

**NO. SC87968**

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**IN THE MISSOURI SUPREME COURT**

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**DIANNA REAGAN, et al.**

**Respondents / Cross-Appellants**

**v.**

**ST. LOUIS COUNTY**

**Appellant / Cross-Respondent**

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**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY,  
MISSOURI  
21<sup>st</sup> Judicial Circuit  
Honorable Kenneth Romines, Division 10**

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**APPELLANT / CROSS-RESPONDENT'S SUBSTITUTE REPLY BRIEF**

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## **STATEMENT OF FACTS**

The Property was zoned “M-1” from the 1965 countywide rezoning until the enactment of St. Louis County Ordinance No. 20,545 (“Rezoning Ordinance”).<sup>1</sup> Tr. 43:23-25; Tr.Ex.Vol.III, Ex.6. The character of the area surrounding the Property changed from undeveloped in 1965 to a residential corridor by the time of the Rezoning Ordinance. Tr.Ex.Vol.III, Ex. 7 & 8 Tr. Ex.Vol.III, Ex.12. The Property was devoted to residential use all along. Tr. 57:18 to 58:6. No industrial use had ever been located on the Property. Tr. 57, 107:14 - 108:11, 117:7-12, & 339; and Tr.Ex.Vol.III, Ex.7 & 8. By the time that Reagan bought the Property, it was surrounded on all sides by residential uses. TR. 260-261; Tr. 107:14 to 108:4 & 117:7-12; Tr. Ex.Vol. III, Ex. 7, 8 & 12; and Tr. Ex.Vol.V, Ex.56 & 57. It was not located in a “mixed use” area as that term is used by planners. Tr. 33:6 to 34:4.

The Planning Department recommended that the Property be rezoned from “M-1” Industrial District to “R-3” Residence District because the Planning Department felt the existing “M-1” zoning was incompatible with the surrounding uses and “R-3” zoning was more compatible with the surrounding uses. Tr.56:4-14; Tr.Ex.Vol. III, Ex. 7 & 8. Glenn Powers thought Property was worth more for residential uses than for industrial uses. Tr.118:1-13. The County did not rezone

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<sup>1</sup> Citations to the record are as follows: Trial transcript (Tr. page:line), Legal File (LF. page), and Trial Exhibits (Tr.Ex.Vol.\_\_\_\_, Ex.\_\_\_\_).

the Property before the Rezoning Ordinance because it was a small parcel that just got lost in the midst of the rezoning of the surrounding property to residential zoning and because the existing residential uses on the Property were not incompatible with the surrounding and subsequent subdivision development. Tr. 57:18-25. The uses of the Property from 1965 through the spring of 2001 just didn't present a problem for anyone. Tr. 57:25. However, during those same 36 years the surrounding properties had all been rezoned from "M-1" Industrial to residential zoning. Tr. Ex.Vol.III, Ex. 7 & 8; Tr.Ex.Vol.III, Ex.12.

Reagan incorrectly states the value of the Property zoned as "R-3" Residence district on July 3, 2001 was \$167,000, citing to page 305 of the Trial Transcript. That \$167,000 value was from the testimony of Mr. McReynolds, and the Court stated that it believed the competing testimony of Mr. Michael Andrew Green. Tr. 304:14 to 305:17; and County's Sub. Apdx., p.A-8 (Nunc Pro Tunc Order).

Reagan could not have built her office building without a building permit. Tr. 87:19-11. Reagan was "following the process" toward a building permit, but there is absolutely no evidence of what that process was, what the requirements were for the issuance of a building permit, or whether Reagan satisfied any of those requirements. Tr. 87:19-20. Reagan filed a Permit Application Center ("PAC") Form on June 7, 2001. Tr.Ex.Vol.III, Ex.21. That form is not an

application for a building permit. Tr.Ex.Vol.III, Ex.21. The PAC Form specifically advised Reagan that she must submit an application for a building permit and four sets of plans. Tr.Ex.Vol.III, Ex.21. There is absolutely no evidence that Reagan ever filed the application for the building permit or submitted the four sets of plans required on the PAC Form. Tr.Ex.Vol.III, Ex.21.

Reagan incorrectly asserts that the Planning Department recommended a change in zoning of the Property from “M-1” District to “R-3” District because of misinformation from neighbors and political pressure from Councilman Campisi. Reagan’s Sub.Brf. p.20. The Planning Department recommended the change in zoning because it believed that “M-1” zoning of the property was incompatible with the surrounding uses and that “R-3” zoning was the most appropriate zoning. 56:4-14. There is absolutely no evidence of political pressure exerted on the Planning Department or, more importantly, that political pressure affected the department’s conclusions and recommendations.

Reagan asserts incorrectly that the County never considered the effect that Reagan’s office development might pose to the complaining neighbors; the effect of Reagan’s development on surrounding property values; the effect of the rezoning on Reagan’s intended development, or Reagan’s public comments. Reagan’s Sub. Brf. p.20-22. There is absolutely no evidence in the record to

demonstrate that the members of the St. Louis County Council failed to consider such matters prior to enacting the Rezoning Ordinance on July 3, 2001.

Similarly, Reagan is incorrect when she asserts that the County Council enacted the Rezoning Ordinance pursuant to the “Planning Department’s downsizing report.” Reagan’s Sub. Brf. P.22. There is absolutely no evidence in the record to demonstrate what facts, comments, arguments, complaints, logic, documents or maps influenced the members of the St. Louis County Council to vote in favor of the Rezoning Ordinance on July 3, 2001.

By the time of trial in this case, the Property had been purchased by a developer who actually built homes on the Property. Tr. 7-10.

**POINTS RELIED ON**

**POINT I**

**REAGAN HAS FAILED TO REBUT THE COUNTY'S ARGUMENT THAT NO TAKING OCCURRED, SINCE THE EVIDENCE AT TRIAL FAILED TO PROVE THAT COUNTY'S REZONING IMPOSED A SEVERE IMPACT ON THE PROPERTY UNDER A *PENN CENTRAL* ANALYSIS OF THE ECONOMIC IMPACT OF THE REZONING, THE EXTENT TO WHICH IT INTERFERED WITH INVESTMENT-BACKED EXPECTATIONS AND THE CHARACTER OF THE COUNTY'S ACTION.**

*Clay County v. Bogue*, 988 S.W.2d 102 (Mo. App. 1999).

*Byrom v. Little Blue Valley Sewer District*, 16 S.W.3d 573 (MO. 2000).

*Carolan v. City of Kansas City, Missouri*, 813 F.2d 178 (8<sup>th</sup> Cir. 1987).

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

St. Louis County Revised Ordinances, Section 1003.111.

St. Louis County Revised Ordinances, Section 1003.112.

St. Louis County Revised Ordinances, Section 1003.113.

St. Louis County Revised Ordinances, Section 1003.115.

St. Louis County Revised Ordinances, Section 1003.117.

St. Louis County Revised Ordinances, Section 1003.119.

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St. Louis County Revised Ordinances, Section 1003.120A.

St. Louis County Revised Ordinances, Section 1003.121.

St. Louis County Revised Ordinances, Section 1003.123.

St. Louis County Revised Ordinances, Section 1003.125.

St. Louis County Revised Ordinances, Section 1003.151.

St. Louis County Revised Ordinances, Section 1003.300.

Missouri Constitution, Article I, Section 26.

Missouri Rule 83.08(b).

## **POINT II**

**REAGAN HAS FAILED TO REBUT THE COUNTY'S ARGUMENT THAT THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT IN THE AMOUNT OF \$65,300 BECAUSE THE TRIAL COURT CALCULATED DAMAGES USING FIGURES NOT SUPPORTED BY THE EVIDENCE AND BECAUSE THE COURT USED AN INCORRECT MEASURE OF DAMAGES.**

*Byrom v. The Little Blue Valley Sewer District*, 16 S.W.3d 573 (Mo. 2000).

*State ex rel. Missouri Highway And Transportation Commission v. Horine*, 776 S.W2d 6 (Mo. *banc*, 1989).

*Collier v. City of Oak Grove*, 2006 WL 3068558 (Mo. App. W.D. 10/31/06).

Missouri Constitution, Article I, Section 26.

### **POINT III**

**REAGAN HAS FAILED TO REBUT THE COUNTY'S ARGUMENT THAT THE TRIAL COURT ERRED IN AWARDING REAGAN'S ATTORNEY FEES AND COSTS BECAUSE COUNTY RAISED IN THE TRIAL COURT ITS DEFENSE THAT NO STATUTORY AUTHORITY EXISTS TO SUPPORT THE TRIAL COURT'S AWARD OF ATTORNEY FEES AND COSTS AND BECAUSE NO UNUSUAL CIRCUMSTANCES EXIST THAT WARRANT AN AWARD OF ATTORNEY FEES AND COSTS.**

*Baumli v. Howard County*, 660 S.W.2d 702 (Mo. 1983).

*Casper v. Hetlage*, 359 S.W.2d781, 789-90 (Mo. 1962).

*66, Inc. v. Crestwood Commons Redevelopment Corp.*, 130 S.W.3d 573, 593-595 (Mo.App. E.D. 2003).

*Temple Stephens Co v. Westhaver*, 776 S.W.2d 438, 443 (Mo. App. 1989)

Missouri Constitution, Article I, Section 26.

Missouri Constitution, Article VI, Section 18(c).

Missouri Revised Statute, Chapter 64.

Missouri Revised Statute, Section 89.491.

Missouri Rule 84.13.

Missouri Rule 84.06.

Missouri Rule 87.09

Section 1003.151 SLCRO.

#### **POINT IV**

**THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT THE REZONING OF REAGAN’S PROPERTY FROM THE “M-1” INDUSTRIAL DISTRICT TO THE “R-3” RESIDENCE DISTRICT DID NOT VIOLATE REAGAN’S SUBSTANTIVE DUE PROCESS RIGHTS UNDER EITHER THE UNITED STATES CONSTITUTION OR THE MISSOURI CONSTITUTION BECAUSE REAGAN HAS CHANGED THE BASIS OF THIS CLAIM AFTER TRANSFER THEREBY WAIVING IT, REAGAN DID NOT HAVE A PROPERTY**

**INTEREST IN THE “M-1” ZONING FOR THE PROPERTY  
AND REZONING THE PROPERTY TO THE “R-3” ZONING  
DISTRICT WAS NOT TRULY IRRATIONAL.**

*Chesterfield Development Corporation v. City of Chesterfield*, 963 F.2d 1102,  
1104 (8<sup>th</sup> Cir. 1992).

*Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 170 (Mo. banc  
2006).

*Carolan v. City of Kansas City*, 813 F.2d 178 (8<sup>th</sup> Cir. 1987).

*Storage Masters-Chesterfield, L.L.C. v. City of Chesterfield*, 27 S.W.3d 862, 865  
(Mo. App. 2000).

42 U.S.C. §1983.

42 U.S.C. §1988.

Missouri Constitution, Article 1, Section 26.

Missouri Revised Statutes, Section 64.090.

Missouri Rule 83.08.

St. Louis County Charter, Section 2.180.

St. Louis County Revised Ordinances Section 1003.115.

Section 1003.300 2. Section 1003.170 SLCRO.

**POINT V**

**THE TRIAL COURT DID NOT ERR IN REFUSING TO AWARD REAGAN ADDITIONAL DAMAGES IN THE SUM OF \$83,332.01, AS SET FORTH IN REAGAN'S TRIAL EXHIBITS NUMBERED 61-73 AND 84, BECAUSE THERE WAS NO TAKING TO SUPPORT THE AWARD OF DAMAGES AND THE ADDITIONAL DAMAGES CLAIMED BY REAGAN ARE SUBSUMED IN THE CORRECT MEASURE OF DAMAGES WHICH IS THE DIFFERENCE BETWEEN THE FAIR MARKET VALUE OF THE PROPERTY IMMEDIATELY BEFORE AND AFTER A TAKING.**

*U.S. v. Miller*, 317 U.S. 369 (1943).

*N.W. Electric Power Cooperative*, 319 S.W.2d 930 (Mo. App. 1950).

*City of St. Louis v. Union Quarry & Const.*, 394 S.W.2d 300, 305 (Mo. 1965).

*State ex rel. Missouri Highway And Transportation Commission v. Horine*, 776 S.W2d 6 (Mo. *banc*, 1989).

Missouri Constitution, Article 1, Section 26.

## **ARGUMENT**

### **POINT I**

**REAGAN HAS FAILED TO REBUT THE COUNTY'S ARGUMENT THAT NO TAKING OCCURRED, SINCE THE EVIDENCE AT TRIAL FAILED TO PROVE THAT COUNTY'S REZONING IMPOSED A SEVERE IMPACT ON THE PROPERTY UNDER A *PENN CENTRAL* ANALYSIS OF THE ECONOMIC IMPACT OF THE REZONING, THE EXTENT TO WHICH IT INTERFERED WITH INVESTMENT-BACKED EXPECTATIONS AND THE CHARACTER OF THE COUNTY'S ACTION.**

#### **A. Standard of Review.**

In a court-tried case, the decision of the trial court should not be reversed “unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

#### **B. Zoning Ordinance Did Not Effect Regulatory Taking.**

The parties agree that this Court should apply the *Penn Central* factors as set out in *Clay County v. Bogue*, 988 S.W.2d 102, 107 (Mo. App. 1999) to determine whether the Rezoning Ordinance constituted a taking. Those factors are (1) the

economic impact of the regulation, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the government action. *Id.*

**(1) Economic Impact of Regulation**

Reagan did not suffer a constitutionally significant economic impact as a result of the Rezoning Ordinance for the reasons set forth in Point I of County's Substitute Brief.

**(a) Rezoning Ordinance Did Not Cause Constitutionally Significant Reduction In Market Value.**

The trial court erred when it entered judgment in the amount of \$65,300 for a regulatory taking because the Rezoning Ordinance did not cause a taking and because, even if there had been a taking, the amount of the judgment is based on figures not in the record and constitutes an incorrect measure of damages.<sup>2</sup> See Points I & II of County's Substitute Brief.

Reagan argues that the sum of the damages calculated by the trial court, along with out-of-pocket expenses of \$83,332.01, together amount to a severe

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<sup>2</sup> Reagan incorrectly asserts at page 35 of Reagan's Substitute Brief that the trial Court included the out-of-pocket expenses of \$83,332.01 in deciding that the Rezoning Ordinance caused a taking. In fact, the trial court denied Reagan's prayer for out-of-pocket expenses. LF. 146.

economic impact on the value of the Property that tips the first *Penn Central* factor in Reagan's favor. Reagan starts by disputing County's argument that because Reagan sold the property for more than she paid for it, she has not been damaged.<sup>3</sup> Reagan's Sub. Brf. p.35. In making that argument, Reagan asserts a different, and incorrect, measure of damages based upon her reading of *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984).<sup>4</sup>

In fact, *Kirby* holds that the proper measure of damages is the value of the Property before the taking and the value of the property after the taking. *Kirby*, 467 U.S. at 10. *Kirby* also holds that “‘Just compensation’... means in most cases the fair market value of the property on the date it is appropriated.” *Id.* Both holdings support County's argument.

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<sup>3</sup> Significantly, Reagan does not deny that she sold the Property for more than she paid for it.

<sup>4</sup> Reagan argues that the date of taking in the case at bar could be the date of trial under the holding in *Kirby*. The date of trial was the date of taking in *Kirby* only because the condemnation occurred under the procedure then codified at 40 U.S.C. §257 that provided that the government took possession and title on the date of trial: and therefore that was the date of taking. *Kirby* does not hold that the date of trial is the date of taking in a Missouri inverse condemnation claim.

Reagan then argues that the County and the Court of Appeals urge a measure of economic impact that limits the property owner to “out-of-pocket damages.” To illustrate the supposed fallacy of the County position, Reagan concocts a farfetched example in which Reagan posits a \$1.00 purchase price, a rezoning, a before rezoning value of \$1,000,000, and a later sale price of \$2.00. Reagan’s Sub. Brf. P. 35. Reagan then argues that under the logic of the County and the Court of Appeals, the economic impact is the difference between the \$1.00 purchase price and the \$2.00 sale price. *Id.*

In fact, Reagan’s argument and example illustrate a fundamental misunderstanding of the County’s argument. County argues that even if we accept the trial court’s figures, the Rezoning Ordinance only resulted in a 29 % reduction in value of the property and that is an insufficient economic impact to tip *Penn Central’s* economic impact factor against County. See County Sub. Brf. Point II, p.22-23. County also clearly argues that the economic impact of a regulation is the value of the property affected by the regulation immediately before and after the application of the regulation. See, County Sub. Brf. Point II, p. 31.

Fairly applying County’s argument to Reagan’s illustration, the economic impact on the property would be the difference between the \$1,000,000 value of the property immediately before the application of the regulation and the \$2.00 value immediately after the application of the regulation or a \$998,000 diminution

in value of the property. But neither Reagan's illustration nor her misunderstanding of County's argument actually counter the arguments made in Point I of County's Substitute Brief that clearly demonstrate that the Rezoning Ordinance did not cause the severe economic impact necessary to tip the first *Penn Central* factor in favor of finding a regulatory taking.

**(b) Fair Market Value Is Not Increased By Expenses Incurred By Owning Or Improving Property.**

Reagan argues that the sums she spent for loan origination fees, title insurance and closing fees, asbestos removal, costs to demolish dilapidated structures on the Property, surveying fees, real estate taxes, engineering fees and property maintenance expenses should be added to the amount of the trial court's judgment to determine the economic impact of the Rezoning Ordinance. Reagan's Sub. Brf. P. 36 and LF. P.146. Not surprisingly, Reagan does not cite any authority for this argument.

The out-of-pocket expenses Reagan mentions were all necessary for any development of the property, and they are therefore logically subsumed in the fair market value of the Property. Additionally, most of those expenses were necessary for any future development of the property if not to eliminate dangerous conditions prior to any development. In both regards, Reagan derived benefit from the work, services and products purchased with such expenditures. However,

those expenditures are not additive to the fair market value that is the basis for calculating the economic impact of the regulation. *Byrom v. Little Blue Valley Sewer District*, 16 S.W.3d 573, 577 (Mo. 2000) (defining fair market value).

Reagan attempts to distinguish the case of *Vatterott v. City of Florissant*, 462 S.W.2d 711, 713 (Mo. App. 1971), cited by County for the proposition that zoning regulations may cause significant reductions in property value and still not amount to confiscatory zoning. See Reagan's Sub. Br. p.37 and County's Sub. Brf., p.23. However, none of the "distinctions" pointed out by Reagan undermine the County's argument or the holding that a rezoning may cause significant reductions in property value and not constitute confiscatory zoning.<sup>5</sup> The facts of *Vatterott*, are strikingly similar in that the property in question was rezoned from

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<sup>5</sup> Reagan continues to assert that the County knew she proposed to build an office building. However, it is clear that the County Zoning Ordinance is a permissive zoning code that allowed to Reagan to use her property for any use permitted in the "M-1" Industrial District prior to its rezoning. So Reagan could have built the office building that she proposed and used it for any use permitted in the "M-1" District or sold it to another to use for any such permitted purpose. Tr.Ex.Vol.I, Ex.2, Sections 1003.151. The only way to prevent those uses was to rezone the property to a district where all uses were compatible with the surrounding residential uses. Tr.Ex.Vol.I, Ex.2, Section 1003.151.

commercial to residential just as in the case at bar, the property was surrounded on three sides by residential development, and the rezoning caused a great diminution in value of the property. *Vatterott*, 462 S.W.2d at 712 & 713. The Property is surrounded on all sides by residential uses. Tr.Ex.Vol.III, Ex.12; Tr.Vol.V, Ex.50; Tr. 117:7-12. The cases of *Euclid v. Ambler*, 272 U.S. 365 (1926) and *Hadechek v. Sebastian*, 239 U.S. 394 (1915) cited by County along with *Vatterott* in support of the same point are not distinguished or even mentioned in Reagan's Substitute Brief.

Reagan also attempts to distinguish the cases of *Dorman v. Township of Clinton*, 714 N.W.2d 359 (Mich. App. 2006) and *Town of Georgetown v. Sewell*, 786 N.E.2d 1132 (Ind. App. 2003) on the grounds that both of those cases use what would be a *per se* taking test under Missouri and federal law to make the analysis of economic impact as required under the first *Penn Central* factor. Reagan's Sub. Brf. p. 38. However, all three cases recognize and apply the *Penn Central* factors in a case-specific inquiry. *Dorman*, 714N.W.2d at 64; *Sewell*, 786 N.E.2d at 1139; *Reagan*, Slip Opinion, pp. 4-9.

A *per se* taking occurs when there is a physical invasion of property or where a regulation denies "all economically beneficial or productive use of land." *Clay County*, 988 S.W.2d at 106-107 citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1005 (1992). There was no physical invasion of property

in *Dorman, Sewell and Reagan*. Likewise, the rezoning ordinances in question in *Dorman, Sewell and Reagan*, did not deprive the property owner of all economically beneficial use of their Property. Therefore, a case-specific inquiry was appropriate in each case, and in each case, the court made a case specific inquiry.

In its slip opinion, the Missouri Court of Appeals properly stated and applied the *Penn Central* factors. *Reagan*, Slip Opinion pp. 4-9. In that analysis, the Court of Appeals did not require Reagan to show that she had been denied all economically beneficial or productive use of land. *Id.* Rather, it looked at the extent of economic impact the Rezoning Ordinance imposed on the Property. *Id.* at pp. 4-6. The Court of Appeals found that since Reagan sold the Property for 28% more than she had purchased it for some three and one-half years before, the economic impact of the Rezoning Ordinance was insufficient to support a taking claim. The Court of Appeals then found that the first *Penn Central* factor favored the County. That result is in accord with *Penn Central*.

For the reasons stated in the Court of Appeals opinion and Point I of County's Substitute Brief, the Rezoning Ordinance did not impose an economic impact on the Property that tips the first *Penn Central* factor in favor of finding a taking.

(2) **Interference With Investment-Backed Expectations.**

Reagan argues that a takings analysis should focus particularly on “the extent to which the regulation has interfered with investment-backed expectations” citing to *Penn Central*, 488 U.S. at 124. However, it is equally true that no one factor is dispositive. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327, No.23 (2002).

Reagan argues that County advised Reagan “her office was a ‘permitted and appropriate use’ of the property.” Reagan’s Sub. Brf., p. 40. It is true that before the Rezoning Ordinance, an office was a permitted and appropriate use on the Property. Tr.Ex.Vol.I, Ex.2, Section 1003.151 But it had been many decades since the County had formally studied what was an appropriate and therefore a permitted use on the property. In the interim, the Property had always been used for residential uses, no industrial use had ever been located on the Property, and the surrounding land had been rezoned from “M-1” to residential zoning and actually developed for residential uses. Tr. 57, 107:14 - 108:11, 117:7-12, & 339; and Tr.Ex.Vol.III, Ex.7 & 8. Whether a use is appropriate in light of the current state of development in the area is a decision that depends on legislative facts found by the members of the County Council and the exercise of their legislative discretion. Sub. Apdx. P47. Section 23. Planning officials can provide information and advice to the County Council, but the discretion and authority to

enact zoning ordinances is vested in the County Council. Courts give wide latitude to legislative bodies when they exercise that discretion. *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157,163 (Mo. 2006).

Reagan argues that discussions with planning officials gave her a reasonable investment-backed expectation that the zoning would not be changed. However, any reasonable investment-backed expectation must incorporate knowledge of Section 1003.300 allowing the County to change the zoning of the Property. *Hawkeye Promotions, Inc. v. Miller*, 432 F.Supp.2d 822, 856-857 (N.D. Iowa, 2006). Additionally, the reasonableness of that expectation should hinge on the source of her information and the character of the information. In this case, Reagan points to conversations with officials who did not have the authority to make decisions regarding zoning, and therefore, by definition, the information provided to Reagan could not be more than an opinion. None of these opinions were reduced to writing or resulted from a formal investigation. Further the opinion that the “M-1” zoning could not be changed was a legal conclusion obtained from a non-lawyer that directly conflicted with existing ordinances. Tr.Ex.Vol.I, Ex. 2, Section 1003.300. It is not reasonable to form an expectation as to legal matters based upon advice from non-lawyers. At the same time, there is no evidence that Reagan ever consulted with any member of the County Council in

forming her expectations about future use of the property.<sup>6 7</sup> But even if she had, such consultations could not and should not bind the future action of the Council members who may later see things in a different light and/or learn additional

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<sup>6</sup> If conversations with planning officials are found to create reasonable investment-backed expectations that can bind the discretion of legislative officials, then it is reasonable to conclude that planning officials will cease holding informal discussions with landowners and developers. The loss of such informal give-and-take conversations will lead to more errors in proposals, more unworkable proposals from developers, and more costs for everyone.

<sup>7</sup> *Amicus* argues that under *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), statements of planning officials can give rise to reasonable expectations. The decision in *Kaiser* assumes that information about the dredging in that case was brought to the attention of persons responsible for making decisions for the Corps of Engineers, and that those responsible persons in turn spoke for the Corps in saying no permits were required, and acquiesced when presented with further specific plans for dredging and other work. *Id.* at 168. In the case at bar, there is no evidence that County planning employees spoke for the County. Consequently, those statements do not support a reasonable investment-backed expectation for Reagan.

information relevant to a later zoning decision. Thus, it was not reasonable to make investment-backed decisions based on such informal conversations.

Further, existing zoning is not the only aspect of the Property that Reagan should have examined in forming reasonable investment-backed expectations. *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) and *Dorman*, 714 N.W.2d at 358. Even though the County failed to recognize a changing character of the neighborhood required a change of zoning for the Property, Reagan should have considered the nature and extent of the existing, surrounding development and compared those existing uses to the development Reagan intended. *Palazzolo*, 533 U.S. 634 (O'Connor, J., concurring) and *Dorman*, 714 N.W.2d at 358. This Court should also consider the nature and extent of existing, surrounding uses. *Id.* In *Dorman*, the Michigan court observed that “[a] simple visual inspection of the area would have placed [the landowner] on notice that his proposed development was inconsistent with the character of the neighborhood.” *Dorman*, 714 N.W.2d at 358. Similarly, the fact that the last actual use of the Property had been for residential uses and the Property had never been used for industrial uses, should also have provided Reagan with notice that her planned office development was inconsistent with the character of the neighborhood. Tr. 57:18 to 58:6; 57, 107:14 –108:11, 117:7-12 & 339; and Tr.Ex.Vol.III, Ex. 7& 8. This Court should hold that a landowner must form

reasonable investment-backed expectations in light of the existing uses of the property to be developed and the existing uses surrounding that property.

The record in this case demonstrates that the Property, although zoned for industrial use, was a long, narrow 4.7 acre parcel of “M-1” District zoning imbedded in a larger surrounding area of residential uses. Tr.Ex.Vol.III, Ex. 12; Tr.Ex.Vol.III, Ex. 7& 8; Tr.Ex.Vol.V, Ex.56 & 57.Tr. 117:7-12. Over thirty homes were adjacent to the Property. Tr.Ex.Vol.III, Ex.12. That information puts a reasonable person on notice that a change in zoning was indicated.

Similarly, Reagan should have considered the history of development in the area.<sup>8</sup> This information is readily available from a view of the neighborhood and a review of public records. These inquiries would have shown that a large area of land including the Property was zoned “M-1” Industrial District in 1965 but that since that time the surrounding property had been rezoned to residential zoning and actually developed for residential uses so that the Property now constituted a sliver of “M-1” District imbedded in a much larger area of residential uses. Tr. 107:14 – 108:4, 117:7; Tr.Ex.Vol.III, Ex. 7 & 8, p.2 and Tr. 242. Those facts, coupled with

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<sup>8</sup> *Amicus* invites the court to speculate concerning the tax treatment of the Property. *Amicus* Brief, p.11. However, there is absolutely no evidence in the record regarding tax treatment of the Property, and so this Court should disregard the arguments of *Amicus*.

the fact that the Property could be rezoned pursuant to Section 1003.300, shows that it was not reasonable to rely upon the opinions of planning department employees regarding future zoning of the Property.

Missouri law provides further reasons why it was not reasonable to form investment-backed expectations regarding the construction of an office building on the Property. Reagan should also have considered when she would complete sufficient steps toward the construction of an office building so that after the passage of the Rezoning Ordinance that use would constitute a preexisting, lawful, non-conforming use. *State Ex. Rel. Great Lakes Pipeline Company v. Hendrickson*, 393 S.W.2d 481, 484 (Mo. 1965). Landowners face a strict test for establishing a prior non-conforming use. *Storage Masters-Chesterfield v. City of Chesterfield*, 27 S.Wd.3d 862, 866 (Mo.App. 2000). Heretofore, a property owner did not obtain a property right in a given zoning until he or she took substantial steps toward completion of a permitted use. *Id.* & *Great Lakes Pipeline*, 393 S.W.2d at 484. The landowner's intentions or plans to use the property are insufficient to establish a lawful, non-conforming use. *Storage Masters*, 27 S.W.3d at 866. Likewise, preliminary work, which is not of a substantial nature, does not arise to the level of a lawful non-conforming use. *Id.* at 27 S.W. 3d at 866. Rather, actual use of the Property and not a contemplated use of the Property is determinative of the existence of a non-conforming use. *Id.* Reagan's argues to

supplant these well-settled principles controlling the existence of a lawful, non-conforming use with a new vested right controlled by the landowner's intentions in the name of investment-backed expectations. This Court should reject Reagan's invitation for a radical change in existing law, and hold instead that reasonable investment-backed expectations do not arise for uses that do not constitute a pre-existing, lawful, non-conforming use after a zoning change.

Reagan also argues that she incurred expenditures for resolving an illegal subdivision issue, demolishing the existing buildings on the Property and removing asbestos from the Property and that those expenditures form the basis of her investment-backed expectations. Reagan's Sub. Brf., p. 42. However, such expenditures are necessary for any development, and do not uniquely prepare property for the development of an office building. Accordingly, such expenditures are, at most, evidence of mere preliminary work that does not constitute a non-conforming use. *Storage Masters*, 27 S.W.3d at 866.

Reagan also argues that because the County did not rezone the Property sooner, it should not be heard to argue that Reagan should have considered whether the Property was appropriate for industrial uses. Yet, before Reagan bought the Property it had always been used for residential uses and no objectionable uses were ever called to the County's attention. Thus, County had no reason to rezone the Property. Similarly, County has hundreds of thousands of

parcels of real estate. It is inevitable that an occasional outdated zoning will be missed. Additionally, the County is better able to make correct zoning decisions when an actual proposal for development is submitted and motivated proponents and opponents present their respective cases for and against the development. Zoning decisions before that point just invite mistakes and potential litigation.

Reagan's argument that she submitted a County "PAC" Form as a first step in receiving a building permit from County did not actually create any vested rights. Reagan's Sub. Brf., p. 45. Actually, the form Reagan filed was a St. Louis County Permit Application Center form called a "PAC." Tr.Ex.Vol.V, Ex. 21. The PAC form is not an application for a building permit. In fact, the PAC form specifically informs the applicant that other approvals are required including the approval of the Department of Public Works. *Id.* Reagan's PAC form also specifically informs Reagan that a building permit application and four sets of plans were to be submitted by applicant. *Id.* There is absolutely no evidence that Reagan ever applied for a building permit as instructed in the PAC or supplied the plans required for the issuance of building permit. Reagan asserts that "[t] he only reason [she] did not obtain a building permit was because the County rezoned her property." Reagan's Sub. Brf. p.45.*Id.* However, Reagan fails to provide any citation to the record to support this second assertion. *Id.* There is absolutely no evidence in the record that County building officials ever made a decision to deny

Reagan a building permit. That was a decision that they never had to make because Reagan apparently abandoned her pursuit of a building permit.

Reagan also argues that the County had no discretion to issue a building permit to Reagan as long as her contemplated office building met the code requirements. Yet even if that is true, Reagan did not acquire a property interest in a building permit because she never actually applied for the permit or supplied the requested building plans. *Carolan v. City of Kansas City, Missouri*, 813 F.2d 178, 181 (8<sup>th</sup> Cir. 1987) & *Wintercreek Apartments of St. Peters v. City of St. Peters*, 682 F.Supp. 989, 994 (E.D. Mo 1988). Further, there is no evidence in the record of the actual requirements to obtain a building permit from the County or evidence of facts showing that Reagan actually fulfilled the requirements to obtain a building permit. *Id.* Hence, Reagan never acquired a property interest in a building permit or in the right to construct an office building that could form the basis of a reasonable investment-backed expectation. *Id.*

Lastly, real estate development is a highly regulated industry in St. Louis County. Tr.Ex.Vol.I, Ex.2. Persons who choose to do business in such a regulated area “cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.” *Hawkeye Commodity Promotions, Inc. v. Miller*, 432 F.Supp.2d 822, 857 (N.D. IA. 2006) citing *Connolly v. Pension Benefit Guar. Corp.*, 457 U.S. 211, 227 (1986). Reagan’s reasonable investment

backed expectations are therefore greatly diminished by the extensive regulation of real estate development in St. Louis County. *Id.*

For the foregoing reasons, *Penn Central's* reasonable investment-backed expectations factor favors the County.

(3) **Character of Government Action.**

Reagan argues for the first time that the Rezoning Ordinance is not legitimate because the County ignored its own standards in Section 1003.300 for carrying out a rezoning. Reagan's Sub. Brf. p.46. Since this was not raised in the trial court or the Court of Appeals, it cannot be raised here for the first time.

Missouri Rule 83.08(b). Additionally, Reagan does not cite any legal authority for her argument of the facts.

Reagan's suggestion that the Property is in a mixed-use area twists Glenn Powers' testimony. See Tr. 33-36; 97-99. When the area of land viewed becomes large enough, every portion of the County will ultimately have mixed uses. In this case, there is a large area of contiguous residential uses and the Property was imbedded in the midst of that area of residential uses. Tr. 117:7-12, Tr.Ex.Vol.V, Ex.50. The Property is entirely surrounded by residential uses.<sup>9</sup> TR. 260-261; Tr.

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<sup>9</sup> Schools, including colleges, are a permitted use in all "R" residence districts.

Sections 1003.111, 1003.112, 1003.113, 1003.115, 1003.117, 1003.119, 1003.120, 1003.120A, 1003.121, 1003.123, and 1003.125 SLCRO. Tr.Ex.Vol. I, Ex. 2.

107:14 to 108:4 & 117:7; Tr. Ex.Vol. III, Ex 12; and Tr. Ex.Vol.V, Ex.56 & 57.

Therefore, the Junior College District School adjacent to the Property is a residential use. There were at least 30 residential lots adjacent to the Property that had actually been developed for residential uses at the time of trial. *Id.*

Accordingly, at the level relevant to rezone 4.7 acres in the midst of this residential area, it was not a mixed-use area.

Reagan argues that there is no presumption in favor of residential zoning. That may be true in the broadest sense. But when the adjacent area is devoted to residential uses and the character of the area is residential, County must consider those facts in rezoning, and those facts show that residential zoning is reasonable. *Hoffman v. Town and County*, 831 S.W.2d 223, 232 (Mo. App. E.D. 1992) (holding that zoning bodies are required to consider the uses of surrounding property in deciding what zoning is reasonable for a particular parcel of property.)

*Amicus* argues that courts should favor the landowner when the evidence points to conflicting evidence regarding reasonable investment backed expectations. *Amicus* Brief, p. 13. That argument is foreclosed by the well-settled law holding that zoning ordinances are presumed to be valid, and the burden is on the opponent of the ordinance to show that the ordinance is invalid. *Desloge v. St. Louis County*, 431 S.W.2d 126, 132 (Mo. 1968).

Reagan's arguments regarding the "character of the government action" are inapposite. For the reasons stated in Point I of County's Substitute Brief, this Court should hold that this third *Penn Central* factor favors County.

**C. Claims Of A Regulatory Taking Brought Pursuant To Article I, Section 26 Of The Missouri Constitution Are Properly Adjudicated Using The Penn Central Analysis.**

Reagan argues that takings claims brought pursuant to Article I, Section 26 of the Missouri Constitution require a different analysis than takings claims brought under the Fifth Amendment to the United States Constitution because Article I, Section 26 requires just compensation for property that is "taken or damaged" for public use, while the Fifth Amendment only requires just compensation when property is "taken" for public use. Plaintiff cites *Van de Vere v. Kansas City, et al.*, 17 S.W. 695 (Mo. 1891)(holding that on facts of case that property was not damaged for public use, but enunciating rule that plaintiff who alleges that his property has been damaged for public use "must show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially affected."); *Kamo Electric Cooperative, Inc. v. Cushard*, 416 S.W.2d 646 (Mo.App. 1967) (holding that where utility condemned an easement for a transmission line that "looks" or "unsightliness" of transmission line was not too uncertain, speculative and conjectural to be considered as an element affecting

fair market value); and *Aronstein v. Missouri State Highway Commission*, 586 S.W. 2d 328 (Mo. 1979) ( holding on facts of case that property outside area to be condemned was not damaged for public use). None of these three cases were regulatory takings cases. Further, *Kamo Electric* and *Van de Vere* were both decided before *Penn Central*. *Aronstein* was decided shortly after *Penn Central*, but this Court found that no taking occurred because the property owner did not suffer an injury to property that was distinct from that suffered by the general public.

In the case at bar, Reagan alleges the Rezoning Ordinance is a regulatory taking that violates Article I, Section 26. Missouri cases adjudicating questions of regulatory taking brought under Article I, Section 26 of the Missouri Constitution since the *Penn Central* case have uniformly applied the *Penn Central* factors to determine if a taking has occurred. See, *Harris v. Missouri Department of Conservation*, 755 S.W.2d 726 (Mo.App.1988); *Schnuck Markets, Inc. v. City of Bridgeton*, 895 S.W.2d 163 (Mo. App. 1995); and *Clay County*, 988 S.W.2d 102. The application of the *Penn Central* factors to determine if a regulation causes a taking is now well-settled law. This Court should not abandon the *Penn Central* analysis in regulatory takings cases like the case at bar.

## **POINT II**

**REAGAN HAS FAILED TO REBUT THE COUNTY'S ARGUMENT THAT THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT IN THE AMOUNT OF \$65,300 BECAUSE THE TRIAL COURT CALCULATED DAMAGES USING FIGURES NOT SUPPORTED BY THE EVIDENCE AND BECAUSE THE COURT USED AN INCORRECT MEASURE OF DAMAGES.**

### **A. Standard of Review.**

The standard of review for this point is the same as for Point I, above.

### **B. Argument**

Assuming *arguendo* that a taking occurred, Reagan would be entitled to the fair market value lost in that property. *See Byrom*, 16 S.W.3d at 577. “Fair market value of land is what a reasonable buyer would give who was willing but did not have to purchase, and what a seller would take who was willing but did not have to sell.” *Id.* (citation omitted). Where only part of the tract of land is taken, the property owner is entitled to the difference in fair market value of the property immediately before and after the taking. *State ex rel. Missouri Highway And Transportation Commission v. Horine*, 776 S.W2d 6, 12 (Mo. banc, 1989).

Reagan's argument is incorrect to the extent that it argues for compensation above and beyond fair market value. Reagan's Sub. Brf. p.54.

Reagan concedes that the difference in fair market value is the correct measure of damages as applied in a formal eminent domain proceeding. Reagan's Sub. Brf., p. 55. But Reagan disputes this measure of damages in a regulatory taking case such as the case at bar, arguing that a regulatory taking case differs from a formal eminent domain proceeding in two allegedly relevant ways. First, Reagan argues that in a formal eminent domain proceeding, the condemning authority is required to pay the award at the time of the taking and second, that the payment is based on the market value at the time of payment. Reagan's Sub. Brf. p. 55.

Reagan's argument for a different measure of damages in a regulatory taking case is contrary to established case law in Missouri. This Court specifically establishes the measure of damages in inverse condemnation cases as being the difference in fair market value before and after the taking. *Byrom*, 16 S.W.2d at 577. See also *Collier v. City of Oak Grove*, 2006 WL 3068558 (Mo. App. W.D. 10/31/06) ("As the constitutional underpinnings support both the direct condemnation and inverse condemnation actions, the two actions share the same basis for just compensation."). Reagan's reliance on federal statutory law to

suggest a different valuation date is misplaced, because federal law is irrelevant to the measure of damages in this State law case.

Reagan appears to argue that she gets to pick the date of taking, and therefore the date that just compensation is calculated. Reagan's Sub. Brf. p.56. That is a novel argument for which Reagan has provided no legal justification. The measure of damages is too clearly established for Reagan to argue otherwise. Reagan's argument that the trial court correctly deducted real estate commissions from the sale price she received in September of 2002 is in direct contravention of the well-settled standard for fair market value. *Byrom*, 16 S.W.3d at 577. Fair market value as defined in *Byrom* is held to be just compensation.<sup>10</sup> *Id.* The definition of fair market value does not countenance adjustments for real estate commissions or other claimed expenses.

This Court should also reject Reagan's invitation to use Mr. McReynold's testimony that the property was worth \$167,000 on July 3, 2001 if zoned as residential. Reagan Sub. Brf., p. 59. The trial court expressly stated that it believed the testimony of Mr. Michael Andrew Green. L.F.267 (Nunc Pro Tunc Order). Implicitly, the trial court rejected the testimony of Mr. McReynolds in that

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<sup>10</sup> Provided interest is paid when required because of late payment of fair market value.

order. It would be unprecedented to rely on testimony rejected by the trial court.

LF. 267.

For the foregoing reasons, the trial court erred when it entered judgment in the amount of \$65,300 in favor of Reagan on her taking claim brought pursuant to Article I, Section 26 of the Missouri Constitution.

### **POINT III**

**REAGAN HAS FAILED TO REBUT THE COUNTY'S ARGUMENT THAT THE TRIAL COURT ERRED IN AWARDING REAGAN'S ATTORNEY FEES AND COSTS BECAUSE COUNTY RAISED IN THE TRIAL COURT ITS DEFENSE THAT NO STATUTORY AUTHORITY EXISTS TO SUPPORT THE TRIAL COURT'S AWARD OF ATTORNEY FEES AND COSTS AND BECAUSE NO UNUSUAL CIRCUMSTANCES EXIST THAT WARRANT AN AWARD OF ATTORNEY FEES AND COSTS.**

#### **A. Standard of Review.**

The standard of review for whether the trial court had legal authority to award the attorney fees and costs is *de novo*, but if such authority exists, the decision to award them is reviewed for an abuse of discretion. *In re Estate of Cannamore*, 44 S.W.3d 883, 885 (Mo. App. 2001).

#### **B. Appellant Did Not Waive Its Argument Against Attorney's Fees and Costs, and There Is No Statutory Authority Supporting the Award.**

Reagan argument for attorney fees begins with the assertion that County did not argue the lack of statutory support for an award of attorney fees and costs in the courts below; and therefore, that argument is waived. Reagan Sub. Brf., p. 62.

Reagan is mistaken in its unduly narrow interpretation of County's opposition to attorney fees and costs. County opposed the award of attorney fees and costs as unwarranted and erroneous from the inception of the case. L.F. 62-69 and 254-65; Supp. L.F. 552-556.

However, even if the Court views County's position in the trial court as limited to the unavailability of attorney fees under the American Rule, this Court can consider County's full defenses under Missouri Rule 84.13. Rule 84.13(a) provides, in relevant part, that this Court will not review allegations of error not presented to the trial court unless such allegations go to the "sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim."

In this case, County has included in its substitute brief the argument that litigants cannot recover attorney fees and costs from County under the clear holding of *Baumli v. Howard County*, 660 S.W.2d 702 (Mo. 1983). This Court held in *Baumli* that County is nothing more than a sub-unit of the State of Missouri, and because a litigant cannot recover attorney fees against the State, the litigant is similarly barred from recovering attorney fees and costs from the County. *Id.* at 705. Accordingly, under *Baumli*, the trial court could not grant relief on Reagan's claim for attorney fees against County. *Id.* Therefore, County's

*Baumli* argument is an argument that can be raised under Rule 84.13(a). Similarly, it is related to a legal defense, and therefore, it can be raised under Rule 84.13(a).

This Court can also review the County's *Baumli* argument under the "plain error" review of Rule 84.06(c). Although plain error is rarely invoked in a civil case, this Court does exercise its discretion to review errors where a manifest injustice or miscarriage of justice results from the error. Thus, this Court should consider all County's arguments demonstrating that the award of attorney fees is not lawful and appropriate under the circumstances.

### **No Statutory Authority For Award of Attorney Fees.**

Reagan first attempts to support the trial court's judgment for attorney fees by arguing that there is statutory authority for such an award under Section 89.491 R.S.Mo. because County allegedly violated Chapter 64. However, that argument must fail because County's zoning power does not arise under Chapter 64. Rather, County's zoning power arises directly from the Article VI, Section 18(c) of the Missouri Constitution and Chapter 64 R.S.Mo. is inapplicable to St. Louis County. See Casper v. Hetlage, 359 S.W.2d 781, 789-90 (Mo. 1962). Therefore, subsections 1 and 4 of Section 89.491 do not apply to County and Reagan cannot recover attorney fees from County thereunder.

### **C. The Trial Court Did Not Balance The Benefits And Otherwise Abused Its Discretion By Awarding Reagan's Attorney Fees.**

Reagan next argues that while Missouri courts generally follow the American Rule requiring litigants to bear their own attorney fees, the trial court was correct to award attorney fees in this case under an exception to that rule which provides that attorney fees may be awarded where very unusual circumstances exist such that equity demands balancing of the benefits.<sup>11</sup> Reagan's Sub. Brf. 67-70. This exception has never been applied in a case litigated under a common law theory. *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 130 S.W.3d 573, 593-595 (Mo.App. E.D. 2003). Such authority is reserved for cases decided under the trial court's equitable power. *Id.* Thus, because Reagan proceeded on legal theories, Reagan fails to state a claim for attorney fees upon which the trial court could grant relief against St. Louis County.

The trial court further erred in awarding Reagan's attorney fees because it did not find the existence of "very unusual circumstances." Reagan's Sub. Brf.

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<sup>11</sup> It is noteworthy that attorney fees were not awarded in either of the two cases Reagan cites in support of the award of attorney fees in "very unusual circumstances." *First Missionary Baptist Church v. Rollins*, 151 S.W.3d 846 (Mo. App. 2004) (Missouri Court of Appeals overturned trial court's award of attorney fees) and *In Re Estate of Cannamore*, 44 S.W.3d 883 (Mo. App. 2001) (both trial court and appellate court denied award of attorney fees.).

p.68. Rather, the trial court held in its Judgment, Order and Decree of January 24, 2005, that:

... plaintiffs cannot be made whole in this matter unless defendant bears reasonable and necessary attorney fees and costs of plaintiff. In essence Plaintiffs will not be in the same economic position they were in prior to the action of the defendant without an award of attorney fees and costs as Plaintiffs' counsel has informed the Court that Plaintiffs have paid the costs and attorney fees...

L.F.284-285. Clearly the same could be said about any litigant under the American Rule who paid his or her own attorney fees. Therefore, payment of attorney fees cannot be a "very unusual circumstance." Further, Reagan has not cited and County has not found any case establishing the trial court's "making whole" theory a recognized exception to the American Rule. This Court should therefore reverse the award of Reagan's attorney fees.

Additionally, attorney fees are not appropriate because this case did not present such unusual circumstances as to justify an award of attorney fees. For the reasons developed in Point I of County's Substitute Brief and Point I of this brief, there was no taking, and therefore, attorney fees are inappropriate in any event. However, even if the Rezoning Ordinance had effected a taking, this case remains a mere zoning dispute that culminated in a long-recognized inverse condemnation

action. *Schnuck Markest*, 895 S.W.2d at 163; *Harris*, 755 S.W.2d at 726 and *Clay County*, 988 S.W.2d at 102. Inverse condemnation actions are not unusual in Missouri courts; and it is the nature of the lawsuit, not the nature of the facts, which determine whether a case is unusual for the purpose of becoming an exception to the American Rule. *Chapman v. Levy*, 20 S.W.3d 610 (Mo App. E.D. 2000). Since Missouri courts have long recognized inverse condemnation actions, this case does not present the type of unusual circumstances that justify an award of Reagan's attorney fees and costs.

Similarly, Missouri courts have adopted the analysis from *Penn Central Transportation Company v. City of New York*, 483 U.S. 104 (1978) to determine whether a zoning ordinance causes a regulatory taking under Article I, Section 26 of the Missouri Constitution. *Clay County*, 988 S.W.2d 102, 107 (Mo. App. W.D. 1999). This case is just such a case. *Penn Central* was decided in 1978, and the *Penn Central* analysis has been followed, analyzed and reported since that date. *Penn Central*, 483 U.S. 104. Thus, inverse condemnation actions using the *Penn Central* tests do not present the type of unusual circumstances that support an exception to the American Rule. *Chapman*, 20 S.W.3d at 610.

Reagan also argues that she is entitled to attorney fees because the County engaged in intentional misconduct when it made representations that Ms. Reagan could build an office building on the property only to change the zoning so that the

office building was no longer allowed. Reagan's Sub. Brf. p. 69. Reagan cites *Temple Stephens Co v. Westhaver*, 776 S.W.2d 438, 443 (Mo. App. 1989) as authority for this argument. Initially, it is important to recognize that prior to the Rezoning Ordinance, an office building was a permitted use on the Property under the then current "M-1" Zoning. Tr.Ex.Vol.I, Ex.2., Section 1003.151 SLCRO. Accordingly, statements made by County officials to that effect were truthful and provided Reagan with the same information she is presumed to know from Section 1003.151 SLCRO. Further, there is no evidence in the record that any of these planning officials were privy to any information about potential future zoning changes. County planning officials could do nothing more than look at the then-applicable ordinances and tell Reagan what they thought the ordinances allowed. That is exactly what they did. No one can or should expect planning officials to know the future. Certainly, providing a truthful answer is not misconduct as alleged by Reagan.

More importantly, *Temple Stevens* was a declaratory judgment action in which attorney fees were ordered payable under Missouri Rule 87.09 dealing exclusively with declaratory judgment actions. The case at bar is not a declaratory judgment action, and therefore, Rule 87.09 is not applicable to this case.

Further, the *Temple Stevens* case is not factually analogous to this case. In *Temple Stevens*, the trial court found that the property owner seeking a zoning

change intentionally omitted the Temple Stephens Company from the list of all adjacent landowners which the property owners were required to file with their rezoning application. *Id.* at 440. The trial court found that one of the property owners failed to disclose Temple Stevens Company name on the list because he knew Temple Stephens was owner of 26% of the land adjoining the parcel to be rezoned; it was opposed to the rezoning; and it could file a written protest. *Id.* The list was used by the city to mail to affected property owners notice of the dates and times of all public hearings regarding the rezoning. *Id.* at 439.

The court in *Temple Stephens* held that the intentional omission of Temple Stevens Company's name from the list was a special circumstance supporting an award of attorney fees as costs within the meaning of Rule 87.09. In this case, the County did not intentionally mislead any governmental entity or even Reagan. When County planning officials opined that Reagan could build an office building on the property, that was a true statement. Furthermore, Reagan did not have a vested right in the "M-1" zoning, and there is no evidence that any zoning changes were then contemplated by or known to any of the County planning officials who spoke to Reagan or any elected officials who ultimately rezoned the Property.

Significantly, in *Temple Stevens*, attorney fees were only assessed against the property owner who intentionally and actively left the name off of the notice list. *Id.* at 443 & 444. No attorney fees were assessed against the other partners

who also owned the property but had no hand in this devious act. *Id.* Likewise, and most importantly, attorney fees were not assessed against the City of Columbia, even though it was found to have violated its own procedural notice provisions and even though its rezoning ordinance was found unconstitutional. *Id.* at 439.

The type of misconduct that cause the court to award attorney fees in *Temple Stephens* was extreme and bears no resemblance to the actions Reagan cites as justification for an award of attorney fees in this case. County's actions were legal, truthful and not of an ilk sufficient to justify an award of attorney fees under *Temple Stevens*.

#### **POINT IV**

**THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT THE REZONING OF REAGAN’S PROPERTY FROM THE “M-1” INDUSTRIAL DISTRICT TO THE “R-3” RESIDENCE DISTRICT DID NOT VIOLATE REAGAN’S SUBSTANTIVE DUE PROCESS RIGHTS UNDER EITHER THE UNITED STATES CONSTITUTION OR THE MISSOURI CONSTITUTION BECAUSE REAGAN HAS CHANGED THE BASIS OF THIS CLAIM AFTER TRANSFER THEREBY WAIVING IT, REAGAN DID NOT HAVE A PROPERTY INTEREST IN THE “M-1” ZONING FOR THE PROPERTY AND REZONING THE PROPERTY TO THE “R-3” ZONING DISTRICT WAS NOT TRULY IRRATIONAL.**

#### **A. Standard of Review.**

In a court-tried case, the decision of the trial court should not be reversed “unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

#### **B. Reagan Has Changed The Basis Of Her Substantive Due Process Argument.**

Reagan argues for the first time in this brief that she had a property interest in the “M-1” Zoning that existed at the time she purchased the Property and that the County’s action in rezoning it was truly irrational because the Rezoning Ordinance did not fully comply with Section 1003.300 2. of the St. Louis County Revised Ordinances (“SLCRO”). In the Missouri Court of Appeals, Reagan argued that the Rezoning Ordinance constituted a substantive due process violation because it was unreasonable, arbitrary and violative of Reagan’s due process rights. See Respondents’/Cross Appellants’ Brief in Missouri Court of Appeals, p. 56; Respondents’/Cross Appellants’ Reply Brief in Missouri Court of Appeals, p.3 (Reagan even urged the court in the cross-appellant’s reply brief to disregard the “truly irrational” standard enunciated in *Chesterfield Development Corporation v. City of Chesterfield*, 963 F.2d 1102 (8<sup>th</sup> Cir. 1992) cited by County and establish the court’s own standard to decide Reagan’s substantive due process claim.). Similarly, there was no argument that a failure to follow Section 1003.300 2. SLCRO caused or constituted a violation of substantive due process. See Respondents’/Cross Appellants’ Brief in Missouri Court of Appeals, Point IV, p. 45. There was simply no mention of a failure to follow Section 1003.300 2. in Reagan’s briefs in the Court of Appeals.

Missouri Rule 83.08 provides that a substitute brief in this Court may not change the basis of a claim. Reagan has changed the basis of her substantive due

process claim to a theory and argument not raised in the Court of Appeal.

Therefore, this Court should hold that Reagan waived the substantive due process argument contained in Point IV of Respondents'/Cross-Appellants' Substitute Brief. Rule 83.08.

**C. The Rezoning Ordinance Did Not Violate Reagan's Right To Substantive Due Process Because It Was A Legislative Act, Reagan Did Not Have Property Right In The Existing Zoning, The Rezoning Ordinance Is Rationally Related To A Legitimate Government Interest And The Rezoning Ordinance Was Not Truly Irrational.**

Reagan argues that the Rezoning Ordinance violated her right to substantive due process.<sup>12</sup> Respondents/Cross Appellants Brief, Point IV. Missouri courts have been reluctant to hold that local planning and zoning decisions violate substantive due process. That is demonstrated by the fact that no Missouri case holds that the zoning of a parcel of property violated the landowner's substantive

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<sup>12</sup> Reagan also pled a violation of substantive due process rights arising under the Missouri Constitution, but she does not brief that point and therefore it is abandoned in this brief. Rule 83.08(b). Additionally, a claimed violation of rights conferred by the Missouri Constitution is not actionable under 42 U.S.C. §1983.

*Bagley v. Rogerson*, 5 F.3d 325,328 (8th Cir. 1983).

due process rights arising under the Fourteenth Amendment to the United States Constitution.

Federal courts recognize the same reluctance to find a substantive due process violation in zoning matters, and they are also directly admonished not to act as a zoning board of appeals. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 12 (1974). The Eighth Circuit Court of Appeals follows that admonishment by taking a very restrictive view as to when zoning decisions violate the substantive due process rights of persons affected by such decisions. *Chesterfield Development Corporation*, 963 F.2d at 1104; *Martin v. City of Brentwood*, 200 F.3d 1205, 1206 (8<sup>th</sup> Cir. 2000), citing *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070-71 (8<sup>th</sup> Cir. 1997). Substantive due process is reserved for truly egregious and extraordinary cases. *Chesterfield Development Corporation*, 963 F.2d at 1105.

### **Facial Challenge To Rezoning Ordinance.**

Reagan specifically pled that the Rezoning Ordinance “is **unlawful on its face** in that it is arbitrary and capricious and not reasonably related to protecting the public health, safety or welfare...” L.F. p. 39. Clearly, this is a facial challenge to the ordinance. In adjudicating a facial challenge to a zoning ordinance, courts give broad latitude to the legislative bodies to make legislative determinations because it is not the province of a court to monitor the basis for each legislative decision. *WMX Technologies, Inc. v. Gasconade County*,

*Missouri*, 105 F.3d 1195, 1201 (8thCir. 1997). Courts only ask “whether a conceivable rational relationship exists between the ordinance and legitimate governmental ends.” *Id.* Conversely, Reagan must prove that there is no conceivable set of facts under which the Rezoning Ordinance is rationally related to a legitimate governmental purpose. *Id.* Either way, Reagan’s argument is untenable.

In the case at bar, the Property was purchased by a developer who actually built homes on the Property prior to trial. Tr. 7-10. It is beyond dispute that the County Council could have rationally believed that residential use of the Property was compatible with the existing residential uses then in place on adjacent land and land in close proximity to the Property. That rational relationship is underscored by the market forces that led to the residential development in the area and of the Property itself. Tr. 7-10. Further, the subsequent owners to whom Reagan sold the Property entered into this case as intervenors to prevent any change in zoning from the then-current “R-3” zoning and only left the case when Reagan and County stipulated that neither was seeking to rezone the Property and after counsel for Reagan actually dismissed the counts of the lawsuit seeking to rezone the property. LF. 58 and Trial 7-10. Thus, at that point in the case, all parties had agreed that the present “R-3” zoning of the Property would remain unchanged and

therefore, implicitly stipulated that “R-3” zoning was a reasonable zoning for the Property. *Id.*

The rational relationship of the Rezoning Ordinance to a legitimate governmental purpose is further supported by the dimensions of the Property and the permitted uses in an “M-1” Industrial District. The Property was a long, narrow, 4.7 acre parcel of real estate that is entirely surrounded by residential uses.<sup>13</sup> TR. 260-261; Tr. 107:14 to 108:4 & 117:7; Tr. Ex. Vol.. III, Ex 12; and Tr. Ex.Vol.V, Ex.56 & 57. There were at least 30 residential lots adjacent to the Property that had actually been developed for residential uses at the time of trial. *Id.* Accordingly there were a large number of property owners who would be impacted by the ultimate use of the Property. That fact coupled with the potential for incompatible uses then permitted in an “M-1” district clearly provide a rational relationship between the Rezoning Ordinance and the legitimate governmental interest in locating compatible land uses in such close proximity to so many homes.<sup>14</sup> This Court should therefore find that the Rezoning Ordinance bears a

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<sup>13</sup> Schools including colleges are a permitted use in all “R” residence districts. Sections 1003.111, 1003.112, 1003.113, 1003.115, 1003.117, 1003.119, 1003.120, 1003.120A, 1003.121, 1003.123, and 1003.125 SLCRO. Tr.Ex.Vol. I, Ex. 2.

<sup>14</sup> Permitted uses that could be incompatible with nearby residential uses include business, professional, and technical training schools; laundries and dry

rational relationship to a legitimate governmental interest, and therefore, it does not, on its face, violate Reagan's substantive due process rights.

**“As Applied” Challenge To Rezoning Ordinance.**

Reagan now argues THAT under an “as applied” theory, the County violated her rights to substantive due process, relying upon this Court’s decision in *Furlong*, 189 S.W.3d at 170. Reagan argues that *Furlong* is controlling in this case because of its similarity to the facts of the case at bar. Reagan’s Sub. Brf. p.72 and 87.

Reagan, however, ignores fundamental differences between the facts in *Furlong* and the facts in the case at bar that make the *Furlong* decision inapposite to this case. In *Furlong*, the property owner sought and was denied preliminary

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cleaning plants; manufacturing, fabrication, assembly, processing or packaging of any commodity from semi-finished materials, except explosives or flammable gases or liquids; printing and duplicating services; research laboratories and facilities; sales and renting of equipment and vehicles used by business, industry, and agriculture, excluding retail automobile sales; terminals for trucks and buses; wholesaling or warehousing of manufactured commodities; and yards for storage of contractors’ equipment, materials, and supplies.

Section 1003.151 SLCRO, Tr.Ex.Vol.I, Ex.1.

plat approval. *Furlong*, 189 S.W.3d 161. This Court began its analysis in *Furlong* with the recognition that zoning “...is the exercise of legislative authority as to what land uses are in the interest of the public...”, and governmental entities “have great latitude in this regard.” *Furlong*, 189 S.W.3d at 163. In contrast, the “plat approval” sought by the plaintiff in *Furlong* was, under the Kansas City ordinances controlling preliminary plat approval, a ministerial act of applying zoning and planning laws to all properties in the zoning district. *Id.* Governmental entities receive far less latitude in this regard in that all landowners in the district are entitled to the equal application of the zoning and planning laws. *Id.* The only “exercise of discretion and judgment vested in the Kansas City Council or its planning commission, then acting as an administrative body, was to determine whether the preliminary plat met the requirements of the applicable zoning or subdivision ordinances.” *Id.* at 164. Once it was determined that the preliminary plat met those requirements, it became a ministerial act to approve it, and the administrative body had no discretion to deny it. *Furlong*, 189 S.W.3d at 164. However, the burden to show compliance with the subdivision and zoning requirements was on the landowner. *Id.* at 167. The plaintiff in *Furlong* met that burden, and therefore, mandamus was the appropriate remedy to compel preliminary site plan approval. *Id.* at 169.

The plaintiff in *Furlong* then argued that the denial of its preliminary plat in contravention of the ministerial duty to approve it violated Furlong Company's right to substantive due process. *Id.* at 169. Success on that claim required a showing that the plaintiff had a protected property interest to which the Fourteenth Amendment's due process protection applies and secondly, that the city's action was "truly irrational." *Id.* at 170. The city did not dispute the existence of a protected property interest, so the inquiry shifted to the question of whether the city's actions were truly irrational. *Id.* at 170.

Under the facts in *Furlong*, this Court found that the evidence could support the trial court's finding that the city's actions were truly irrational. *Id.* at 171. In reaching that decision, this Court focused on the fact that plat approval was a ministerial act under then existing law and that the city through its council and various staff members intentionally delayed and denied plat approval in the face of advice from counsel, staff and even one council member that there was no legal basis to deny plat approval. *Id.* at 171. This Court then held that "[w]hen government acts with intentional disregard of its own valid law, knowing that its actions deprive individuals of their property rights, such action is "truly irrational." *Id.* at 171. Clearly, the advice of the city council's attorney and staff coupled with the arguments of a member of the council all combined to demonstrate the

“intentional disregard of its own valid law” and the knowledge that a denial of preliminary plat approval would deny Furlong Companies of a property right. *Id.* *Furlong Is Inapposite To The Facts Of This Case.*

Reagan, relying on *Furlong*, now argues for the first time that that the Rezoning Ordinance is truly irrational because it does not comply with Section 1003.300 SLCRO.<sup>15</sup> However, because the facts and law applicable in the case at bar differ significantly from the facts and law in *Furlong*, and because of those differences, *Furlong* does not control.

Those differences are that zoning is a legislative act and not a ministerial act; Reagan did not have a protected property interest in the “M-1” zoning originally applicable to the Property; the County Council was not advised that there was no legal basis upon which it could pass the Rezoning Ordinance; there is no evidence that the members of the County Council knew that the Rezoning Ordinance violated any laws or constitutional provisions; and there is no evidence in the record to suggest that the County Council intentionally disregarded any law including Section 1003.300 2. SLCRO.

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<sup>15</sup> Reagan mentions an equal protection claim for the first time at page 87 of Reagan’s Substitute Brief. Reagan did not plead, argue or brief that claim in the trial court or the Court of Appeals; and therefore, it cannot be raised for the first time on transfer to this Court. Rule 83.08 (b).

### **Zoning Is Legislative Act And Not A Ministerial Act**

Zoning is a legislative act and not a ministerial act. *Furlong*, 189 S.W.3d at 163. Courts give legislative bodies wide latitude when they act in their legislative capacity. *Id.*

### **Property Interest In “M-1” District Zoning**

The analysis of substantive due process claims must begin with an examination of the constitutional interest allegedly violated. *Carolan*, 813 F.2d at 181. In this case, Reagan alleges that the Rezoning Ordinance violated her rights to substantive due process because it interfered with her “property interest” in developing the Property for an office building which was a permitted use in the former “M-1” Industrial District zoning of the Property.

The burden is on Reagan to show the existence of a “property interest” in the right to build the office building said she intended. *Id.* Property interests are created and their dimensions defined by existing rules or understandings that arise from a source other than the Fourteenth Amendment itself. *Id.* Property interests can arise from state laws or rules. *Id.* The ordinances of St. Louis County have a like affect on matters of local concern. *Casper*, 359 S.W.2d at 789.

Reagan did not have a protected property interest in “M-1” zoning of the Property. Tr.Ex.Vol.I, Ex.2. Sections 1003.115 and 1003.300 SLCRO SLCRO specifically establishes the “R-3” Residence District applied to the Property in the

Rezoning Ordinance and Section 1003.300 2. SLCRO establishes the very procedure utilized by the County Council to enact the Rezoning Ordinance.

Tr.Ex.Vol.I,Ex.2. A property owner's intentions to develop his or her property in a specific manner cannot repeal either of those ordinances or deprive a member of the County Council of the lawful authority to vote on an ordinance entrusted to his or her discretion. This Court has specifically recognized the great latitude extended to local legislators in this regard. *Furlong*, 189 S.W.3d at 163.

Reagan also argues that she only need demonstrate that a rezoning decision will have a substantial impact on her rights or interests to establish a property right in the outcome of a rezoning matter relying upon language in *Lenette Realty & Investment Company v. City of Chesterfield*, 35 S.W.3d 399, 405 (Mo. App. 2000). Reagan's Sub. Brf., p.73. But that language in *Lenette* was part of a discussion about standing, not property interests. *Id.* at 405. The Court decided that Lenette Realty had standing, but it did not decide it had a property interest in the zoning. *Id.* at 405.

Reagan principally relies upon the cases of *Tandy Corporation v. City of Livonia*, 81 F.Supp.2d 800 (E.D.Mich. 1999) and *Nasierowski Brothers Investment Company v. City of Sterling Heights*, 949 F.2d 890 (6<sup>th</sup> Cir. 1991) to support the existence of a property interest in the former "M-1" zoning of the property. But that reliance is misplaced. In the more than 15 years since the 6<sup>th</sup> Circuit decided

the *Nasierowski* case, it has never been cited or followed by any state or federal court in the Eighth Circuit. Similarly, *Tandy* has never been cited or followed by any court in the Eighth Circuit.<sup>16</sup> But more importantly, the finding of a property interest in prior zoning in both *Tandy* and *Nasierowski* is based on the construction of state and local law. *Nasierowski*, 949 F.2d at 897 and *Tandy*, 81 F.2d at 808. The 6<sup>th</sup> Circuit found that under Michigan’s extremely low threshold for establishing a property interest, a property owner acquired a vested property interest in a land use regulation when he or she had done “anything of a substantial character towards the construction the building.” *Id.* The 6<sup>th</sup> Circuit then found that mere acquisition of the land was a substantial act. *Id.* This Court should look instead to Missouri law to determine whether Reagan had a property interest in constructing the office building she hoped to build.

The relevant inquiry in this case is when does a property interest in zoning, or more accurately in the right to construct Reagan’s office building, arise under Missouri law. That, in turn, is really a question of whether Reagan had taken sufficient steps toward the construction of the office building prior to the

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<sup>16</sup> *Tandy* has only been cited one time, and that was in an unreported case that did not cite *Tandy* for the proposition that a landowner had a property interest in a prior zoning. *Jim Sowell Construction Co., inc. v. City of Coppel, Texas*, (N.D.Tex. 2005). Not reported in F.Supp.

enactment of the Rezoning Ordinance to constitute a lawful, pre-existing, nonconforming use (“nonconforming use”) of an office building on the Property as provided for in Section 1003.170 SLCRO after the Rezoning Ordinance was enacted. Tr.Ex.Vol.I,Ex.2 *Great Lakes Pipe Line Company*, 393 S.W.2d at 484 (holding that property owner took substantial steps to build a pumping station starting construction )<sup>i</sup>; *Storage Masters*, 27 S.W.3d at 865 (holding a nonconforming use is a vested property right and mere preliminary work which is not of a substantial nature does not constitute a nonconforming use.); and *Outcom Inc., v. City of Lake St. Louis*, 996 S.W.2d 571, 575 (Mo. App. 1999)(no vested property right found even though Outcom had acquired land by purchase or lease; had engaged an engineering firm to makes site surveys; had received state permits and applied for City permits for the sights; had ordered one sign to be built although construction had not yet begun; and all signs could have been completed within 60 days.). The facts in this case demonstrate that Reagan did not establish a nonconforming use on the Property.

The test for establishing a nonconforming use is strict and Reagan bore the burden to prove its existence. *Storage Masters*, 27 F.3d. at 865. The determinative factor in finding a nonconforming use is the actual use rather than an intended use. *Id.* at 866. A planned or intended use does not give rise to a vested right in a nonconforming use. *Id.* So clearly, Reagan’s intentions for the property

do not, in and of themselves, create a property right to build an office building on the Property. *Id.*

In order to establish a nonconforming use, this Court must focus on the actual use of the Property on the effective date of the Rezoning Ordinance. *Storage Masters*, 27 S.W.3d at 866. Reagan must have at least made a substantial step toward construction of the office building, and mere preliminary work that is not of a substantial nature does not constitute a nonconforming use. *Id.* Reagan argues that property maintenance, asbestos removal, demolition of two dilapidated houses, submission of a site plan, payment of real estate taxes, and mortgage payments all constitute substantial steps toward building her office building. However, most of these steps were required either as an incident of ownership or were steps necessary for any development of the property and not steps particularized toward the construction of an office building.<sup>17</sup> There is no evidence in the record of steps taken that are specifically and particularly unique to

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<sup>17</sup> Reagan did not submit her site development plan until May, 14, 2001, which was almost one month after the County enacted on April 17, 2001, the Resolution of Intention to rezone the Property to an “R” Residence District. Tr.Ex.Vol.III, Ex. 13 and Vol.V, Ex.18. There is no evidence in the record to demonstrate what, if any, portion of the fees paid for that site development plan was for work occurring before Reagan had notice of a potential change in zoning.

the construction of an office building. In fact, there is no evidence any construction plans were ever drawn for an office building much less submitted to County. It is hard to conceive of substantial steps toward the construction of an office building occurring until plans for the building are drawn.

Additionally, in order to have a property interest in a building permit, Reagan must have applied for a building permit, demonstrate that she had satisfied all the requirements for the building permit, and demonstrate that issuance of a building permit in St. Louis County was a ministerial act and not a discretionary act. *Carolan*, 813 F.2d at 181. There is absolutely no evidence in the record of the requirements to obtain a building permit or facts to show that Reagan satisfied those requirements. Further, there is no evidence in the record that Reagan ever applied for a building permit or actually received a building permit.<sup>18</sup> Rather the

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<sup>18</sup> Reagan argues that the “PAC” Form that she submitted is a step in the process of obtaining a building permit. Yet, there is no evidence that the PAC form is an application for a building permit, and the PAC form itself specifically informs Reagan that she must still submit a building permit application and four sets of plans. Tr.Ex.Vol.V, Ex.21 (“Public Works: 6/7/01 Copy of PAC app. forwarded. B.P. App. & four sets of plans to be submitted by applicant.” / stated in “St. Louis County Departments/Outside Agency Approvals Required” category of Reagan’s PAC form.) Further, there is absolutely no evidence that Reagan ever submitted an

only evidence is that a building permit is required to build an office building on the Property, and Reagan was told what steps she needed to take to obtain a building permit. Tr.87/9-11; Tr.Ex.Vol.V, Ex. 21. Since Reagan did not have a building permit required to construct the office building on the premises, she could not lawfully take any substantial steps toward construction of the office building. TR.87/9-11. Therefore, Reagan never acquired a property interest in constructing an office building on the Property or the former “M-1” zoning of the Property.

Additionally, the Rezoning Ordinance did not destroy any property interest Reagan had in constructing an office building on the Property. *Littlefield v. City of Afton*, 785 F.2d 596, 602 (8<sup>th</sup> Cir. 1986) (holding that a landowner does not have to comply with an illegal requirement to get building permits). Rather, it was Reagan’s failure to apply for and demonstrate satisfaction of the requirements for a building permit and take substantial steps toward the construction of the office building that prevented Reagan from acquiring a property interest in the construction of an office building.

Additionally, there is no evidence that Reagan ever took any other steps toward getting approval for her office building after the Rezoning Ordinance was application for a building permit, the requirements to obtain a building permit or facts to show that Reagan satisfied the requirements for the issuance of a building permit.

enacted. Accordingly, even if Reagan established a nonconforming use, she abandoned it within six months of the date of the Rezoning Ordinance and certainly before she sold the Property in September of 2001.<sup>19</sup> Tr. Ex., Vol. VI, Ex.61 and Vol. I, Ex.2, Section 1003.170 4. SLCRO. Thus, Reagan is not entitled to damages based on a property right that never existed, and if it did exist, Reagan abandoned it.

### **Rezoning Ordinance Not Truly Irrational**

Even if Reagan could show the existence of a property interest in constructing the contemplated office building, she still could not demonstrate a violation of her rights to substantive due process. Reagan must also prove that the Rezoning Ordinance was “truly irrational” because only government actions that are “truly irrational” violate substantive due process. *Chesterfield Development Corporation*, 963 F.2d at 1104 & 1105; *Bituminous Materials*, 126 F.3d at 1070; *Iowa Coal Mining Co., Inc. v. Monroe County, Iowa*, 257 F.3d 846, 853 (8<sup>th</sup> Cir. 2001); *Anderson v. Douglas County*, 4 F.3d 574, 577 (8<sup>th</sup> Cir. 1993); *WMX Technologies*, 105 F.3d at 1200; and *Koscielski v. City of Minneapolis*, 435 F.3d 898, 902 (8<sup>th</sup> Cir. 2006). Government actions only violate substantive due process

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<sup>19</sup> Reagan has never asserted that her office building was a pre-existing lawful nonconforming.

rights where they are so egregious or extraordinary as to shock the conscience.

*Koscielski*, 435 F.3d at 902.

In the zoning context a “truly irrational” government action is one that is analogous to a government attempting to apply a zoning ordinance only to persons whose names begin with a letter in the first half of the alphabet. *Chesterfield Development Corporation*, 963 F.2d at 1104. Government actions that are allegedly arbitrary and capricious or in violation of state law do not arise to a violation of substantive due process. *Id.* Accordingly, Reagan’s arguments in the trial court and the Court of Appeals that the Rezoning Ordinance was arbitrary, capricious and/or unreasonable, even if true, fail to state a claim that the County thereby violated Reagan’s rights to substantive due process. *Id.* Reagan did not meet her burden to demonstrate that the Rezoning Ordinance was “truly irrational” by demonstrating that it was akin to a “zoning ordinance that applies only persons whose names begin with letters in the first half of the alphabet.” *Id.*

In this case, Reagan’s property was zoned “M-1” Industrial beginning in 1965. Tr.Ex.Vol. III, Ex. 8, p.2 and Tr. 242. In fact, much of the surrounding land and all of the adjacent land was also zoned “M-1” Industrial District in the 1965 Zoning Ordinance. *Id.* at pp. 1 and 2. That zoning reflected the County’s prediction in 1965 that the area would be developed for industrial uses. Tr. 333-335 and Tr.Ex.Vol. VII, Ex. A. However, the County’s predictions about future

land use turned out to be mistaken. Over the years after the “M-1” zoning was enacted all of the adjacent properties and most of the surrounding properties previously zoned “M-1” Industrial District were rezoned for residential use. Tr.Ex.Vol.III, Ex. 8. Reagan’s property was the lone exception, and it remained zoned “M-1” Industrial District even though it was actually used for residential purposes. *Id.* & Tr. 57 & 339. By the time Reagan bought the property, it was the lone parcel of “M-1” imbedded in a larger area of residential districts actually developed for residential purposes. Tr.Ex.Vol.V, Ex. 50. So the history of the immediate area was that the County zoned the area for industrial uses, but market forces dictated that the area was more suitable for residential uses. Investors and landowners obtained zoning to change the permitted uses of their properties from industrial uses to residential uses. *Id.*, Tr.Ex.Vol.III, Ex.7, 8 & 12. By the time Reagan bought the property the predominant use of the surrounding properties was for residential uses. Tr. 107:14 to 108:4; 117:7-12; and Tr.Ex.Vol.III, Ex.12.

Counties are required to consider the uses of surrounding property in deciding what zoning is reasonable for a particular parcel of property. *Hoffman*, 831 S.W.2d at 232 (“Factors relevant to the determination of a public benefit include the character of the neighborhood, the zoning and uses of nearby property and the effect that a change in zoning would have on other property in the area.”). With this enjoiner in mind and with a view of the actual development of the

property surrounding the property, it cannot be said that enacting an “R-3” Residence District for the property was truly irrational. Since the property was actually imbedded in a larger area of residential property and the surrounding uses were predominantly residential, residential zoning for the property was both reasonable and appropriate.

Similarly, the record in this case demonstrates that Reagan actually sold the Property for residential uses after the rezoning and realized a profit on that sale. Tr. 258-260; Tr.Ex.Vol.V, Ex. 56; Tr.Ex.Vol.VI, Ex.61; and Tr. 7-9. Further, the record demonstrates that the Property was actually developed for residential purposes shortly after Reagan sold it. Tr. 7-9. Clearly, market forces underscored the reasonableness of zoning the Property for residential uses.

Therefore, rezoning the Property from “M-1” Industrial to “R-3” Residential is not a truly irrational act akin to limiting zoning approval to persons whose name begins with a particular letter. *Chesterfield Development Corporation*, 949 F.2d 1104. Accordingly, the trial court was correct when it found that County did not violate Reagan’s substantive due process rights when it rezoned the Property to “R-3” Residence District.

Reagan now relies on *Furlong* to support the argument that the Rezoning Ordinance was truly irrational, but Reagan ignores crucial differences between the facts of the two cases.

**County Council Did Not Intentionally Disregard It Own Ordinances.**

Reagan argues that County intentionally violated its own valid law. Reagan's Sub. Brf. p.79. So as a beginning point, it is important to realize that in the zoning context, a mere failure to comply with state law or local ordinances does not violate Reagan's rights to substantive due process. *Chesterfield Development Corporation*, 963 F.2d at 1104. That would be true even if the County clearly violated or distorted the valid state statute or County Ordinance. *Id.*

[T]he conventional planning dispute - at least when not tainted with fundamental procedural irregularity, racial animus, or the like - which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the constitution. This would be true even were planning officials to clearly violate, 'much less distort' the state scheme under which they operate. ...Every appeal by a disappointed developer from an adverse ruling by a local... planning board necessarily involves some claim that the board exceeded, abused or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a

substantial federal question under Section 1983. As has been often stated, “[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution.

(internal citations omitted) *Chesterfield Development Corporation*, 963 F.2d at 1104. Accordingly, even if the Rezoning Ordinance did not fully comply with Section 1003.300 2. SLCRO in some regard, the rezoning took place within the recognized framework of the St. Louis County Zoning Code, Sections 1003.115 and 1003.300 2. SLCRO. Tr.Ex.Vol.I, Exhibit 2. There was no evidence of fundamental procedural irregularity, racial animus, or like matters in this case; and therefore, any such deviation from Section 1003.300 2. does not implicate the United States Constitution including rights to substantive due process of law. *Chesterfield Development Corporation*, 963 F.2d at 1104; *Lemke v. Cass County, Nebraska*, 846 F.2d 469, 472 (8<sup>th</sup> Cir. 1987); *WMX Technologies*, 105 F.3d at 1198-1201; *Bituminous Materials*, 126 F.3d 1068 (holding that “[e]ven allegations of bad faith enforcement of an invalid zoning ordinance do not, without more, state a substantive due process claim.”); and *Anderson*, 4 F.3d at 577. Accordingly, any failure to comply with the technical requirements of Section 1003.300 2. SLCRO does not by itself constitute a violation of Reagan’s substantive due process rights.

Reagan argues that the County Council intentionally violated valid County ordinances as required under *Furlong* to establish a violation of substantive due

process rights by failing to follow exactly the strictures of Section 1003.300 2. authorizing the County Council to change provisions of the Zoning Code when “the public necessity, convenience, general welfare, and good zoning practice require.” Reagan’s Sub. Brf. p. 86 and Tr. Ex., Vol. I, Ex.2, Section 1003.300 2. Reagan argues that this contention is borne out by the lack of any evidence in the record regarding what factors the County Council considered with regard to the “public necessity, convenience, general welfare, and good zoning practice.” Reagan’s Sub. Brf. p.81. However, a lack of evidence of what the County Council considered is not affirmative proof that the County Council did not consider relevant matters. There is just an absence of proof one way or the other. Since Reagan had the burden to show that the Council’s actions are truly irrational, it is Reagan’s burden to establish what the County Council considered and that it was truly irrational, considering those facts, to rezone the Property.

But significantly, there is absolutely no testimony regarding the requirements of Section 1003.300 2. or its application to the Rezoning Ordinance. There is absolutely no evidence in the record that any Council member recognized any defect in the Rezoning Ordinance much less some failure to follow the strictures of Section 1003.300 2. Further, in contrast with *Furlong*, there is absolutely no evidence that any attorney, much less the County’s attorney, told any council member that there was no legal basis upon which it could enact the

Rezoning Ordinance. Similarly, there is no evidence of discussions between Council members or between Council members and staff concerning a lack of a legal basis upon which to enact Rezoning Ordinance.<sup>20</sup> Thus the crucial facts that allowed this Court to find in *Furlong* that the city council passed the rezoning ordinance intentionally disregarding valid law are totally absent in the case at bar. Therefore, there is no basis to find that the County intentionally disregarded any valid law in enacting the Rezoning Ordinance.

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<sup>20</sup> Reagan argues that Glenn Powers, County's director of planning told Councilman Campisi that Reagan had a right to build an office building under existing zoning. Tr. 64:1-8 That statement was true when made, but it does not relate to the legality of the Rezoning Ordinance. Likewise, Powers' comments to Councilman Campisi regarding a need to be cautious due to the whole takings issue did not address the legality of the Rezoning Ordinance. Tr. 74:12-23; 117:18-25; and 118:1-5. Further, that advice was extremely conservative since even the Missouri Court of Appeals did not find a taking on the facts of this case. Additionally, Powers' statement does not even address substantive due process or the legal basis to enact the Rezoning Ordinance.

**The County Council Did Not Have Knowledge The Rezoning Ordinance  
Would Violate Any of Reagan's Rights.**

There is absolutely no evidence in the record that the County Council knew or thought that the Rezoning Ordinance would violate Reagan's property rights. That is not surprising since under the Missouri and federal law discussed above, Reagan did not have a property right in the prior "M-1" zoning of the Property. Additionally, the Missouri Court of Appeals did not find the Rezoning Ordinance violated any of Reagan's property rights. It would be extraordinary to expect local elected officials to spot violations of property rights that the learned judges of the Missouri Court of Appeals did not see after full briefing and argument by counsel.

Reagan argues that the citizens' comments directed to County officials were factually incorrect about what Reagan intended to build. Reagan's Sub.Brf. p. 80. However, it is completely rational for Council members to listen to the concerns of citizens. Further, citizen complaints focused on uses that were permitted uses in an "M-1" Industrial District. 1003.151 SLCRO. It is impossible to know if any of those uses would ever have come to pass. Therefore, it was not irrational for Council members to consider preventing such uses. But more importantly, there is no law requiring the County Council to confirm from other sources the information

or testimony they receive.<sup>21</sup> Any failure to confirm the legislative facts found from the testimony and documents before the County Council is at most negligence, and negligent acts do not constitute a due process violation. *Daniels v. Williams*, 474 U.S. 327, 332-333 (1986).

Reagan also argues that because County did not perform certain studies it violated Reagan's due process rights.<sup>22</sup> However, it is clear that the Fourteenth Amendment does not require the County to perform any particular studies prior to rezoning property. *WMX Technologies*, 105.F.3d at 1201. Similarly, Reagan argues that a motive to block Reagan's office building somehow leads to a violation of Reagan's rights to substantive due process. Yet, there is no evidence

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<sup>21</sup> Reagan insists that the Property was in a mixed-use area. Glenn Powers testified that was not correct in this case. Tr. 33:6 to 34:4. However, once the area viewed becomes large enough, any such area will ultimately contain mixed uses. But that is not what is meant by a mixed use. *Id.*

<sup>22</sup> Reagan is incorrect where she alleges that the County is required to follow the mandates of the Comprehensive Plan citing to Section 64.090 and Section 2.180 of the County Charter. Reagan's Sub. Brf. p. 82, FN 10 and p. 83. Chapter 64.090 is not applicable to the County and Section 2.180 does not require planning officials or the County Council to follow comprehensive planning documents. See argument in Point III, p. 50 of this brief.

of what motivated the County Council members to vote for the Rezoning Ordinance. And 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. *Id.* at 105 F.3d 1200-1201. That is because legislative bodies are given broad latitude in legislative activities, and courts do not monitor the basis for legislative decisions. *Id.* Likewise, even if the true purpose motivating the passage of an ordinance could be known, it is irrelevant to the question of whether the ordinance bears a conceivable rational relationship to a legitimate governmental interest. *Id.* So personal *animus* is also generally too insubstantial to support a substantive due process claim. *Bituminous Materials, Inc.*, 126 F.3d at 1076.

**Reagan's Rights To Substantive Due Process Were Not Violated, And Therefore, She Is Not Entitled To Compensatory Damages Or Attorney Fees.**

There was no violation of Reagan's rights to substantive due process of law and therefore, she is not a prevailing party entitled to damages pursuant to 42 U.S.C. § 1983 or attorney fees pursuant to 42 U.S.C. §1988.

## POINT V

**THE TRIAL COURT DID NOT ERR IN REFUSING TO AWARD REAGAN ADDITIONAL DAMAGES IN THE SUM OF \$83,332.01, AS SET FORTH IN REAGAN'S TRIAL EXHIBITS NUMBERED 61-73 AND 84, BECAUSE THERE WAS NO TAKING TO SUPPORT THE AWARD OF DAMAGES AND THE ADDITIONAL DAMAGES CLAIMED BY REAGAN ARE SUBSUMED IN THE CORRECT MEASURE OF DAMAGES WHICH IS THE DIFFERENCE BETWEEN THE FAIR MARKET VALUE OF THE PROPERTY IMMEDIATELY BEFORE AND AFTER A TAKING.**

### **A. Standard of Review.**

The proper measure of damages is a question of law that this Court reviews *de novo*. *66 Inc.*, 130 S.W.3d at 584. However, where the trial court uses the correct measure of damages, this Court gives the trial court's findings great weight and will only reverse those findings if "it is shown that the damages awarded were clearly wrong, could not have been reasonably determined, or were excessive or grossly inadequate." *Id.*

**B. Reagan Cannot Recover The Additional Damages Claimed In Count V of Reagan's Substitute Brief.**

Reagan argues that she should be allowed to collect \$83,332.01 in damages above and beyond the damages awarded by the trial court. Reagan's Sub. Brf. p. 93. Reagan begins this argument with an attempt to distinguish this case from other zoning cases. Reagan's Sub. Brf. p.93-94. However, that that argument ignores the fact that Reagan seeks these damages as "just compensation" for a taking under Article 1, Section 26 of the Missouri Constitution. Reagan's Sub. Brf. p. 94. Reagan then restates the language of Article I, Section 26 that provides that "private property shall not be taken or damaged for public use without just compensation." *Id.* Reagan continues the argument stating that "just compensation" means " the full and perfect equivalent in money of property taken, so that the owner will be put in as good a position pecuniarily as he would have occupied if his property had not been taken," citing to *U.S. v. Miller*, 317 U.S. 369 (1943) and *N.W. Electric Power Cooperative*, 319 S.W.2d 930 (Mo. App. 1950). *Id.*

Reagan's argument is incorrect. For the reasons developed in Point I of this brief and Point I of County's Substitute Brief, there was no taking for which the trial court could impose damages. However, if there had been a regulatory taking, Reagan is entitled to "just compensation" and nothing more. Article 1, Section 26,

Missouri Constitution. Reagan quotes language from the *Miller* case to support her claim that she is entitled to expenses in addition to the difference between the value before and after the taking.<sup>23</sup> Reagan’s Sub. Brf. p. 94. However, that quoted language is taken out of context with the holding of the case.

The Supreme Court in *Miller* explained that courts have strived to reach a practical standard for valuation that is fair to the property owner and the condemnor, and fair market value is the practical standard adopted and retained by courts.<sup>24</sup> *Miller*, 317 U.S. at 374. The property owner must be compensated for what is taken from him, but that is done when he is paid fair market value for his property.<sup>25</sup> *Miller*, at 317 U.S. 374; *Kirby*, 467 U.S. 10 (holding that in most cases,

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<sup>23</sup> “ ‘[J]ust compensation’ ... means the ‘the full and perfect equivalent in money of (*sic*) property taken, so that the owner will be put in as good a position pecunarily (*sic*) as he would have occupied if his property had not been taken.’ ”

<sup>24</sup> The terms “market value” and “fair market value” really have the same meaning. *Miller*, at 317 U.S. 374.

<sup>25</sup> State and federal courts define “fair market value” similarly to be the value a willing buyer who is not forced to buy would pay a willing seller who is not forced to sell. *Byrom*, 16 S.W.3d at 577 and *Kirby*, 467 U.S. 10.

“just compensation” means the fair market value of the property taken on the date of taking); and *City of St. Louis v. Union Quarry & Const.*, 394 S.W.2d 300, 305 (Mo. 1965) (holding that full and perfect equivalent in money for property taken is equivalent to fair market value). Such fair market value is to be ascertained at the time of taking. *Miller*, at 317 U.S. 374; *Kirby*, 467 U.S. 10; and *Shelton v. M&A Electric Power Cooperative*, 451 S.W.2d 375, fn.1 (Mo. App. S.D. 1970) (holding that the proper measure of damages in an inverse condemnation action is the difference between the fair market value of the entire tract immediately before and after the appropriation (taking)). This same measure of damages is used where there is a partial taking. *Id.*; *Horine*, 776 S.W.2d at 12; and *State ex el. Kansas City Power and Light v. Keen*, 332 S.W.2d 935, 938. (Mo. 1960).

Reagan claims the \$83,332.01 in additional damages for “demolition and environmental remediation of the property, site development plan, real estate taxes, interest charges on the mortgage for the property, loan origination fees, survey fees, title insurance, closing fees in connection with purchasing the property, maintenance and upkeep of the property, etc.” Reagan’s Sub. Brf. p.24. Virtually all of these expenses would have been necessary for any development of the property; and therefore, they are subsumed in the fair market value of the property on the date the Rezoning Ordinance took effect. But more importantly, the

definition of fair market value does not include additions for any of these expenses. See discussion of fair market value above.

Reagan argues that the court should consider Reagan's compensable rights as two separate property rights, the right to diminution in property value due to the Rezoning Ordinance and the right to develop her property for a permitted use. But this argument is really two sides of the same coin. The Rezoning Ordinance changed the permitted uses and may have affected fair market value of the Property. Reagan has not cited any authority for the proposition that she is entitled to damages for a loss of use that does not decrease the fair market value of the Property. Additionally, Reagan has not cited any case holding that a property owner is entitled to damages in addition to the difference between fair market value immediately before and after a taking. But most importantly, Reagan is not entitled to anything above such difference in fair market value, and the additional expenses sought by Reagan are simply not included in the definition of fair market value. See discussion above in this point.

Reagan argues that allowing such expenses will not open a floodgate of litigation, but that is nothing more than a fond hope. In fact, almost every landowner facing condemnation can point to some amount that that he or she has paid to increase his or her enjoyment or use of the property that has not yet been fully depreciated or realized. If the Court follows Reagan's argument, it would not

only abandon well-settled law that payment of the difference in fair market value is just compensation, but it would also invite a deluge of claims for compensation in addition to fair market value.

Finally, Reagan argues that the trial court erred in its reliance on *66, Inc.*, at 130 S.W.3d 102 for the proposition that Reagan is not entitled to the additional damages of \$83, 332.01. Reagan attempts to distinguish *66, Inc.* by distinguishing the case of *Aboussie v. Chicago Title Ins. Co.*, 949 S.W.2d 207 (Mo. App. 1997) cited and discussed therein. *Aboussie* holds that if a litigant retained ownership of the property during the pendency of the case, the litigant cannot recover the expenses of ownership such as mortgage interest because such recovery would result in a windfall. *Aboussie*, 949 S.W.2d at 209-210. Reagan argues that the holding of *Aboussie* does not apply to the case at bar because the plaintiff in *Aboussie* continued to receive the benefits of ownership of their condos during the pendency of the dispute whereas Reagan argues that she could not use her property to build the office building she contemplated after the Rezoning Ordinance. Reagan Sub. Brf. p. 100. However, after the Rezoning Ordinance was enacted, Reagan actually retained all the rights of ownership of property located in an “R-3” District. Reagan could have refinanced the property and developed it for residential purposes. There is certainly no evidence in the record to demonstrate such development was impracticable. In fact, the record demonstrates that the next

owner of the property actually developed the Property for residential uses. TR.7-9: LF. 58, 59. Thus, residential use was clearly a feasible use of the property. If Reagan did not want to develop the property for residential purposes, she could have petitioned for rezoning, a course Reagan never pursued. Finally, Reagan could have sold the property at any time. While the Rezoning Ordinance removed some interests from the bundle of interests that made up the Property prior to the rezoning, it also added interests to that same bundle of rights (i.e. all the permitted uses in a “R-3” District.). Finally, for the reasons set forth in Point I of this brief and Point I of County’s Substitute Brief, the Rezoning Ordinance did not cause a taking. Accordingly, the trial court did not err in refusing to award Reagan the additional damages of \$83,332.01 sought in this Point V.

## CONCLUSION

This Court should reverse the trial court's entry of judgment in the amount of \$65,300 in favor of Reagan on the inverse condemnation claim of Count III of the First Amended Petition. This Court should reverse the trial courts' entry of judgment in favor of Reagan for attorney fees in the amount of \$103,763.75 and costs of \$7,591.50, and further hold that County is not liable for the Reagan's attorney fees and costs. This Court should uphold the trial court's refusal to award Reagan \$83,332.01 in additional damages for out-of-pocket expense. Finally, this Court should affirm the trial court's entry of judgment in favor of St. Louis County on the claim of deprivation of substantive due process rights pursuant to 42 U.S.C. §1983 of Count IV of the First Amended Petition.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this Brief contains all the information required by Rule 55.03 and complies with the type-volume limitation of Rule 84.06(b). This Brief was prepared in Microsoft Word 9.0 and contains 17, 308 words according to the word count of the word processing system used to prepare this Brief. Pursuant to Rule 84.06(g), I hereby certify that a 3.5 inch diskette, which was scanned for viruses and is virus free, contains the full text of this Brief and has been submitted for filing with this Brief.

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Christopher J. McCarthy  
Associate County Counselor

**CERTIFICATE OF COMPLIANCE**

I hereby certify that on December, 18, 2006, one copy of Appellants' Substitute Brief in the form specified by Rule 84.06(a) together with one copy of the disk required by the Rule 84.06(g) were sent first-class mail, postage prepaid, to: Mr. Kevin L. Fritz & Mr. Michael C. Seamands, Lashly and Baer, P.C., 714 Locust Street, St. Louis, MO 63101 and Mr. J. David Beemer, Pacific Legal Foundation, 3900 Lennane Drive, Suite 200, Sacramento California 95834.

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