

TABLE OF CONTENTS

Table of Authorities 4

Statement of Facts 6

Points Relied On 10

Argument 12

IV. THE TRIAL COURT ERRED IN FAILING TO (1) FIND THAT THE DOWNZONING ORDINANCE WAS A SUBSTANTIVE DUE PROCESS VIOLATION UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS AND (2) AWARD RESPONDENTS ALL COMPENSATORY AND CONSEQUENTIAL DAMAGES INCURRED BECAUSE THE ORDINANCE WAS NOT ENACTED TO FURTHER A VALID PUBLIC BENEFIT, THE PRIVATE DETRIMENT OUTWEIGHED ANY “PUBLIC BENEFIT” AND RESPONDENTS POSSESSED A SUFFICIENT PROPERTY RIGHT TO INVOKE THE DUE PROCESS CLAUSES IN THAT THERE WAS NO PUBLIC BENEFIT TO ENACT THE ORDINANCE, RESPONDENTS HAD AN

**INVESTMENT-BACKED AND JUSTIFIABLE
 EXPECTATION REGARDING THE PRIOR ZONING
 OF THE PROPERTY AND RESPONDENTS WERE
 NOT MADE WHOLE BY THE TRIAL COURT’S
 JUDGMENT 12**

A. Standard of Review 12

B. Reagan Has Not Changed the Basis of Her Substantive
 Due Process Argument 13

C. The Rezoning Ordinance Violated Reagan’s Due Process
 Rights Because Reagan Had a Property Right in the
 Existing Zoning, the Rezoning Ordinance Was Not
 Rationally Related to a Legitimate Government Interest,
 and The Rezoning Ordinance was “Truly Irrational” as
 Defined in Furlong 15

**V. THE TRIAL COURT ERRED IN FAILING TO
 AWARD RESPONDENTS ALL COMPENSATORY
 AND CONSEQUENTIAL DAMAGES INCURRED IN
 THE SUM OF \$83,332.01, AS SET FORTH IN
 RESPONDENTS’ TRIAL EXHIBITS NOS. 61
 THROUGH 73 AND 84, IN CONNECTION WITH**

**THEIR INVERSE CONDEMNATION CLAIM
 BECAUSE UNDER ARTICLE I, § 26 OF THE
 MISSOURI CONSTITUTION, RESPONDENTS DID
 NOT RECEIVE FULL INDEMNITY OR
 REMUNERATION FOR THE LOSS OR DAMAGE
 SUSTAINED BY RESPONDENTS AS A RESULT OF
 APPELLANT’S ACTIONS IN THAT THE TRIAL
 COURT’S DAMAGE AWARD ONLY PARTIALLY
 COMPENSATED RESPONDENTS. 42**

- A. Standard of Review 42
- B. Reagan Is Entitled To Recover The Additional Damages
 Claimed In Count V of Reagan’s Substitute Brief..... 42

Certificate of Service 46

Certificate of Compliance with Rules 84.06(b) and (c) 47

TABLE OF AUTHORITIES

Federal Cases

<u>Nasierowski Bros. Investment Co. v. City of Sterling Heights</u> , 949 F.2d 890 (6 th Cir. 1991)	28
<u>Tandy Corp. v. City of Livonia</u> , 81 F.Supp.2d 800 (9 th Cir. 1999)	28
<u>United States v. Miller</u> , 317 U.S. 369 (1943)	44

State Cases

<u>Casey's General Stores, Inc. v. City of Louisiana</u> , 734 S.W.2d 890 (Mo. App. 1987)	28
<u>Furlong Companies, Inc. v. City of Kansas City</u> , 189 S.W.3d 157, 170 (Mo. banc 2006)	21, 22, 23, 24, 25, 27, 29, 30, 37
<u>Great Lakes Pipe Line Company v. Hendrickson</u> , 393 S.W.2d 481 (Mo. 1965)	28
<u>State ex rel. N.W. Electric Power Cooperative, Inc. v. Waggoner</u> , 319 S.W.2d 930 (Mo. App. 1959)	45

Statutes

42 U.S.C. § 1983	41
42 U.S.C. § 1988	41

Other Authorities

St. Louis County Revised Ordinance § 1003.300 13, 14, 15, 24, 31, 32, 34, 36,
..... 38, 41

St. Louis County Revised Ordinance § 1003.170 21, 26, 27

Missouri Constitution, Article I, Section 26 11, 42, 43, 44

STATEMENT OF FACTS

The County has presented additional facts in its Substitute Reply Brief. (See Appellant/Cross-Respondent's Substitute Reply Brief, pp. 13-16). Reagan submits the following additional facts to address her position on certain facts presented by the County in its Substitute Reply Brief.

The residential construction which the County claims constituted a change in the character of the area surrounding Reagan's property took place in the mid-1980s, and thus the alleged "change" substantially preceded the rezoning of Reagan's property in 2001. (Tr., p. 56, ll. 22-25). Reagan's property was not surrounded on all sides by residential uses. The property immediately to the east of Reagan's property is the site of a community college campus. (Tr., p. 338, ll. 18-25; p. 339, ll. 1-12). The west side of Reagan's property borders Hawkins-Fuch Road. (Tr. Ex. 18).

The County claims "the existing residential uses on the Property were not incompatible with the surrounding and subsequent subdivision development", and "the uses of the Property from 1965 through the spring of 2001 just didn't present a problem for anyone." (See Appellant/Cross-Respondent's Substitute Reply Brief, p. 14). Reagan's property contained several unsafe, dilapidated houses and a barn which had not been used for a residential use for a long time, and which had been vandalized. (Tr., p. 261, ll. 16-25; p. 262, ll. 1-21). Reagan subsequently removed

the structures and accompanying asbestos as part of her development efforts. (Tr. Ex. 20; Tr. Ex. 77, pp. 9-17).

The County states that Reagan's property "was not located in a "mixed use" area as that term is used by planners." (See Appellant/Cross-Respondent's Substitute Reply Brief, p. 13). Reagan's property was located in a mixed-use area from the standpoint that there were multiple types of uses of properties in the area, and the surrounding properties were not being utilized for one uniform type of use. (Tr., p. 34, ll. 2-3; p. 35, ll. 18-19; p. 36, ll. 17-25; p. 37, ll. 1-10). Reagan has never claimed her property was located in an "MXD" – Mixed Use Development District (See Tr. Ex. 2, Section 1003.157), or any other type of formal "Mixed-Use" district as that classification is used by planners and discussed by the County's Director of Planning Glenn Powers. (Tr., p. 33, ll. 6-25, pp. 34-36, p. 37, ll. 1-10).

The County argues that Reagan "incorrectly states the value of the Property zoned as "R-3" Residence district on July 3, 2001 was \$167,000". (See Appellant/Cross-Respondent's Substitute Reply Brief, p. 14). The \$167,000 value cited by Reagan was provided by the County's own expert witness, and Reagan cites said number only as a secondary argument in the event this Court decides to reevaluate the trial court's damage determination. (See Respondents'/Cross-

Appellants' Substitute Brief, pp. 59-60). The trial court did not utilize the \$167,000 value assessment of the County's expert in its computation of damages.

There is a factual dispute as to whether Reagan had actually filed a building permit application. Reagan had initiated the building permit process prior to the rezoning by filing a Permit Application Center ("PAC") form. (Tr., p. 83, ll. 13-25; p. 84, ll. 1-4; p. 87, ll. 4-20; p. 112, ll. 9-11; Tr. Ex. 21). The County's Director of Planning Glenn Powers testified that the PAC form is the form used to initiate the building permit process. (Tr., p. 83, ll. 24-25; p. 84, ll.1-2; p. 112, ll. 9-11). The County now argues that the PAC form is "not an application for a building permit" despite Mr. Powers testimony to the contrary. (See Appellant/Respondent's Substitute Reply Brief, pp. 14-15). Regardless, Mr. Powers testified that Ms. Reagan was following the process to obtain a building permit. (Tr., p. 87, ll. 4-20).

The County claims "there is absolutely no evidence in the record to demonstrate that the members of the St. Louis County Council failed to consider" certain important issues when rezoning Reagan's property. (See Appellant/Respondent's Substitute Reply Brief, pp. 15-16). Reagan elicited evidence regarding the County Council's motivation in rezoning the property from both Councilman Campisi (Tr. Ex. 79), and the County's Director of Planning Glenn Powers (testimony of both individuals is discussed in detail in

Respondents'/Cross-Appellants' Substitute Brief, pp. 79-86). Such testimony is clearly sufficient to reveal the motivation behind the rezoning of Reagan's property, and any further discussion is made impossible due to the fact that the County lost the record of the public hearing regarding the rezoning. (Tr., p. 86, ll. 20-25; p. 87, ll. 1-3; p. 112, ll. 14-25; p. 113, ll. 1-2).

POINTS RELIED ON

IV. THE TRIAL COURT ERRED IN FAILING TO (1) FIND THAT THE DOWNZONING ORDINANCE WAS A SUBSTANTIVE DUE PROCESS VIOLATION UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS AND (2) AWARD RESPONDENTS ALL COMPENSATORY AND CONSEQUENTIAL DAMAGES INCURRED BECAUSE THE ORDINANCE WAS NOT ENACTED TO FURTHER A VALID PUBLIC BENEFIT, THE PRIVATE DETRIMENT OUTWEIGHED ANY “PUBLIC BENEFIT” AND RESPONDENTS POSSESSED A SUFFICIENT PROPERTY RIGHT TO INVOKE THE DUE PROCESS CLAUSES IN THAT THERE WAS NO PUBLIC BENEFIT TO ENACT THE ORDINANCE, RESPONDENTS HAD AN INVESTMENT-BACKED AND JUSTIFIABLE EXPECTATION REGARDING THE PRIOR ZONING OF THE PROPERTY AND RESPONDENTS WERE NOT MADE WHOLE BY THE TRIAL COURT’S JUDGMENT.

V. THE TRIAL COURT ERRED IN FAILING TO AWARD RESPONDENTS ALL COMPENSATORY AND CONSEQUENTIAL DAMAGES INCURRED IN THE SUM OF \$83,332.01, AS SET FORTH IN RESPONDENTS' TRIAL EXHIBITS NOS. 61 THROUGH 73 AND 84, IN CONNECTION WITH THEIR INVERSE CONDEMNATION CLAIM BECAUSE UNDER ARTICLE I, § 26 OF THE MISSOURI CONSTITUTION, RESPONDENTS DID NOT RECEIVE FULL INDEMNITY OR REMUNERATION FOR THE LOSS OR DAMAGE SUSTAINED BY RESPONDENTS AS A RESULT OF APPELLANT'S ACTIONS IN THAT THE TRIAL COURT'S DAMAGE AWARD ONLY PARTIALLY COMPENSATED RESPONDENTS.

ARGUMENT

IV. THE TRIAL COURT ERRED IN FAILING TO (1) FIND THAT THE DOWNZONING ORDINANCE WAS A SUBSTANTIVE DUE PROCESS VIOLATION UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS AND (2) AWARD RESPONDENTS ALL COMPENSATORY AND CONSEQUENTIAL DAMAGES INCURRED BECAUSE THE ORDINANCE WAS NOT ENACTED TO FURTHER A VALID PUBLIC BENEFIT, THE PRIVATE DETRIMENT OUTWEIGHED ANY “PUBLIC BENEFIT” AND RESPONDENTS POSSESSED A SUFFICIENT PROPERTY RIGHT TO INVOKE THE DUE PROCESS CLAUSES IN THAT THERE WAS NO PUBLIC BENEFIT TO ENACT THE ORDINANCE, RESPONDENTS HAD AN INVESTMENT-BACKED AND JUSTIFIABLE EXPECTATION REGARDING THE PRIOR ZONING OF THE PROPERTY AND RESPONDENTS WERE NOT MADE WHOLE BY THE TRIAL COURT’S JUDGMENT.

A. Standard of Review

Reagan agrees with the County’s recitation of the applicable standard of review.

B. Reagan Has Not Changed The Basis Of Her Substantive Due Process

Argument

The County claims that Reagan argues for the first time in Respondents'/Cross-Appellants' Substitute Brief that Reagan had a property interest in the "M-1" Zoning that existed at the time she purchased the Property. (See Appellant/Cross-Respondent's Substitute Reply Brief, p. 58). This statement is incorrect, and Reagan presented the same argument during the trial of this matter and in the Missouri Court of Appeals. (L.F. 118-119; see also Respondents'/Cross Appellants' Brief in Missouri Court of Appeals, pp. 52-54; and Respondents'/ Cross-Appellants' Reply Brief in Missouri Court of Appeals, pp. 1-2).

The County also claims that Reagan has never before argued that the County's actions in rezoning the property were truly irrational on the basis that the rezoning did not comply with the requirements of Section 1003.300. (Appellant/Cross-Respondent's Substitute Reply Brief, p. 58). This statement is also incorrect. Reagan established during the trial of this matter that the County's rezoning of the property was governed by the standards of Section 1003.300 (Tr., p. 21, ll. 13-17; see Tr. Ex. 2, Section 1003.300). The legal analysis of the rezoning must determine whether there was a legitimate state interest for the rezoning, and a "legitimate state interest" for the rezoning must necessarily fall within the requirements of Section 1003.300.

Reagan's entire case at trial and her arguments during the subsequent appeal related to establishing that the County's actions were not rationally related to a legitimate governmental purpose because there was no valid basis for the rezoning. (L.F. 114-117; L.F. 127-130; see also citations to the trial record in Respondents'/Cross-Appellants' Brief in the Missouri Court of Appeals, pp. 48-51; Respondents'/Cross-Appellants' Reply Brief in the Missouri Court of Appeals, pp. 3-8; and Respondents'/Cross-Appellants' Substitute Brief, pp. 79-86). The County presented no evidence to support the rezoning, and if the County had tried to do so, such evidence was required to meet the rezoning standard set forth in Section 1003.300 in order to establish a legitimate state interest for the rezoning. The trial court specifically ruled that the County "found no detrimental effect on the residential owners" posed by Reagan's project, that the County had not found "any public interest which would be served by the rezoning", and that "there is no showing of public benefit at all" from the rezoning. (App. Subst. Appen. A-4, 5).

Reagan argued at trial that the rezoning was governed by Section 1003.300, and that the County's rezoning of her property was not based on a legitimate state interest as defined under Section 1003.300. Reagan also argued in the Missouri Court of Appeals that there was no legitimate interest for the rezoning. Reagan has not changed the basis of her substantive due process claim with her arguments in this Court, and the County cannot claim there was a legitimate state interest for the

rezoning of Reagan's property without showing how it met the rezoning standards of Section 1003.300.

C. The Rezoning Ordinance Violated Reagan's Due Process Rights Because Reagan Had A Property Right In The Existing Zoning, The Rezoning Ordinance Was Not Rationally Related To A Legitimate Government Interest, And The Rezoning Ordinance Was "Truly Irrational" As Defined In Furlong

This fact pattern is very unusual and has not been addressed by a Missouri court before. The County itself admits it has never rezoned property over the landowner's objection. (Tr., p. 84, ll. 14-25; p. 85, p. 86, ll.1-19; p. 357, ll. 16-25; p. 358, ll. 1-9; Tr. Ex. 78, p. 18, ll. 22-25; p. 19, ll. 1-11).

The County claims that Reagan has pled the rezoning ordinance was both "facially invalid" and "invalid as-applied" to Reagan. (See Appellant/Cross-Respondent's Substitute Reply Brief, pp. 60-66). Reagan's argument has always been that the rezoning ordinance was facially invalid and defective as enacted due to the lack of a legitimate state interest for the rezoning.

The County has misinterpreted the standard for analyzing whether the rezoning of Reagan's property was rationally related to a legitimate government purpose. The County argues that it has established a "legitimate governmental purpose" for the rezoning by claiming that there were residential areas near

Reagan's office site. (See Appellant/Cross-Respondent's Substitute Reply Brief, pp. 61-63). In Reagan's situation, the proper issue for review is whether Reagan's intended use of the property was inappropriate. Many pieces of property would support more than one possible zoning classification, and just because there is an alternative feasible zoning classification does not automatically justify rezoning the property to that other zoning classification over the landowner's objection. The issue for review is not whether the new residential zoning classification was appropriate for Reagan's property, rather, the standard of review requires analysis of whether Reagan's existing zoning classification and proposed use were inappropriate for the area, i.e. would Reagan's proposed office use cause a detriment to the surrounding area. Even if the County's claim that a residential use of Reagan's property was an appropriate use of the property is true, such a claim does not negate the fact that Reagan's proposed office use of the property was also appropriate, and the County presented no evidence to show otherwise. The County's only analysis mistakenly consisted of whether residential zoning was an acceptable zoning for Reagan's property, and not whether Reagan's proposed office use was inappropriate. (Tr., p. 78, ll. 1-18).

Reagan's office building was compatible with the surrounding area. Reagan's property was situated directly in a mixed land use area that was very

diverse in the types and intensity of existing uses.¹ (Tr., p. 33, ll. 6-13; p. 34, ll. 5-25; p. 35, ll. 1-25; p. 36, ll. 1-25; p. 37, ll. 1-10; p. 38, ll. 16-22; p. 132, ll. 6-25; p. 139, ll. 10-24; p. 323, l. 25; p. 324, ll. 1-11; Tr. Ex. 5, pp. 134-35; Tr. Exs. 9, 43 and 50; Tr. Ex. 76, p. 48, ll. 9-16; Tr. Ex. 83, pp. 39-43). For example, the property immediately to the east of Reagan's property is the site of a community college campus. (Tr., p. 338, ll. 18-25; p. 339, ll. 1-12). According to the Comprehensive Plan, mixed land use was encouraged by the County.² (Tr., p. 37, ll. 5-10; p. 38, ll. 16-22; p. 40, ll. 7-16; Tr. Ex. 5, pp. 134-35). The Comprehensive

¹ During trial, the County's Planning Director, Glenn Powers, admitted that an office development just one-eighth of a mile "up the road" from the property certainly fitted in with the overall character of the area as depicted on Tr. Ex. 50. (Tr., p. 113, ll. 12-25; p. 114, ll. 1-16).

² The Comprehensive Plan is comprised of three documents: General Plan -1980, General Plan Update-1985, and the Sixth County Council District Community Area Study -2000. (Tr. Exs. 3, 4 and 5; Tr., p. 28, ll. 11-17; p. 29, ll. 6-11; Tr. Ex. 82, pp. 30 and 31). The County is required to follow the mandates of the Comprehensive Plan when considering any zoning issues. (See Mo. Rev. Stat § 64.090 and St. Louis County Charter § 2.180(33)-App. Subst. Appen.; Tr., p. 29, ll. 6-11; see also Tr. Ex. 3, p. 26, Government Policy No. 1; p. 41, Land Use Policy No. 1).

Plan contemplates that mixed-use areas such as an office next to a residential area might occur, and provides specific options including landscaping, etc. for dealing with mixed-use areas, i.e. alternatives to rezoning. (Tr., p. 40, ll. 7-16; p. 41, ll. 22-25; p. 42, ll. 1-19; p. 102, ll. 11-19; p. 325, ll. 3-17; Tr. Ex. 3, p. 41, Land Use Policy No. 3). Matt Prickett, the County Planner who authored the Planning Department's recommendation to rezone (Tr. Ex. 7), admitted that he had never seen the Comprehensive Plan (Tr. Ex. 76, p. 42, ll. 15-25; p. 43-45; p. 46, ll. 1-18), despite the fact he was required to utilize the Comprehensive Plan policies in his analysis of the rezoning. (Tr. Ex. 3, p. 88, Section III.1). The evidence showed that Reagan's office was an appropriate use of Reagan's property.

The County approved Reagan's site plan for construction of an office building on the property. (Tr., p. 64, ll. 11-17). The County would not have approved Reagan's site plan unless Reagan's site plan preserved the "integrity of adjacent properties." (Tr., p. 65, ll. 6-25; p. 66, ll. 1-16; Tr. Ex. 2, Section 1003.179.2(3); Tr. Ex. 78; p. 27, ll. 5-11). Mr. Powers thought Reagan's office development as shown on the site plan with its landscaping and buffering was a "reasonable solution." (Tr., p. 77, ll. 11-17; see also Tr. Ex. 76, p. 67, ll. 10-25; p. 68, pp. 69-72). Reagan's office building was compatible with the surrounding area, and therefore there was no legitimate state interest for rezoning the property over Reagan's objection.

The evidence is clear that the rezoning was only carried out due to false complaints from the neighbors that Reagan was constructing a “manufacturing plant for re-bar construction” on the property. (Tr., p. 47, ll. 2-14; Tr. Exs. 14 and 15; Tr. Ex. 77, p. 26, ll. 4-25; p. 27, ll. 1-3; Tr. Ex. 79, p. 11, ll. 7-18; Tr. Ex. 81, p. 7, ll. 5-25; p. 8, ll. 1-17; Tr. Ex. 81, p. 10, ll. 5-21). These misinformed allegations apparently arose due to the name of Reagan’s company, “K. Bates Steel Services, Inc.”.

Reagan’s company provides union labor to job sites, and Reagan’s current office is located in a strip mall and houses only 4 people performing clerical work. (Tr., p. 248, ll. 9-25; p. 249, ll. 12-25; p. 250, ll. 1-25; p. 251, ll. 1-2). The complaining neighbors had purchased their property knowing that Reagan’s property was zoned M-1 Industrial, and thus Reagan’s office development was easily foreseeable by the neighbors. (Tr., p. 56, ll. 15-25; p. 57, ll. 1-17). The County’s Planning Department did not attempt to determine whether the complaining residents’ claims were true or false, nor did the County find any detriment to the community from Reagan’s proposed office use. (Tr., p. 50, ll. 14-25; pp. 51-54; p. 55, ll. 1-22; Tr. Ex. 77, p. 20, ll. 17-24; p. 21, ll. 1-4; p. 22, l. 1).

The County claims that “there were a large number of property owners who would be impacted by the ultimate use of the Property”, but the County made no assertions and presented no evidence as to what that impact would be, or **how**

those property owners would be impacted. (See Appellant/Cross-Respondent's Substitute Reply Brief, p. 62). The County has not claimed that Reagan's office would create any traffic issues, cause a decrease in property values, cause pollution, etc. The County has not claimed any detriment from Reagan's proposed use whatsoever. As a result, there was no legitimate state objective for rezoning Reagan's property over her objection.

The County argues that many permitted uses allowed in an M-1 Industrial District would be incompatible with any residential communities in the area. (See Appellant/Cross-Respondent's Substitute Reply Brief, p. 62, n. 14). The County never argued at trial that it was concerned about uses other than Reagan's office building, and thus it waived this argument. The evidence shows the County was not concerned about any uses other than Reagan's office building. The County knew Reagan was intending to build an office building due to her conversations with the County (Tr., p. 257, ll. 17-25, p. 258, ll. 1-22; p. 271, ll. 15-25; p. 272, ll. 1-8; p. 357, ll. 5-15; Tr. Ex. 19; Tr. Ex. 77, pp. 9-17), and the filing of her site plan (Tr., p. 64, ll. 11-17; Tr. Ex. 18). The County determined that Reagan's proposed office as detailed on the site plan was acceptable. (Tr., p. 77, ll. 11-17; see also Tr. Ex. 76, p. 67, ll. 10-25; p. 68, pp. 69-72). The County would not have approved Reagan's site plan unless it preserved the integrity of adjacent properties. (Tr., p. 65, ll. 6-25; p. 66, ll. 1-16; Tr. Ex. 2, Section 1003.179.2(3); Tr. Ex. 78; p. 27, ll. 5-

11). Additionally, Mr. Powers testified that the County's objection was to Reagan's office use, not some other hypothetical use under Industrial zoning:

Q: "The rezoning ordinance at issue in this case . . . was enacted to prevent Ms. Reagan from building her office development, wasn't it"?

A: "Yes." (Tr., p. 78, ll. 22-25; p. 79, l. 1).

Although the County never presented the "alternative M-1 uses" argument at trial, if the County was worried about a subsequent buyer tearing down Reagan's office building and then building one of the other uses allowed in an M-1 Industrial District, the County could have rezoned the property after Reagan constructed her office building. Reagan's continued use of the office building would have been allowed as an existing, non-conforming use (See Tr. Ex. 2, Section 1003.170), and all other subsequent uses would have been subject to the County's new zoning classification. Regardless, the evidence is clear that the County rezoned the property to prevent Reagan's office, and not to prevent any of the other permitted uses in an M-1 Industrial District.

Reagan believes the Furlong case is almost identical in facts to Reagan's situation. Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157 (Mo. banc 2006). Reagan's situation and the Furlong case are comparable because both cases involve a landowner that purchased the property because of the established favorable zoning. (Furlong at 161). In both cases, (1) the local governing body

was opposed to the proposed development (Id. at 171); (2) there was no detriment to the community shown from the proposed use (Id. at 168); (3) the landowners had met all the requirements of the existing regulations governing their proposed uses (Id. at 168); and (4) approval of the proposed use should have been a ministerial act with no discretion allowed to the governing body. (Id. at 171).

The County argues that the Furlong case does not control Reagan's situation due to the following alleged factors: (1) zoning is a legislative act and not a ministerial act; (2) Reagan did not have a protected property interest in the "M-1" zoning originally applicable to the Property; (3) the rezoning ordinance was not truly irrational; (4) the County Council did not intentionally disregard its own ordinances; and (5) the County Council did not have knowledge the rezoning ordinance would violate any of Reagan's rights. (See Appellant/Cross-Respondent's Substitute Reply Brief, p. 66).

(1) Zoning is a legislative act and not a ministerial act

The County attempts to distinguish the Furlong case on the basis of the method used by the respective governing bodies to block the proposed development of each plaintiff. (See Appellant/Cross-Respondent's Substitute Reply Brief, pp. 63-66). In Furlong, the City attempted to block Furlong's proposed development by denying its preliminary plat. In Reagan's situation, the County approved Reagan's site plan (identical to the preliminary plat in Furlong),

but rezoned Reagan's property to a zoning category which did not allow Reagan's intended use as an office building. In short, the governing bodies in Furlong and in Reagan's situation each used a procedural maneuver to block a proposed development even though the development was permitted under the existing regulations prior to the governing body's actions.

The distinction between the method used to block the proposed developments is irrelevant for purposes of a substantive due process analysis. The County attempts to distinguish Furlong's situation by discussing the discretion attributed to a legislative act (ex. the rezoning in Reagan's situation), versus the administrative approval of an application (ex. preliminary plat approval in Furlong's situation). (Appellant/Cross-Respondent's Substitute Reply Brief, pp. 63-66). It is clear from the County's arguments in its Brief that it realizes that it had no discretion to administratively deny Reagan's site plan application or her building permit application for her proposed, permitted use.

The County knew that rezoning Reagan's property was the only method it had available to block Reagan's proposed use. The County admits the rezoning of Reagan's property was carried out for the sole purpose of blocking Reagan's office development, and not as part of some broad evaluation of existing zoning in the overall community. (Tr., p. 78, ll. 22-25; p. 79, l. 1).

Reagan admits that a legislative act is accompanied by greater discretionary authority than an administrative act, but both administrative and legislative actions are still required to meet the relevant standards in the governing ordinances in order to satisfy a substantive due process analysis. The County's actions do not become completely discretionary simply because they were legislative in nature. In Furlong, the plaintiff was required to meet the relevant standards for preliminary plat approval in the City's ordinances. In Reagan's situation, the legislative discretion of the County to rezone Reagan's property was governed by the rezoning standard of Section 1003.300 of the County's Zoning Code. (See Tr., p. 21, ll.13-17; see also. App. Subst. Appen. A-49).

Just as in Furlong, the County presented no evidence supporting its claim that Reagan's development should be blocked under the relevant standard. (Tr., p. 50, ll. 14-25; pp. 51-54; p. 55, ll. 1-22; Tr. Ex. 77, p. 20, ll. 17-24; p. 21, ll. 1-4; p. 22, l. 1). Such actions constitute a substantive due process violation regardless of whether the action was administrative or legislative in nature.

Additionally, the County should not be permitted to use procedural maneuvering to take action legislatively which it would not have been allowed to take administratively. The County had no discretionary authority to deny Reagan's proposed use, and the County should not be permitted to use a legislative rezoning to create discretion to block a development where it should have none.

For example, assume for discussion that after the Furlong decision was issued and the order of the trial court requiring approval of Furlong's preliminary plat was upheld by this Court, the City of Kansas City then attempted to block Furlong's development by rezoning Furlong's property to a zoning classification which did not allow Furlong's proposed use. Such action would obviously be a maneuver by the City to block Furlong's development using a legislative means after their attempt to block the development administratively had failed. A substantive due process analysis of the City's actions would remain the same because the analysis would still consist of whether the City's actions were related to a legitimate state interest, and whether the actions were still a "truly irrational" attempt to block a development which was otherwise permitted. The means to the end are not the issue, rather, the substantive due process analysis must review whether the County's intent and end result, i.e. to block an otherwise permitted development, was rationally related to a legitimate state interest.

The point of comparing the Furlong case to Reagan's situation is to illustrate that a governing body cannot act arbitrarily in violation of its own laws and standards regulating its behavior in order to block a proposed development. If such actions are to be allowed, then the zoning codes and regulations governing each municipality and unincorporated area are rendered meaningless, and the local governing body can retain discretion over proposed developments in a situation

where it is allowed none under its own zoning code. According to the County, a governing body should be allowed to rezone a property to block a proposed development in any situation where the development is otherwise a permitted, authorized use under the existing zoning classification.

(2) Reagan held a protected property interest in the “M-1” zoning originally applicable to the Property

Reagan discusses the issue of her property rights in the existing zoning of the property in detail in her Substitute Brief. (See Respondents’/Cross-Appellants’ Substitute Brief, pp. 73-78). The County argues that Reagan was required to establish a non-conforming use in order to prove a property right in the existing zoning of her property. (See Appellant/Cross-Respondent’s Substitute Reply Brief, pp. 67-74). The County has applied the wrong standard, and Reagan is not required to establish a non-conforming use in order to prove she held a protected property interest in the existing zoning.

The standard for establishing a nonconforming use is contained in Section 1003.170 of the County’s Zoning Code. (Tr. Ex. 2, Section 1003.170). Section 1003.170.3(3) states that in order to establish a non-conforming land use, Reagan was required to begin construction on her office building prior to the rezoning of her property.

Reagan admits that she did not meet the standards for establishing a non-conforming use under Section 1003.170, and she has never attempted to argue during the course of this litigation that she had established a non-conforming use. If Reagan had initiated actual construction of her office building prior to the rezoning, then her completion of the office building and subsequent use would be permitted under Section 1003.170 regardless of any rezoning, and it is likely Reagan would not have been required to bring this litigation in the first place. If Reagan had established a non-conforming use, there would be no requirement that Reagan prove that the rezoning of her property was arbitrary, capricious and irrational, and her non-conforming use would be permitted to continue under Section 1003.170 regardless of whether the rezoning of Reagan's property was legitimate or invalid.

Reagan possessed a vested property right different and distinct from a non-conforming use. Reagan's property rights in her proposed use vested due to her investment-backed expectations created by the County's representations and approval of Reagan's proposed use prior to the rezoning, and Reagan's subsequent expenditure of costs prior to the rezoning in reliance on those representations. (See Respondents'/Cross-Appellants' Substitute Brief, pp. 73-78). The plaintiff in Furlong had not established a non-conforming use or obtained a building permit either. In Reagan's situation, Reagan had already received site plan approval, so

she was actually further along in the development process than Furlong. (Tr., p. 64, ll. 11-17; Tr. Ex. 18).

There is no Missouri case directly on point; but there are several non-Missouri cases which are similar in fact pattern under which the courts determined that the property owners held a vested right to their existing zoning and proposed use due to actions taken in reliance on the defendant governing bodies' representations and actions taken regarding the proposed use. (See Tandy Corp. v. City of Livonia, 81 F.Supp.2d 800 (9th Cir. 1999); Nasierowski Bros. Investment Co. v. City of Sterling Heights, 949 F.2d 890 (6th Cir. 1991); Great Lakes Pipe Line Company v. Hendrickson, 393 S.W.2d 481 (Mo. 1965); Casey's General Stores, Inc. v. City of Louisiana, 734 S.W.2d 890 (Mo. App. 1987)). These cases did not require the plaintiff to meet the non-conforming use standard under local law, rather the plaintiffs' property rights were determined to exist due to the plaintiffs' expenditures of costs in reliance on representations by the local governing body that the proposed use would be permitted. The County's non-conforming use cases cited in support of its argument are not relevant due to the fact that Reagan is not attempting to submit a non-conforming use argument. (See Appellant/Cross-Respondent's Substitute Brief, p. 70, Great Lakes Pipe Company, Storage Masters, and Outcom, Inc.).

The County's argument that Reagan was required to establish a non-conforming use in order to have a vested right in her proposed use also fails for the additional reason that the County was the party controlling Reagan's ability to initiate construction on the property. Reagan was required to obtain a building permit prior to initiating construction on the property. (Tr., p. 87, ll. 9-11). Reagan had initiated the building permit process prior to the rezoning by filing a Permit Application Center ("PAC") form. (Tr., p. 83, ll. 13-25; p. 84, ll. 1-4; p. 87, ll. 4-20; p. 112, ll. 9-11).

The County rezoned the property because it knew it had no administrative discretion to deny Reagan's building permit application as long as the application met all of the County's building code requirements. The County knew it had to rezone the property in order to avoid a Furlong situation, where the City had no discretion to deny the preliminary plat application. (Tr., p. 87, ll. 4-8). Reagan could not establish a non-conforming use under Section 1003.170 without obtaining a building permit and initiating construction on the new building.

The County cannot claim that Reagan's lack of a building permit negates Reagan's right to use her property for her proposed use. The County was responsible for preventing Reagan from obtaining a building permit due to the County's rezoning of Reagan's property to a zoning category which would not allow Reagan's proposed use. The County argues that "the Rezoning Ordinance

did not destroy any property interest Reagan had in constructing an office building on the Property”, and “there is no evidence that Reagan every took any other steps toward getting approval for her office building after the Rezoning Ordinance was enacted”. (See Appellant/Cross-Respondent’s Substitute Reply Brief, pp. 73-74). This argument is moot because the County had no legal authority to issue a building permit to Reagan for construction of an office building once her property was rezoned to a residential zoning category which does not allow an office building as a permitted use (which was the intent of the County’s rezoning, see Tr., p. 78, ll. 22-25; p. 79, l. 1).

(3) The rezoning ordinance was truly irrational

This Court in Furlong defined a “truly irrational” action as one where “the government acts with intentional disregard of its own valid law, knowing that its actions deprive individuals of their property rights...”. (Furlong at 171). The application of the Furlong standard to Reagan’s factual situation clearly shows that the County’s rezoning of Reagan’s property was “truly irrational”. (See Respondents’/Cross-Appellants’ Substitute Brief, pp. 79-89).

The County claims that the rezoning was carried out to create a “contiguous group of residential uses that included the Property.” (App. Subst. Br., p. 28-29). The County’s claim that the overall community was residential was disputed by Reagan, and Reagan presented evidence at trial showing that her property was

situated in a mixed land use area that was diverse in the types and intensity of existing uses. (See Respondents'/Cross-Appellants' Substitute Brief, pp. 47-48). For example, the property immediately to the east of Reagan's property is the site of a community college campus. (Tr., p. 338, ll. 18-25, p. 339, ll. 1-12).

Regardless, there is no mandate under any federal or state law, or the County's own zoning code, which requires the County to uniformly zone all property in a given area. To the contrary, the County's own Comprehensive Plan states that mixed land use is encouraged by the County. (Tr., p. 37, ll. 5-10; p. 38, ll. 16-22; p. 40, ll. 7-16; Tr. Ex. 5, pp. 134-35). Even if the overall character of the neighborhood is residential as the County claims, there is no legal presumption that a residential use is preferred to Reagan's proposed office use, nor is there a presumption that Reagan's office use would be detrimental to the community.

The County's claim that rezoning Reagan's property created a "contiguous group of residential uses" does not establish why or how such action is required by "the public necessity, convenience, general welfare, and good zoning practice," as mandated by Section 1003.300. The neighbors to whom the County is referring purchased their property knowing that Reagan's property was zoned M-1 Industrial, and thus Reagan's office development was easily foreseeable. (Tr., p. 56, ll. 15-25, p. 57, ll. 1-17). The County has provided no explanation for why it was not necessary to rezone Reagan's property in the 1980s when the complaining

subdivisions were built (Tr., p. 56, ll. 15-25), but it suddenly became necessary in 2001 to rezone Reagan's property after she had owned it for two years and invested substantial costs in preparing it for development.

The County was required to show at trial how creating a "contiguous group of residential uses" somehow provided a public benefit or avoided a public detriment, and the County failed to do so. The trial court specifically determined that the County found no detriment to the community from Reagan's proposed office, nor did the County find any public interest served by the rezoning. (App. Subst. Appen. A-4, 5). The County cannot overcome the trial court's findings by claiming that the County wanted to create a "contiguous group of residential uses," unless the County explains how or why such a motivation constitutes a legitimate state interest or is required by Section 1003.300.2.

The County also argues that the County only has to show that a residential zoning classification for Reagan's property was not truly irrational in order to satisfy the substantive due process standard. (See Appellant/Cross-Respondent's Substitute Reply Brief, pp. 74-77). This position would be correct if Reagan's property had originally been zoned residential, and Reagan herself petitioned the County to rezone the property to Industrial, and the request for Industrial zoning was denied by the County. In Reagan's situation, however, Reagan desired to retain the existing Industrial zoning of her property, and she objected to the

County's rezoning of her property to Residential. As a result, the County is required to show more than that a residential zoning classification might be appropriate for Reagan's property, and the County is also required to show that Reagan's proposed office use is not appropriate for the property.

Assuming solely for discussion purposes that the County's claim that a residential use might be appropriate for the property is true, such a finding does not automatically dictate that Reagan's proposed use was inappropriate, i.e. both a residential use and an office use may have been appropriate. The County made no attempt to prove any detriment from Reagan's proposed office, and there was no showing of any public benefit from the rezoning. As a result, the County did not establish that Reagan's proposed use was inappropriate, and the County's rezoning of the property was truly irrational regardless of whether a residential use was also appropriate.

The County also argues that Reagan "realized a profit" on the sale of her property. (See Appellant/Cross-Respondent's Substitute Reply Brief, p. 77). The "profit" to which the County refers has already been refuted by Reagan. (See Respondents'/Cross-Appellants' Substitute Brief, pp. 53-61, pp. 93-102). Although Reagan admits she sold her property for more than she paid for it, it is not "profitable" or just compensation for Reagan to have to pay an additional \$65,300 out of her own pocket to acquire an equivalent piece of property, nor is it

profitable for her to have to spend another \$83,332.01 in carrying and development costs when she does locate an equivalent piece of property to purchase and develop. The County's argument focuses on sales price versus purchase price, but it ignores just compensation and lost value, and it ignores Reagan's other components of economic damages such as development and carry costs.

(4) The County Council intentionally disregarded its own ordinances

Section 1003.300 of the County's Zoning Code specifies that only when "the public necessity, convenience, general welfare, and good zoning practice require" should the County consider rezoning a property. (Tr., p. 21, ll. 13-17; see also App. Subst. Appen. A-49).

The County submitted no evidence or arguments at the trial court level or the appellate level regarding how the rezoning of Reagan's property was required by "the public necessity, convenience, general welfare, and good zoning practice", despite the fact that the County admitted Section 1003.300 governed its decision. (Tr., p. 21, ll. 13-17). As a result, it is presumed that the County did not utilize the relevant standard when deciding to rezone Reagan's property, which constitutes an intentional disregard of its rezoning ordinance.

The County claims that "a lack of evidence of what the County Council considered is not affirmative proof that the County Council did not consider relevant matters", and states "there is just an absence of proof one way or the

other”. (See Appellant/Cross-Respondent’s Substitute Reply Brief, p. 80). Reagan conducted extensive pre-trial discovery and engaged in exhaustive questioning of the County’s representatives at trial. Reagan’s inquiries included the deposition of Councilman Campisi. Mr. Campisi is the County Council member who requested the rezoning of Reagan’s property.

Councilman Campisi never spoke to Ms. Reagan regarding her plans for the property (Tr. Ex. 79, p. 12, ll. 7-25; p. 13, ll. 1-2; p. 23, ll. 3-16; p. 27, ll. 21-25; p. 28, l. 1; Tr. Ex. 81, p. 9, ll. 14-24), nor did he recall seeing her written comments objecting to the rezoning (Tr. Ex. 79, p. 20, ll. 6-8; Tr. Ex. 19). Councilman Campisi never attempted to verify whether the complaining residents’ concerns were true or based on fact. (Tr. Ex. 79, p. 13, ll. 5-25; p. 14; p. 15, ll. 1-7; Tr. Ex. 81, p. 13, ll. 12-21). Councilman Campisi’s only action in response to the residents’ complaints was to ask the County to initiate the rezoning process. (Tr. Ex. 79, p. 27, ll. 8-20).

The County’s Director of Planning Glenn Powers testified that the Planning Department did not consider any of the normal rezoning factors when deciding to rezone Reagan’s property (Tr., p.54, ll. 5-7; p. 91, ll. 23-25; p. 92, ll. 1-7), and that the rezoning was carried out for the sole purpose of blocking Reagan’s office (Tr., p. 78, ll. 22-25; p. 79, l. 1).

Reagan established at trial that the County had no valid reason for rezoning Reagan's property. Councilman Campisi's and Glenn Powers' testimony regarding their reasons (or lack thereof) for initiating the rezoning of Reagan's property are clearly sufficient to establish the County Council's irrational and improper motivation for the rezoning, and their intentional disregard of the County's own standard for rezoning. The County made no effort to submit any evidence at trial which would support the rezoning under the mandate of Section 1003.300.2 that the rezoning be required by "the public necessity, convenience, general welfare, and good zoning practice".

The County claims there is "absolutely no testimony regarding the requirements of Section 1003.300.2 or its application to the Rezoning Ordinance." This statement is incorrect, and Reagan established at the outset of trial that the standards of Section 1003.300 applied to the analysis of the County's rezoning of her property. (Tr., p. 21, ll. 13-17). Reagan then proceeded to question the County's representatives on the basis for the rezoning, and Mr. Powers testified that the County's Planning Department had not looked at any of "those major reasons for why we would rezone or not rezone". (Tr., p. 54, ll. 5-7). The County's representatives were given every opportunity under both direct and cross-examination to cite any valid basis for the rezoning which might satisfy the requirements of Section 1003.300, and no reasons were provided.

This is not a situation where the County cited a reason for the rezoning (for ex., a perceived negative effect of Reagan’s office on nearby property values), and Reagan then disputed the allegation and asked the trial court to determine the credibility of competing claims. For example, in Furlong, the City at least attempted to argue that Furlong’s proposed development caused a detriment to the community because (a) it had a potential impact on traffic (Furlong at 168); (b) it violated the stacking requirements for cars at a car wash (Furlong at 168); (c) it did not comply with the ratio of the lot depth to width requirements; and (d) the preliminary plat did not “eliminate the easterly drive on proposed lot 3” (Furlong at 169).

In this situation, the County made no attempt whatsoever to prove that the rezoning of Reagan’s property was required by “the public necessity, convenience, general welfare, and good zoning practice”. The County presented no evidence that Reagan’s development posed a detriment to the community, or that rezoning the property provided a public benefit. The trial court specifically found that Reagan’s proposed office posed no detriment to the complaining neighbors, and that the County had not shown any public interest served by the rezoning. (App. Subst. App. A-4, 5). The County’s failure to even attempt to prove that the rezoning was based on a legitimate state interest establishes an intentional

disregard by the County of its own zoning code and the standards contained therein.

The County also argues that there is no evidence that any Council member recognized a failure to follow the requirements of Section 1003.300.2. (See Appellant/Cross-Respondent's Substitute Reply Brief, p. 80). As discussed above, Councilman Campisi's testimony establishes that he did not attempt to follow the requirements of Sections 1003.300.2 when he instigated the rezoning of Reagan's property. Mr. Campisi's testimony is clear that he decided to rezone the property to appease the complaining neighbors, and he took no steps to determine whether the requirements of Section 1003.300.2 were met. Mr. Campisi did not provide any evidence which would indicate any of the other Council members utilized Section 1003.300.2 in their decision to rezone Reagan's property, despite being extensively questioned during his deposition as to the reasons the County Council carried out the rezoning. (Tr. Ex. 79). Even if the County Council was ignorant of the necessity to follow the requirements of Section 1003.300 when deciding to rezone Reagan's property, such ignorance constitutes an intentional disregard of Section 1003.300 since the County Council is presumed and required to know the legal standard governing its actions in any given situation.

(5) The County Council knew the rezoning ordinance would violate Reagan's rights

The County Council was fully aware that rezoning Reagan's property would deprive Reagan of her rights in the property, and cause her substantial financial detriment and the loss of her development. (See Respondents'/Cross-Appellants' Substitute Brief, pp. 86-89; see also Tr. Ex. 19). Mr. Powers informed Councilman Campisi that the County should proceed with caution due to the takings issue. (Tr., p. 74, ll. 12-19; p. 117, ll. 18-25; p. 118, ll. 1-5).

The County argues that "it is completely rational for Council members to listen to the concerns of citizens". (See Appellant/Cross-Respondent's Substitute Reply Brief, p. 82). It is not rational for Council members to listen to concerns of citizens after those citizen complaints have been flatly disproved and rejected as untrue. For example, the complaining neighbors alleged in a form complaint letter that Reagan might be building a "manufacturing plant for re-bar construction". (See Tr. Exs. 14 and 15). Obviously such a false allegation would incite numerous objections and protests from additional neighbors. If such an allegation were true, the County Council might have a rational basis for listening to such an objection. The residents submitted similar false complaints at the public hearing (Tr., p. 341, ll. 24-25; p. 342, ll. 1-7). Reagan, however, clearly established at the public hearing prior to the rezoning that such allegations were false, and that she was not constructing a "manufacturing plant for re-bar construction", nor were any of the other allegations made by the residents based on fact. The County could not

produce the record of the hearing, and thus Reagan was unable to submit the neighbors' testimony or Reagan's refuting testimony to the trial court. (Tr., p. 86, ll. 20-25; p. 87, ll. 1-3; p. 112, ll. 14-25; p. 113, ll. 1-2).

The County also claims that "citizen complaints focused on uses that were permitted uses in an "M-1 Industrial District"". (See Appellant/Cross-Respondent's Substitute Reply Brief, p. 82). Reagan disagrees with this assertion. (Tr. Exs. 14 and 15). As stated above, the County has misplaced the record of the hearing, and thus Reagan's ability to argue over what the citizen complaints did or did not allege is necessarily limited. Regardless, the County was fully aware of Reagan's intended use of the property for an office building due to Reagan's extensive contact with the County, including but not limited to the filing of her site development plan which was approved by the County and which detailed her proposed use down to the exact square footage. (Tr. Ex. 18; Tr. Ex. 76, pp. 62-72; Tr., p. 64, ll. 11-25; p. 65, ll. 1-25; p. 66, ll. 4-16; p. 77, ll. 3-17; p. 87, ll. 4-20). The County cannot assert it was concerned about alternative uses when it was fully aware of the exact use of the property which Reagan was proposing.

The County argues that "even if the Rezoning Ordinance were enacted solely in response to public opposition to the planned development and merely to kill the development, those facts would not constitute truly irrational acts arising to a violation of substantive due process rights." (See Appellant/Cross-Respondent's

Substitute Reply Brief, p. 84). The County's standard for rezoning under Section 1003.300 does not authorize the County to block Reagan's proposed development solely on the basis of "public opposition" and to "kill the development". The County's argument would constitute an unlawful delegation of zoning authority to the neighbors, and would result in the fate of any development being tied to public opinion rather than the proper exercise of administrative or legislative authority by the County.

Reagan's substantive due process rights were violated when the County rezoned her property with no legitimate state interest supporting the rezoning, and due solely to political pressure from the misinformed neighbors. The trial court was correct in determining that the County "found no detrimental effect on the residential owners" posed by Reagan's project, that the County had not found "any public interest which would be served by the rezoning", and that "there is no showing of public benefit at all" from the rezoning. (App. Subst. Appen. A-4, 5). The trial court erred by not ruling that such findings constitute a substantive due process violation by the County.

Reagan is entitled to compensatory damages (including lost property value of \$65,300 and consequential damages of \$83,332.01) and attorney's fees under 42 U.S.C. § 1983 and § 1988. Such an award would serve to distribute Reagan's

damages equally among the public which the rezoning purportedly benefited, rather than forcing Reagan to bear the economic burden of the rezoning alone.

V. THE TRIAL COURT ERRED IN FAILING TO AWARD RESPONDENTS ALL COMPENSATORY AND CONSEQUENTIAL DAMAGES INCURRED IN THE SUM OF \$83,332.01, AS SET FORTH IN RESPONDENTS' TRIAL EXHIBITS NOS. 61 THROUGH 73 AND 84, IN CONNECTION WITH THEIR INVERSE CONDEMNATION CLAIM BECAUSE UNDER ARTICLE I, § 26 OF THE MISSOURI CONSTITUTION, RESPONDENTS DID NOT RECEIVE FULL INDEMNITY OR REMUNERATION FOR THE LOSS OR DAMAGE SUSTAINED BY RESPONDENTS AS A RESULT OF APPELLANT'S ACTIONS IN THAT THE TRIAL COURT'S DAMAGE AWARD ONLY PARTIALLY COMPENSATED RESPONDENTS.

A. Standard of Review

Reagan agrees that the County has presented the proper standard of review.

B. Reagan Is Entitled To Recover The Additional Damages Claimed In Count V of Reagan's Substitute Brief

The trial court erred by not awarding Reagan her consequential damages of \$83,332.01 from the rezoning.

Reagan admits there is a lack of case law addressing this specific situation. Reagan's position is that in order for her to receive "just compensation" as required by Article I, § 26 of the Missouri Constitution, she should be reimbursed for her out-of-pocket costs incurred in proceeding with a development which the County eventually blocked by rezoning her property. There is a lack of case law on the matter because it is extremely rare for a governing body to take steps to stop a project in the middle of the development, and after costs have been incurred but prior to completion of the development.

The County claims that Reagan's expenses "would have been necessary for any development of the property", and that the expenses are "subsumed in the fair market value of the property", i.e. that Reagan should be expected to pay these amounts as a cost of holding real estate. (See Appellant/Cross-Respondent's Substitute Reply Brief, p. 88). This position is not valid because Reagan was not allowed to complete her development. As a result, Reagan never realized the value of her completed development, and her expenditures invested in preparing the property for her development were wasted. Reagan will be forced to duplicate these same expenditures during construction of her office building on another parcel of property.

The County could have rezoned Reagan's property prior to her purchase, or warned Reagan after her purchase that the property was going to be rezoned and

thereby prevented Reagan from incurring the \$83,332.01 of development costs. The County failed to do so, and instead encouraged Reagan's expenditure of costs by advising her that her office use was permitted up until 2001 when the neighbors began complaining.

The evidence is clear that Reagan would not have purchased the property or incurred her \$83,332.01 of costs but for the County's representations that her use was permitted. Reagan was damaged by the County's actions because those funds could have been used by Reagan to develop another parcel or to invest in another asset if the County had only rezoned the property prior to Reagan's purchase of the property and/or expenditure of those costs. Reagan spent \$83,332.01 to partially complete a development which ended up being terminated by the County, and Reagan reaped no offsetting benefits from the expenditure of the costs.

Even if Reagan receives the lost value of her property of \$65,300 as awarded by the trial court, she will not be placed in as good a position from a monetary standpoint as she would be if she had not relied on the County's representations and purchased the property in the first place. The property owner should be put in as good a position pecunarily as he would have occupied if his property had not been taken." United States v. Miller, 317 U.S. 369 (1943) (interpreting "just compensation" provision of Fifth Amendment to U.S. Constitution, which is similar to language of Article I, § 26 of Missouri Constitution); see also State ex

rel. N.W. Electric Power Cooperative, Inc. v. Waggoner, 319 S.W.2d 930 (Mo. App. 1959) “Just compensation” requires that Reagan be reimbursed for her expenses incurred in reliance on the County’s representations and actions. A reimbursement of Reagan’s costs of \$83,332.01 will not create a flood of similar litigation, and it is extremely unlikely that a fact scenario such as this one will arise on any regular basis.

The trial court’s denial of Reagan’s claim for reimbursement of her out-of-pocket costs is clearly wrong because it violates the requirement that Reagan should be put in as good a position pecunarily as if her property had not been rezoned. In order to meet this standard, Reagan should have been reimbursed her \$83,332.01 of cost expenditures.

Respectfully submitted this 4th day of
January, 2007.

Kevin L. Fritz #41638
Michael C. Seamands #45989
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939 – Telephone
(314) 621-6844 – Facsimile
klfritz@lashlybaer.com
mseamands@lashlybaer.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Brief and a disk in compliance with Rule 84.06(g) were mailed on the 4th day of January, 2007 by first-class mail, postage pre-paid, to: Mr. Christopher J. McCarthy, Assistant County Counselor, 41 South Central Avenue, 9th Floor, Clayton, MO 63105, Attorney for Appellant; and a copy of same to: Cynthia Clark Campbell, Campbell Law Firm, 1627 Main Street, Suite 400, Kansas City, MO 64108; and to J. David Breemer, Pacific Legal Foundation, 3900 Lennane Way, Suite 200, Sacramento, CA 95835.

CERTIFICATE OF COMPLIANCE WITH RULES 84.06(c) AND (g)

The undersigned hereby certifies that the foregoing Brief complies with the limitations set forth in Rule 84.06(b) and that the number of words in the Brief are 9,102. The undersigned relied on the word count feature on his firm's word processing system to arrive at that number.

The undersigned further certifies that the labeled disk, filed concurrently herewith, has been scanned for viruses and is virus-free.
