paid \$151,000 which is \$10,000 per acre. That is the commercial price for the property.

The court found the property is ideal for a convenience store and the types of buildings that plaintiff constructed as potential warehouses on the property. Lafayette County had indicated before the rezoning application

that plaintiff's tract would be ideal for commercial use. f) another witness identified a tract of land that was five miles east of plaintiff's property that had been rezoned B-2. He wrote the Staff Report that indicated that the property was in the I-70 corridor which was reserved for higher intensity mixed uses and also that property had a residential house at the time and that house is still occupied and on the property. g) a member of the Lafayette County Planning and Zoning Commission was of the opinion that the best use which could be made of the property was commercial B-2 Zoning. He also stated that the tract was not sustainable in agriculture.

h) Plaintiff bought the property for commercial use and paid a commercial price. He built five ordinary farm buildings that he planned to complete and develop for commercial use to the specifications of prospective tenants. Plaintiff was not able to use the property because of the Agricultural zoning except one building that he has rented to an organic fertilizer manufacturer. Plaintiff had to take 50% less rent for that building than it was worth. This particular tract existed at the last fully accessible intersection in Lafayette County that was undeveloped. It is at the intersection of Route O and M and I 70 in the I 70 corridor which is reserved for higher intensity mixed use. The land across Route M had been zoned B-2. Photographic exhibits showed that a small Flea Market was at that

location, which is five acres exactly opposite Route M from plaintiffs 15 acres. Plaintiff explained how his neighbor across the interstate to the north and west (Williams) was able to have a lot in between the farm house and his silos zoned B-2 so he could put in a self storage facility like plaintiff proposed. Plaintiff admitted an aerial map that shows that there is considerable commercial use in the area. i) Staff Reports from, three rezoning requests, Lasure, Ron Williams within close proximity to his own commented on the location in the I-70 corridor as being the most significant factor in the zoning determination. Two of the other requests were granted. The court found no reasonable basis upon which to distinguish the three applications.

It is important that these are the only findings that the trial court made, the trial court is entitled to due deference to his findings on what was the credible reliable evidence, under the scope of review, **Fairview Enterprises, Inc. v. City of Kansas City**, 62. S.W. 3d 71, 76 (Mo. App. W.D. 2001).

It was not up to the trial court or the appellate court to ferret out all of the uses that could have been made in the Ag zone by delving into the labyrinthine Lafayette County Zoning Regulations. It was up to the attorney for the County to put on testimony or some evidence as to what reasonable

uses could be made. The factual findings of the trial court are entitled to some deference.

In light of the prevailing law, the quality of the evidence, the fact that Lafayette County put on no expert testimony as to reasonableness itself, the trial court's findings should stand. Plaintiffs overwhelmingly rebutted the presumption of reasonableness. And there was no evidence at all offered by the county that the keeping the existing zoning was fairly debatable. All of this material in the brief is argument, not evidence.

RESPONSE TO RESPONDENT-

APPELLANTS POINT VI

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE CONTINUED ZONING OF THE PLAINTIFF'S PROPERTY AS AGRICULTURAL WAS NOT FAIRLY DEBATABLE BECAUSE THE COUNTY DID NOT PRODUCE SUFFICIENT TESTIMONY AND EVIDENCE WHICH DEMONSTRATED THAT THE CURRENT ZONING WAS FAIRLY DEBATABLE IN THAT 1) THE ALLEGED ZONING VIOLATIONS NEVER MATERIALIZED, 2) THE PROPOSED ZONING WAS CONSISTENT WITH THE MASTER PLAN 3) CONCERNS ABOUT SEWAGE, RUNOFF AND TRAFFIC WERE SPECULATIVE, 4) REZONING TO

COMMERCIAL WAS CONSISTENT WITH THE OTHER USES IN THE AREA AND 5) WHETHER OTHER B-2 PROPERTY WAS UNDERUTILIZED OR WHETHER B-2 AT THE LOCATION WAS VIABLE IS NOT A PROPER CONSIDERATION.

The standard of review on this point is de novo, **Fairview Enterprises, Inc. v. City of Kansas City**, 62. S.W. 3d 71, 76 (Mo. App. W.D. 2001).

After finding that the plaintiffs had rebutted the presumption of reasonableness the trial court made detailed findings that the existing zoning was not fairly debatable.

On that issue the court made detailed findings: (L.F. 133-137)

a) a member of the Lafayette County Planning and Zoning Commission, testified that she did not agree with the master plan, she felt it had become obsolete within five (5) years of its inception. She indicated that she did not follow the master plan. She has some concern about run-off about which she was unable to elaborate.

b) another member of the Lafayette County Planning and Zoning Commission, admitted Lafayette County Master Plan provided for higher intensity mixed uses in the I-70 corridor.

and was unable to testify how the existing zoning contributed to the health, safety, morals or general welfare of the citizens of Lafayette County.

c) Two County Commissioners were unable to articulate how the existing Agricultural zoning contributed to the health, safety, morals and general welfare of the citizens of Lafayette County. One testified that they had authorized the letter to Plaintiff that if he would make a payment in the amount of \$10,000 in lieu of a fine they would not pursue the alleged violations.

d) Lafayette County produced no expert testimony that would rebut plaintiff's expert testimony that the existing classification of Agriculture was unreasonable and defendant produced no testimony that would support the conclusion that the continuance of the existing zoning was fairly debatable. The trial judge found that the existing zoning classification of Agricultural does not contribute to the health safety and welfare of the residents of Lafayette County. He found that the defendants produced no evidence that would support the finding that the health, safety, morals and general welfare of the citizens of Lafayette County is promoted by continuing the zoning of plaintiff's property as Agricultural.

The trial court also found that Lafayette County Planning and Zoning Administrator wrote a letter which offered to resolve all pending zoning

violations with plaintiff for the sum of \$10,000 which evinced the County's interest was not in promoting the health safety and welfare of its citizens. The court further found that if the health welfare and safety of its citizens was involved under no circumstances would a payment in lieu of a fine suffice to resolve the alleged violations. The trial court found that Lafayette County has not produced any evidence that B- 2 Zoning of plaintiff's property would adversely impact the surrounding property zoned agricultural and that the adjacent property on the state road M is B-2. Further the property was not adaptable to agriculture it could not produce sufficient agricultural income to pay the annual taxes on the property. The trial judge found that Lafayette County produced no evidence to show the effect of the zoning on the value of land and the effect removal of the zoning would have on nearby property. And it found that it would not damage the surrounding property for the plaintiff's property to be zoned commercial. Further, landowner to the south Weir supported rezoning of plaintiff's property. Plaintiff's land would be worth \$750,000 more if zoned commercial which would not affect the value of the adjoining property adversely. Additionally Lafayette County had not adhered to its comprehensive plan for its development and Lafayette County has totally

disregarded the content and policy of its own Comprehensive Plan in its treatment of plaintiff's property. (L.F. 133-137).

Although, the county is entitled to *de novo* review there should be shown some deference to the trial court's careful recitation of the facts that influenced its decision. This case is squarely in line with the leading reported cases in this state, see **Loomstein v. St. Louis County** 609 S.W. 2d 443 (Mo. App E.D.1980) and its progeny and it should be affirmed.

The trial court figured the fairly debatable issue out, if plaintiff had paid the \$10,000 in lieu of a fine or in place of a fine this brief would never have been written, this law suit would never have been filed and the Gashes would have gotten their rezoning back in June of 2003.

Nothing in Missouri law supports subpart 5 of this point. The suggestion that the county has a responsibility to avoid opening up the property to inappropriate uses in the absence of a viable plan for development has nothing to do with the issues before this court i.e. whether keeping the zoning Agricultural was fairly debatable. Speculation as to whether a particular development at a particular location would or would not be successful is not part of the "fairly debatable analysis".

That being said, the county suggested "Everyone agrees that someday, commercial development should occur at this location"

Defendant/Appellant's Brief in Western District at P. 104. The problem with that is that was not found by the trial court and there is no evidence of what "Everyone agrees". So now this court is now supposed to reverse this case, and Appellant who contrary to the implication of economic non-feasibility has rented out all of his buildings, needs to go back to watching them sit empty until some point in the nebulous future Lafayette County in its benevolent wisdom sees fit to allow him to rent these buildings out at a busy intersection right along I-70.

Lafayette County suggests it is not required to ignore its experience as to the success or failure of colorably similar properties. Plaintiff/Respondent would suggest that if Lafayette County had some evidence to that effect it might have wanted to expose it to the trial court and get a ruling on that "evidence" before utilizing such "speculation" in its brief to suggest that the existing zoning was not fairly debatable. There is nothing in Missouri law that would suggest that Lafayette County could base its decision to zone or rezone on such a speculative principal. In **Lenette Realty and Investment Co. v City of Chesterfield**, 35 S.W. 3d 399 (Mo App. E.D. 2000) the court said that the city officials were swayed by the anti-competitive outcry of area business owners. Id at 408. "Administrative tribunals vested with power and authority to implement zoning laws may

not use such power and authority to regulate business and restrict competition” at 408. That is part of what the counsel for Lafayette County is suggesting in this sub-part 5 of this point.

RESPONSE TO RESPONDENT-

APPELLANTS POINT VII

THE TRIAL COURT DID NOT ERR IN ENTERING ITS JUDGMENT INVALIDATING THE ZONING OF PLAINTIFF’S PROPERTY BECAUSE THE COURT FOLLOWED MISSOURI LAW WHICH REQUIRES THAT ONCE THE PLAINTIFF SHOWS THE EXISTING ZONING UNREASONABLE THE BURDEN SHIFTS TO THE GOVERNMENTAL BODY TO SHOW IT IS FAIRLY DEBATABLE AND THE COUNTY FAILED TO DO SO, THE IMPOSITION OF A RATIONAL BASIS TEST WOULD REVERSE

**MISSOURI PRECEDENT AND DESTABILIZE THE
ESTABLISHED LAW.**

In this point defendant seeks to go back to Genesis in an attempt to get this court to change the course of Missouri law and of course reverse the judgment below. In order to prevail the Respondent-appellant seeks to change the tide of Missouri law and impose a rational basis test for zoning questions.

We do not have to go back to **Lochner v. New York** 198 U. S. 45 (1905), and **Nectrow v. City of Cambridge** 277 U.S. 183 (1928) to understand the basis and logic for such modern decisions as **Loomstein v. St. Louis**. 609 S.W. 2d 440 (Mo. App. E.D. 1980) upon which the court based its decision.

The modern foundation for the Missouri approach to zoning decisions is found in **Flora Realty v. City of Ladue** 246 S.W. 2d 771 (Mo. Banc 1952).

That court elucidated the modern paradigm as follows:

“It is well settled, however, that, 'The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such

restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.” **Nectow v. City of Cambridge**, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed 842, **Flora** at 778.

In articulating the actual test for constitutionality of a zoning ordinance, the court further went on to say. “A zoning ordinance 'must rest upon some rational basis of classification and apply alike to all persons and things falling within a designated class.' **Flora** at 778 citing, **State ex. rel Oliver Cadillac Co. v. Christopher** 317 Mo. 1179, 298 S.W. 720, 726.

And more apropos to the application to any specific state of facts the court held 'In any event the regulation and restriction into districts must be reasonable, uniform or universal and nondiscriminatory, the restrictions having a fair tendency to accomplish or aid in the accomplishment of some purpose for which the city may exercise its power.' Id at 778 citing, **City of Richmond Heights v. Richmond Heights Memorial Post Benevolent Assn.** 358 Mo. 70, 213 S.W. 2d 479, 480 **Welch v. Swasey**, 214 U.S. 91, 105, 29 S.Ct 567 (1909). The Missouri Supreme Court went on to say “A zoning ordinance may be valid in its general aspects, and yet as to a particular state of facts involving a particular owner affected thereby may be as to such owner so clearly arbitrary and unreasonable as to be

unenforceable.' Id. at 778 citing, **Women's Kansas City St. Andrew Soc. V. Kansas City, Mo**, 58.F.2d , 593, 599 (1931).

Thus, there is no need to follow the suggestion of the counsel for the defendant Lafayette County. The law in this state is well in line with sound constitutional practice and due process.

The trial court performed the proper analysis by balancing whether the zoning is substantially related to the alleged purpose of the zoning, i.e. to promote the health safety and welfare which is balanced by the private detriment See. **State ex rel. Barber and Sons Tobacco Company v. Jackson County** 869 S.W. 2d 113 (Mo. App. W.D. 1993).

And then the court conducted the proper analysis whether the zoning of appellant's property was is unreasonable and if it is, then is the existing zoning fairly debatable. The trial court did that, it followed to the law and articulated detailed factual findings that the trial court believed, out of that flowed the legal conclusion that the existing zoning was unreasonable, and then not fairly debatable.

In conclusion there is no need to reinvent the wheel here, the Missouri analytical paradigm is sound constitutionally and protective of the state and its individual citizens. As is shown in this case the law as it has developer actually works to correct oppressive zoning practices.

CONCLUSION

For the reasons stated above the Appellant respectfully requests this court to affirm the judgment of the Circuit Court of Clay County in its ruling on the Declaratory Judgment and reverse the dismissal of the inverse condemnation claim, Count IV.

J. Armin Rust #28156
108 N. College
Richmond, MO 64085
(816)776-6300
FAX (816)776-6305

Attorney for Appellant
Maurice Gash Revocable
Trust and the Nancy
Gash Revocable Trust

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 10,225 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 August 2007, to: Terrence Messonier, Lafayette Hall, 10th and Franklin, Lexington, Missouri 64067.

J. ARMIN RUST, #2815

APPENDIX

TABLE OF CONTENTS

EXHIBIT 31.....A1