

IN THE SUPREME COURT OF MISSOURI

No. SC94339

State of Missouri ex rel. RUTH CAMPBELL, et al.

Appellants,

v.

COUNTY COMMISSION OF FRANKLIN COUNTY

Respondent,

and

UNION ELECTRIC COMPANY, D/B/A AMEREN MISSOURI

Respondent.

On Appeal from the Circuit Court of Franklin County
The Honorable Robert D. Schollmeyer

SUBSTITUTE BRIEF OF APPELLANTS RUTH CAMPBELL ET AL.

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JURISDICTIONAL STATEMENT

This is a civil action challenging, by means of a petition for writ of certiorari, the Franklin County Commission's adoption of zoning amendments designed to enable Ameren to build a coal ash landfill adjoining its Labadie power plant. The Circuit Court of Franklin County dismissed five of the six counts of the Petition and subsequently entered Judgment in favor of the County Commission and Ameren on the sole remaining count. Appellants Ruth Campbell et al. timely filed an appeal to the Court of Appeals pursuant to § 512.020, R.S.Mo.

By written opinions dated July 22, 2014, the Court of Appeals transferred the case to this Court pursuant to Rule 83.02 of the Missouri Rules of Civil Procedure. This Court has jurisdiction under Article V, §10, of the Missouri Constitution.

STATEMENT OF FACTS

Based on a draft submitted by Ameren, Franklin County proposed amendments to its Unified Land Use Regulations ("zoning regulations") to enable Ameren to build a coal ash landfill next to its Labadie power plant in the floodplain of the Missouri River. R.24, ¶¶58-60, R.27, ¶¶78, 80 (Vol.1), R.3658-62 (Vol.20). After a "hearing" at which the County Commission prohibited the public from addressing Ameren's proposed landfill, the Commission voted 2-1 to adopt the landfill zoning amendments. R.26, ¶70, R.27-28, ¶¶83-86, R.146-164 (Vol.1), R.849 (Vol.5), R.1031-36, 1037-39, 1051-55, 1097-99, 1100-05, 1141 (Vol.6).

Appellants challenge the Circuit Court's May 21, 2012 Order dismissing Count I of the Petition. R.91 (Vol.1). Count I alleges that the hearing did not satisfy the statutory

and ordinance requirements for a public hearing because the Commission prohibited the public from discussing the subject of the zoning amendments. R.14-30 (Vol.1).

Appellants also challenge the Circuit Court’s January 11, 2013 Judgment on Count II in favor of Respondents upholding the validity of the zoning decision on the merits. R.4727-32 (Vol.25). The facts relating to said Order and Judgment are as follows:¹

A. Parties

Appellants are eleven individuals who live or own property in the immediate vicinity of Ameren Missouri’s Labadie power plant in Franklin County, and the Labadie Environmental Organization, whose members include individual Appellants. R.15-18, ¶¶3-11 (Vol.1).² The Labadie Environmental Organization (“LEO”) is a citizens group opposed to Ameren’s plan to build a coal ash landfill in the Missouri River floodplain. R.18, ¶11 (Vol.1), R.765-67, R.904-05 (Vol.5), R.3510-3640 (Vols.19-20).

Respondent County Commission of Franklin County (“Commission” or “County Commission”) is the governing body of Franklin County. R.19, ¶15 (Vol.1). Respondent Union Electric Company, d/b/a Ameren Missouri (“Ameren”), is a utility company headquartered in St. Louis that owns and operates four coal-fired power plants in the St. Louis metropolitan area. R.21, ¶¶30-31 (Vol.1).

¹ Because facts relevant to the Order dismissing Count I are limited to the allegations in Appellants’ Petition, while facts relevant to the Judgment on Count II are from the broader Record of proceedings before the Franklin County Commission, citations to both the Petition and the County’s Record are provided where appropriate.

² Appellants are referred to collectively herein as Labadie Neighbors.

B. Ameren’s Labadie Power Plant

Since 1970, Ameren has owned and operated a coal-fired power plant in Labadie, Missouri (“Labadie plant”) in Franklin County (“County”) alongside the Missouri River. R.21, ¶¶32, 34, 38 (Vol.1), R.3670 (Vol.20). The Labadie plant burns over 10 million tons of coal per year, generating more than 500,000 tons of coal ash³ per year. R.22, ¶41 (Vol.1), R.3670 (Vol.20).

Ameren directs a portion of the plant’s coal ash to “beneficial reuse” and disposes of the rest in two existing coal ash ponds at the Labadie plant. R.22, ¶¶42-43 (Vol.1), R.324-25 (Vol.2), R.2344 (Vol.13). One of the ponds has been in use since 1970 and is not lined. R.22, ¶45 (Vol.1), R.324-25 (Vol.2), R.643 (Vol.4). In 1992, Ameren reported that its unlined ash pond was leaking approximately 50,000 gallons of coal ash wastewater per day. R.22, ¶46, R.643 (Vol.4), R.1037 (Vol.6), R.2284 (Vol.13).

C. Ameren’s Proposed Coal Ash Landfill Next To Labadie Plant

From 2007 to 2009, Ameren Missouri acquired more than 1,100 acres of land east of its Labadie plant in order to construct a coal ash landfill (the “Site”). R.23, ¶51, R.97, ¶51 (Vol.1), R.2307 (Vol.13). The Site is in the 100-year floodplain of the Missouri River, and most of it is also in the floodway designated by the Federal Emergency Management Agency. R.27, ¶79, R.4303-05 (Vol.23). The Site is in an earthquake hazard

³ Coal ash is the residue from burning coal, including material collected from pollution control equipment. It contains toxins that are harmful to human health and that leach out of the coal ash into water. R.4162-69 (Vol.22).

zone at risk of liquefaction according to the Missouri Department of Natural Resources. R.22, ¶40, R.2418 (Vol.13). The Site has a high groundwater table, with groundwater coming above the surface on a regular basis. R.183 (Vol.2), R.376 (Vol.3), R.1079 (Vol.6), R.2263, 2359 (Vol.13).

There are numerous groundwater wells near the Labadie plant and the proposed landfill Site. R.23, ¶50 (Vol.1), R.4265 (Vol.23).⁴ Appellants own property adjacent or immediately proximate to the Site and rely on local groundwater for drinking water and other domestic purposes. R.15-18, ¶¶3-9, 11 (Vol.1). Richard Stettes has a groundwater well approximately one mile from Ameren's proposed landfill Site. R.16, ¶6 (Vol.1), R.4228 (Vol.23). Ruth Campbell's property virtually adjoins the Labadie Plant, separated only by railroad tracks. R.15, ¶3 (Vol.1), R.1190-91 (Vol.7). She has a groundwater well on her property. R.15, ¶3 (Vol.1). Stephen Gambaro, a member of the Labadie Environmental Organization, also lives near the Site and has a groundwater well on his property. R.747 (Vol.4), R.4234, 4237 (Vol.23). Sisters Kara Carter, Jennifer Carter Norris, and Katherine Thomas own property that overlooks the Site. R. 3486 (Vol.19).

Dr. Robert Criss, a Professor of Earth and Planetary Sciences with expertise in the Missouri River and its floodplains as well as groundwater contamination, R.170 (Vol.2), R.1071 (Vol.6), determined that the proposed coal ash landfill puts groundwater wells at risk of contamination. R.195-97 (Vol.2), R.1078-81 (Vol.6), R.2358-62, 2387 (Vol.13).

⁴ Copy of map depicting wells in Appendix at A15.

D. Proposed Zoning Amendments

In 2009, Ameren announced to the public its plan to build a coal ash landfill on 400 acres at the Site, adjacent to the Labadie plant. R.23, ¶53, R.97, ¶53 (Vol.1), R.2276, 2295 (Vol.13). Ameren held public meetings in November 2009 and November 2010 regarding its plan to build a coal ash landfill at the Site. R.23, ¶55, R.97, ¶55 (Vol.1), R.3656, 3666-92 (Vol.20).

Franklin County's zoning regulations did not allow utility waste landfills until the County Commission adopted the amendments at issue here on October 25, 2011. R.19, ¶22 (Vol.1), R.1775-2033 (Vols.10-11).

In April 2010, Ameren drafted and submitted to the County amendments to the County's zoning regulations that would allow a coal ash landfill to be constructed in the County – provided it was within 1,000 feet of and under common ownership with an existing power plant. R.24, ¶¶57-58 (Vol.1), R.3658-62 (Vol.20). The following month, the County published proposed landfill zoning amendments that mirrored Ameren's draft. R.24, ¶¶59-60 (Vol.1), R.3664-65 (Vol.20).

Ameren's Labadie plant is the only public utility power generation plant in Franklin County. R.27, ¶78 (Vol.1), R.611 (Vol.4), R.1113-14 (Vol.6). There is not likely to be another coal-burning power plant in the County in the future. R.611 (Vol.4), R.2320-43 (Vol.13). Ameren noted at the County Commission hearing that the coal ash landfill zoning amendments applied solely to its proposed landfill.

The way this ordinance in front of you is drafted, it requires utility waste landfills to be located within 1,000 feet of a utility, and there is only one

such site in the county....[I]t is the only game in town that's affected by the utility waste section of this ordinance.

R.1113-14 (Vol.6).

E. County Proceedings

The Franklin County Commission held a public hearing on the proposed landfill zoning amendments. R.24-25, ¶¶62-63 (Vol.1), R.165-1245 (Vols.2-7). At the outset of the hearing, the Presiding County Commissioner announced that the public was prohibited from addressing Ameren or its proposed Labadie landfill.

[I]f we start going off referring to Ameren and the proposal, ... there is no proposal. There hasn't been anything filed yet, so that's going to be a totally separate issue. ... If we go off on a tangent about Ameren or about fly ash and all that, I don't want to do that, but I will interrupt you.

R.27-28, ¶83 (Vol.1), R.849 (Vol.5). During the hearing, the Presiding Commissioner and the County Counselor interrupted speakers when they attempted to discuss Ameren or its proposed Labadie landfill, and prevented them from discussing their concerns regarding the Site. R.28, ¶84 (Vol.1). R.1031-36, 1037-39, 1051-55, 1097-99, 1100-05, 1141 (Vol.6).

We are not on any proposal that Ameren has submitted or things like that.

R.1029 (Vol.6) (Presiding Commissioner interruption).

There is no proposed landfill. That's the one thing we're trying to keep everyone from talking about.

R.1051 (Vol.6) (County Counselor interruption).

More than 80 people spoke at the hearing. R.457-1245 (Vols.3-7). Almost all opposed the landfill zoning amendments. The only persons who spoke in support of the amendments were two attorneys and three consultants retained by Ameren, R.591-621 (Vol.4), R.1111-53 (Vol.6), three Ameren employees, R.622-32 (Vol.4), R.1089-95 (Vol.6), R.1175-77 (Vol.7), and the mother of an Ameren employee, R.1095-99 (Vol.6). Many people submitted written materials to the Commission, including comments, reports, and other documents. R.1266-1305, 1308-30, 1333-37, 1339-40, 1343-52, 1362-64 (Vol.7), R.1365-99, 1401-06, 1413-15, 1418-74 (Vol.8), R.2052-2238 (Vol.12), R.2239-4274 (Vols.13-23), R.4284-92, 4303-05, 4324-28, 4331-34, 4340-77 (Vol.23), R.4384, 4388-4495, 4498-4503, 4507-09, 4516-26, 4535-83 (Vol.24), R.4584-4634, 4642-4708 (Vol.25). Labadie Neighbors submitted oral and written comments to the Commission opposing the proposed landfill zoning amendments. R.18-19, ¶¶12-13 (Vol.1), R.521-27 (Vol.3), R.754-64 (Vol.4), R.765-75, 899-909 (Vol.5), R.1099-1111 (Vol.6), R.1190-93, 1995-96 (Vol.7), R.1429-38, 1453 (Vol.8), R.2311-19 (Vol.13), R.3485-99 (Vol.19), R.4115 (Vol.22), R.4242-43 (Vol.23).

On October 25, 2011, the County Commission voted 2-1 to amend the Unified Land Use Regulations of Franklin County. R.19, ¶16, R.146-64 (Vol.1). The adopted landfill zoning amendments make coal ash landfills a permitted use in Franklin County provided that the landfill is contiguous to and under common ownership with an existing power plant. R.27, ¶77, R.29, ¶91, R.156-57 (Vol.1).

F. Circuit Court Proceedings

On November 23, 2011, Labadie Neighbors filed this action under § 64.870.2, R.S.Mo.⁵ The Court issued its Writ of Certiorari, directing the County to produce its Record of the proceedings. R.55-56 (Vol.1).

Count I of the Petition asserts that the County did not satisfy its legal duty to hold a public hearing prior to adopting the amendments because, at the “hearing,” it precluded the public from addressing the only project to which the zoning amendments apply – Ameren’s proposed Labadie landfill. R.26-30 (Vol.1). Count II asserts that the County Commission’s decision to adopt the amendments violated the County’s regulations governing zoning amendments because it did not promote the public health, safety, and general welfare of Franklin County. R.30-37 (Vol.1). Counts III, IV, V, and VI of the Petition raised the same challenges in the context of declaratory judgment and injunction (Counts III-IV) and judicial review (Counts V-VI). R.37-42 (Vol.1).⁶

⁵ Copy of 64.870.2, R.S.Mo., in Appendix at A10.

⁶ The zoning amendments also address non-utility waste landfills. Appellants are not challenging the non-utility waste landfill provisions, and all references herein to the zoning amendments pertain solely to those provisions involving utility waste landfills. Public comment on the zoning amendments focused virtually exclusively on the utility waste provisions.

Ameren and the County Commission filed motions to dismiss Counts I and III-VI. R.70-90 (Vol.1). On May 21 and 23, 2012, the Circuit Court granted their motions and entered Orders dismissing those counts. R.8 (Vol.1).

The Court reviewed Count II based on the Record filed by the County in response to the Writ of Certiorari issued by the Circuit Court. R.11-12, R.55-56 (Vol.1). The County initially filed its Record on January 17, 2012, R.5 (Vol.1), and filed its corrected Record on October 11, 2012 in response to the Circuit Court's Orders resolving objections raised by Ameren and Labadie Neighbors ("Record" or "County Record"). R.9-11 (Vol.1). The Circuit Court did not hold an evidentiary hearing or trial. No witnesses testified and no documentary evidence was submitted outside of the County's Record of proceedings.

On January 11, 2013, the Court entered Judgment on Count II in favor of Respondents. R.4709 (Vol.25). Labadie Neighbors filed this appeal on February 15, 2013. R.4725 (Vol.25).

G. Evidence in County Record Regarding Point Two

1. Property Values

Two property sales were lost due to public knowledge of Ameren's Labadie landfill plans. Roberta Rollins, a real estate broker in Franklin County, lost a sale when a family seeking to purchase land in Labadie on which to build their home abandoned that plan upon learning about the proposed landfill. R.1291 (Vol.7). Another broker lost a sale for the same reason. *Id.* Ms. Rollins explained that Ameren's proposed Labadie landfill could continue to inhibit property sales insofar as sellers may be required to disclose the

existence of a coal ash landfill in the area. R.1292 (Vol.7). Ms. Rollins reported that landfills depress property values up to 5.7 miles from the Site. R.1291 (Vol.7).

Several residents expressed concerns about the impact of the proposed landfill on their property values. *See, e.g.*, R. 509-10, 513, 529-31, 559 (Vol.3); R.591, 747 (Vol. 4); R.873-74 (Vol.5); R.973-74 (Vol. 6); and R.1429-30 (Vol.8). Dave Greeley, who lives on the bluffs overseeing the landfill Site, said that the assessor included his “panoramic view” in the property value. R.509-10 (Vol. 3). Dr. Robert Criss testified that the landfill will increase the amount of groundwater on surrounding farmlands, impeding the use of farm machinery, shortening the growing season, and making the farmland less valuable. R.186-87 (Vol.2), R.1075 (Vol.6), R.2359 (Vol.13).

2. Health And Safety

Coal ash contains toxins such as arsenic, lead, mercury, chromium, and selenium. R.565-67 (Vol.4), R.1136-37 (Vol.6), R. 2409 (Vol.13), R.3453 (Vol.19); R.3702-06 (Vol.20), R.4162-97 (Vols.22-23). The toxins in coal ash readily leach out of the coal ash when they come in contact with water. R.415-17 (Vol.3), R.1227-33 (Vol.7), R.2408-17 (Vol.13). Coal ash toxins have leached out of disposal sites all over the country and contaminated rivers, streams, groundwater, and drinking water wells. R.707-09 (Vol.4), R.3184-3453 (Vols.18-19), R.3719-48 (Vol.20), R.3749-3890 (Vols.20-21), R.3891-3960 (Vol.21), R.4184-90 (Vol.23).

Charles Norris, a hydrogeologist with coal ash landfill expertise, testified that toxins “leach readily from coal ash, and ... are mobile in water. When they mobilize, when they move, they contaminate groundwater and surface water at levels that are toxic

to humans and the environment.” R.1227-28 (Vol.7). He also explained that all landfills leak, including landfills with liners. R.1230-31 (Vol.7).

Specific examples of coal ash contamination include Ameren’s Venice plant across the Mississippi River from downtown St. Louis, where concentrations of arsenic in groundwater are 38 times the federal drinking water standards up to 400 feet downstream from the plant’s ash ponds. R.712-15 (Vol.4), R.3270-74 (Vol.18). *See also* R.3444-52 (Vol.19) (private wells contaminated in Oak Creek, WI) and R.3927-28 (Vol.21) (residential wells contaminated in Pines, IN).

The toxins that leach out of coal ash and contaminate groundwater and surface water can cause serious health problems, including cancer, brain damage, and respiratory illness, when ingested. R.561-67 (Vols.3-4), R.2393-2407, 2419-31 (Vol.13), R.2439-97 (Vol.14), R.3351-62 (Vol.18), R.4162-97 (Vols.22-23). Dr. Greg Evans, Director of the Public Health Program at St. Louis University School of Public Health, testified that “many of the substances in coal ash can be harmful at very low levels.” R.565 (Vol.4). He described the health hazards associated with coal ash, including increased cancer risks due to living next to a coal ash disposal site. R.561-67 (Vols.3-4). Janet Dittrich explained that airborne coal ash can cause serious respiratory damage when inhaled. R.1181-83 (Vol.7).

The proposed landfill Site contains inherent geological risks that increase the likelihood that coal ash will escape the landfill and contaminate groundwater and surface water. Those risks include:

- The Site has a high groundwater table; groundwater is close to the surface and regularly comes above the ground surface. R.182-83 (Vol.2), R.376 (Vol.3), R.1079 (Vol.6), R.2263, 2358-59 (Vol.13), R.3485-91 (Vol.19). Groundwater will come up to the landfill's liner and can come into contact with coal ash through defects in the liner. R.187 (Vol.2), R.1230-31 (Vol.7), R.2359 (Vol.13). Ameren's plans show the base of the landfill four to five feet below the top of the groundwater table in places. R.2263, 2290 (Vol.13), 4116-17 (Vol.22). Groundwater at the Site may already be contaminated or at risk of contamination due to leakage from the Labadie plant's existing ash ponds. R.2261-62 (Vol.13), R.3711-13 (Vol.20).
- The Site is in the 100-year floodplain and floodway of the Missouri River as determined by the Federal Emergency Management Agency ("FEMA"). R.4303-05 (Vol.23). Five months prior to adopting the zoning amendments, the County adopted FEMA maps that include the Site in the 100-year floodplain and floodway of the Missouri River. R.2009 (Vol.11), R.4303-05 (Vol.23). Building in the floodway could exacerbate flooding upstream. R.183-85 (Vol.2). Flooding in the area of the Site has occurred approximately every 14 years over the historical record, with the Site flooded most recently in 1986 and 1993. R.181 (Vol.2), R.1073 (Vol.6), R.2352-57 (Vol.13). Flooding in the vicinity of the Site has been steadily increasing, and is predicted to continue to do so. R.1075-77 (Vol.6), R.2352-57, 2383 (Vol.13). The amendments' requirement for a berm around the landfill does not alleviate flood concerns, and will increase flood risks. R.156-63

(Vol.1), R.2929-30 (Vol.16). Levees displace flood waters, increasing flooding in surrounding areas. R.183-85 (Vol.2), R.1065-68 (Vol.6). Over time, levees fail or are overtopped by water. R.1065 (Vol.6), R.2918, 2929, 2933 (Vol.16). Levee failure can be catastrophic, causing worse flood damage than if the levee was not there in the first place. R.2918, 2929 (Vol.16). The Association of State Flood Plain Managers opposes the use of levees to protect undeveloped land for proposed development. R.2918, 2927 (Vol.16).

- The Site is in an earthquake hazard area at risk of liquefaction according to the Missouri Department of Natural Resources. R.2354, 2418 (Vol.13). Liquefaction could cause the berm to fail, the landfill's liners to crack, and the landfill to slump, releasing coal ash toxins into the environment. R.2256, 2354 (Vol.13).

If one or more of the above risks leads to groundwater contamination from coal ash, it could harm nearby residents who rely on groundwater for drinking water and other domestic purposes. R.195, 197 (Vol.2), R.2257-59, 2358-62, 2387 (Vol.13), R.4265 (Vol.23). Residents are concerned that their drinking water wells would be contaminated by the proposed coal ash landfill. R.511-13 (Vol.3), R.569-71, 747 (Vol.4), R.2304 (Vol.13), R.3482 (Vol.19), R. 4228, 4237 (Vol.23). The Commission was provided a map showing dozens of groundwater wells in the vicinity of the Site. R.4265 (Vol.23). Residents are also concerned about flooding. R.1101-09 (Vol.6), R.1191-92 (Vol.7).

3. General Welfare

Douglas Drysdale, a local resident and lawyer who represents large corporations in contaminated site matters, warned that the amendments' designation of the Site for a coal

ash landfill exposes the County to potential liability for the high costs of cleaning up future contamination associated with the landfill. R.3641-44 (Vol.20).

Labadie's small but thriving downtown helps to maintain and promote the economy of Franklin County. R.793, 799 (Vol.5). The amendments will increase truck traffic through downtown Labadie, undermining ongoing efforts supported by the County to improve the Labadie business district. R.483-85 (Vol.3), R.793-803 (Vol.5), R.3507 (Vol.19), R.3708 (Vol.20).

4. Relationship Between Zoning Amendments And County's Master Plan

Dan Lang, one of the principal authors of Franklin County's Master Plan, concluded that the proposed landfill sanctioned by the amendments is inconsistent with the Master Plan. R.391, 397 (Vol.3), R.4136-60 (Vol.22).

By replacing 400 acres of productive farmland with a landfill, the amendments are contrary to the Plan's goal of preserving the County's rural character, R.249 (Vol.2), R.559 (Vol.3), R.873-84 (Vol.5), R.1515 (Vol.8), R.4148 (Vol.22). The amendments also undermine the Plan's goals to "[m]inimize ground contaminants to protect groundwater resources" and to "[k]eep development out of flood-prone areas." R.1523 (Vol.8), R.1584 (Vol.9).

5. Ameren's Evidence

Ameren's engineering consultant, Paul Reitz, testified "generically about landfill design." R.1141 (Vol.6). He explained that utility waste landfills are generally designed so that there is no "free water" going into the landfill, stormwater is captured and reused or disposed of per state regulations, a liner and leachate collection system are

placed below the landfill, and groundwater monitoring wells are placed up-gradient and down-gradient from the landfill. R.1145-49 (Vol.6). He also explained that levees surrounding a coal ash landfill in the floodplain “are designed to keep the flood water out, but only till such time as the landfill material reach the top of those berms. As soon as that happens, they are no longer acting as levees.” R.1153 (Vol.6).

Ameren’s toxicology consultant, Lisa Bradley, discussed risk assessment, exposure, and toxicity. She noted that any substance can be harmful in large quantities, focusing on aspirin as an example of a substance that can be beneficial in small doses but potentially fatal in large doses. R.1131-33 (Vol.6). She also said that the toxic metals in coal ash are considered trace constituents, and are also present in soil and food. R.1135-37, 1139 (Vol.6). She stated that EPA found composite-lined landfills not to pose risks above regulatory targets. R.1139 (Vol.6), R.2054-58 (Vol.12).

Michael Menne, Ameren’s Vice President for Environmental Services, explained why Ameren prefers to locate a new coal ash landfill adjacent to the Labadie plant rather than transporting the ash elsewhere, notwithstanding the floodplain and seismic risks and presence of groundwater at or near the Site’s surface. R.623-29 (Vol.4). Ameren’s alternative to building the proposed landfill next to the Labadie plant is to send its coal ash to a different site. R.629 (Vol.4).

6. County’s Documents

At the outset of the hearing, the County’s Planning Director summarized the proposed zoning amendments and the Planning and Zoning Commission’s recommendation. R.857-70 (Vol.5). The County presented no testimony. Its documents

in the Record include the County's Unified Land Use Regulations as they existed just prior to the adoption of the landfill zoning amendments, the amendments as adopted, various notes related to the amendments, comments, reports, and other documents submitted to the Commission, the County's Master Plan, and its zoning map. R.128-64 (Vol.1), R.1247-2051 (Vols. 7-11).

H. Court Of Appeals Proceedings

On July 22, 2014, a divided panel of the Court of Appeals for the Eastern District reversed the Circuit Court's dismissal of Count I, determining that the Petition states a claim for relief regarding the validity of the public hearing. The Court of Appeals reversed the Circuit Court's judgment on Count II because it is premature to address the merits of the County Commission's adoption of the landfill zoning amendments before resolving the validity of the hearing. Without a lawful hearing, the amendments are void. The majority decided it was appropriate to remand the case to the Circuit Court for a resolution of Count I on its merits, but the panel instead transferred the case to this Court "because of the general interest of the question posed by this case."

I. Legal File

Most of the Legal File consists of the County's Record ("Record") – i.e., all of Volumes 2-24 and part of Volumes 1 and 25).⁷ The Record is divided into six sections:

⁷ References to the Legal File appear as R.X (Vol.Y). The electronic Legal File is word-searchable.

1. Zoning Amendments adopted by the Franklin County Commission on October 25, 2011 (two versions, identical text), R.128-164 (Vol.1);
2. County Commission's Public Hearing Transcripts, R.165-1246 (Vols.3-7);
3. County's Exhibits, R.1247-2051 (Vols.7-11), including County's zoning regulations prior to the landfill zoning amendments at R.1775-2033 (Vols.10-11);
4. Supporter's Exhibits, R.2052-2238 (Vol.12);
5. Opponents' Exhibits, R.2239-4271 (Vols.13-23); and
6. Other Communications, R.4272-4708 (Vols.23-25).

POINTS RELIED ON

I. THE CIRCUIT COURT ERRED IN DISMISSING COUNT I BECAUSE THE FACTS ALLEGE A CLAIM THAT THE “HEARING” HELD BY THE FRANKLIN COUNTY COMMISSION WAS INVALID IN THAT THE COMMISSION PROHIBITED THE PUBLIC FROM ADDRESSING THE SOLE PROJECT AUTHORIZED BY THE PROPOSED ZONING AMENDMENTS.

State ex rel. Freeze v. City of Cape Girardeau, 523 S.W.2d 123 (Mo. App. 1975)

State ex rel. Casey’s General Stores, Inc. v. City of Louisiana, 734 S.W.2d 890 (Mo. App. 1987)

State ex. rel. Swofford v. Randall, 236 S.W.2d 354 (Mo. App. 1950)

Yost v. Fulton County, 348 S.E.2d 638, 640 (Ga. 1986)

§§ 64.875 and 64.870.2, R.S.Mo.

Article 14, §323, Unified Land Use Regulations of Franklin County

II. THE CIRCUIT COURT ERRED IN UPHOLDING THE FRANKLIN COUNTY COMMISSION’S DECISION TO ADOPT THE COAL ASH LANDFILL ZONING AMENDMENTS BECAUSE THE AMENDMENTS ARE UNLAWFUL IN THAT THEY FAIL TO PROMOTE THE COUNTY’S HEALTH, SAFETY, AND GENERAL WELFARE.

State ex rel. Cooper v. Cowan, 307 S.W.2d 676 (Mo. App. 1957)

Fairview Enterprises, Inc. v. City of Kansas City, 62 S.W.3d 71 (Mo. App. 2001)

Allega v. Associated Theatres, Inc., 295 S.W.2d 849, 858 (Mo. App. 1956)

Plaas v. Lehr, 538 S.W.2d 919, 922 (Mo. App. 1976)

Article 14, §325, Unified Land Use Regulations of Franklin County

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DISMISSING COUNT I BECAUSE THE FACTS ALLEGE A CLAIM THAT THE “HEARING” HELD BY THE FRANKLIN COUNTY COMMISSION WAS INVALID IN THAT THE COMMISSION PROHIBITED THE PUBLIC FROM ADDRESSING THE SOLE PROJECT AUTHORIZED BY THE PROPOSED ZONING AMENDMENTS.

A. Standard Of Review

This Court reviews *de novo* the Circuit Court's Order granting the motions of Ameren and the County Commission to dismiss Count I of Labadie Neighbors’ Petition for failure to state a claim for relief under Rule 55.27(a)(6). *City of Lake Saint Louis v. City of O’Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010).

The Court reviews Labadie Neighbors’ Petition “to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.” *Id.* The Court considers “only the grounds raised in the motion to dismiss in reviewing the propriety of the trial court’s dismissal of a petition.” *Id.*

The Court “assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom.” *LeBeau v. Commissioners of Franklin County*, 422 S.W.3d 284, 288 (Mo. banc 2014).

B. Count I States A Claim That The Commission Violated Its Legal Duty To Hold A Valid Hearing Before Adopting The Zoning Amendments.

Both a Missouri statute and the Franklin County zoning regulations require the Franklin County Commission to hold a public hearing before amending its zoning

regulations.

[N]o amendments shall be made by the county commission except after recommendation of the county planning commission ... after hearings thereon by the commission. Public notice of the hearings shall be given in the same manner as provided for the hearing in section 64.815.

§64.875, R.S.Mo.⁸

No order or recommendation that amends any of the provisions of these regulations may be adopted until a public hearing has been held on such order or recommendation.

Franklin County Zoning Regulations, Article 14, §323. R.26, ¶75 (Vol.1).⁹

Failure to comply with these requirements nullifies the resulting zoning amendments. “The requirements of notice and hearing are mandatory for validity of an amending ordinance, and ordinances passed in contravention thereof are void.” *State ex rel. Freeze v. City of Cape Girardeau*, 523 S.W.2d 123, 126 (Mo. App. 1975).

The plain language of these hearing requirements indicates that speakers must be allowed to address the subject of proposed zoning amendments. The statute renders invalid zoning amendments adopted without “hearings *thereon*.” §64.875, R.S.Mo.¹⁰

⁸ Copy of 64.875, R.S.Mo., in Appendix at A11.

⁹ The public hearing requirement in Franklin County’s zoning regulations appears at Article 14, §323 (copy in Appendix at A13). The Petition erroneously cites §321.

¹⁰ All emphases in this brief are supplied by Appellants unless otherwise noted.

Similarly, the County’s zoning regulations require a “public hearing *on such order or recommendation.*” R.26, ¶75.

The gravamen of Count I is that, by precluding the public from addressing the project at the heart of the amendments, the Franklin County Commission failed to hold a hearing *on* the proposed zoning amendments. Count I alleges that while the zoning amendments were drafted specifically to allow Ameren to build a coal ash landfill next to its Labadie power plant, the County Commission precluded the public from discussing that controversial project at the “hearing.”

First, Count I alleges that the zoning amendments were drafted by and for Ameren.

- In 2009, Ameren notified Franklin County and the public of its plans to build a coal ash landfill adjacent to the Labadie power plant. R.23 ¶¶53-55 (Vol.1).
- At that time, Franklin County’s zoning regulations did not allow landfills. R.19 ¶22 (Vol.1).
- In 2010, Ameren drafted and submitted to the County, and the County proposed, zoning amendments allowing coal ash landfills – but only if built within 1,000 feet of and under common ownership with an existing power plant. R.24 ¶¶57-60, R.27 ¶¶76-77 (Vol.1).
- Ameren is the only entity that could build a coal ash landfill under the proposed zoning amendments. It owns the only power plant in Franklin County and has acquired adjacent property for the purpose of building a coal ash landfill on it. R.15 ¶2, R.21 ¶33, R.23 ¶51, R.27 ¶¶78-81 (Vol.1).

- The zoning amendments allow a coal ash landfill at only one site – Ameren’s proposed landfill site next to its Labadie plant. R.15 ¶2, R.23 ¶51 (Vol.1).

Second, Count I establishes that the public has significant concerns about the proposed landfill Site.

- Ameren’s proposed Labadie landfill Site is in the floodplain and floodway of the Missouri River, and in an earthquake zone at risk of liquefaction. R.22 ¶¶39-40, R.23 ¶52 (Vol.1).
- Because the landfill zoning amendments allow a coal ash landfill only on land adjacent to the Labadie power plant, and that land is in the floodplain and floodway of the Missouri River, the amendments require that any coal ash landfill in Franklin County be located in the floodplain and floodway of the Missouri River. R.23 ¶56, R.26-27 ¶¶76-81 (Vol.1).
- Although there has been a long history of leakage at the Labadie plant’s existing ash disposal ponds, no monitoring has occurred to determine the impact of such leakage on groundwater and no contamination has been cleaned up. R.22-23, ¶¶43-49 (Vol.1).
- Everyone within at least four miles of the Labadie plant relies on groundwater for drinking water and other domestic purposes. R.23 ¶50 (Vol.1).

- Neighbors of the proposed landfill Site are concerned that the landfill will contaminate their groundwater wells, threaten their health, and reduce the value of their property. R.15-18 ¶¶3-11 (Vol.1).

Third, Count I alleges that the County Commission precluded the public from sharing its concerns with the Commission at the “hearing.”

- The Presiding Commissioner announced at the outset that speakers could not discuss Ameren or its Labadie landfill proposal:

[I]f we start going off referring to Ameren and the proposal,... there is no proposal. There hasn't been anything filed yet, so that's going to be a totally separate issue. ... If we go off on a tangent about Ameren or about fly ash and all that, I don't want to do that, but I will interrupt you.

R.27-28 ¶83 (Vol.1).

- The Presiding Commissioner and County Counselor followed up on this threat and repeatedly interrupted speakers when they attempted to discuss Ameren’s proposed Labadie landfill. R.28 ¶84 (Vol.1).
- The Commission prevented members of the public from voicing their concerns about the proposed landfill and its location in the Missouri River floodplain and floodway. R.28 ¶¶84,86 (Vol.1).
- Preventing speakers from addressing Ameren’s proposed landfill, and interrupting speakers, chilled interested parties from even attempting to address Ameren’s proposed Labadie landfill. R.28 ¶85 (Vol.1).

These factual allegations, which are taken as true for purposes of the motion to dismiss, clearly demonstrate that the Commission denied Labadie Neighbors and other members of the public a meaningful opportunity to be heard. This denial constitutes a violation by the County Commission of its legal duty to hold a public hearing regarding the proposed zoning amendments before adopting them.

No Missouri case addresses the precise question of whether a hearing is legally sufficient when individuals may stand up to speak, but may not discuss their concerns regarding the matter at hand. But the cases do reflect strict enforcement of the requirement that local officials hold a valid public hearing on proposed zoning amendments. An event called a hearing is not, by itself, sufficient. Cities and counties must provide proper pre-hearing notice and must afford the public an opportunity to express its views on proposed amendments.

In *State ex rel. Freeze v. City of Cape Girardeau*, the City published notice of proposed zoning changes, including a description of properties to be affected. The property description in the notice did not encompass the Freeze property, but the zoning change adopted by the City did. 523 S.W.2d at 124-5. The Court held that the inaccurate notice deprived the Freezes of an opportunity for a public hearing, and invalidated the amendment as to their property.

Proper notice and public hearing are vital steps in the municipal legislative process for zoning changes. ... This jurisdictional notice is not merely to advise affected parties of changes that will or might occur, but is an indispensable step in the process by which 'parties in interest' may profoundly affect the legislative course

of such ordinance. Further, it permits interested citizens an opportunity to furnish the municipality relevant information to prevent improvident changes.

Id., 523 S.W.2d at 125.¹¹

Similarly, in *State ex rel. Casey's General Stores, Inc. v. City of Louisiana*, 734 S.W.2d 890 (Mo. App.1987), the Court held an ordinance invalid because the City gave less than the statutorily-mandated 15 days advance notice of its hearing on the proposed ordinance. "Where the enabling statutes are not complied with, the ordinance passed is invalidly enacted and cannot be enforced." *Id.*, 734 S.W.2d at 895.

Proper notice is not an end in itself. As *Freeze* makes clear, notice is a means to enable affected citizens to participate in the public hearing. The purpose of the notice requirement cannot be limited to sharing the information that a hearing is occurring. The ultimate objective is for interested parties to attend the hearing and voice their concerns before elected officials take action on the proposed amendments. The notice requirement becomes hollow where affected parties receive the notice and attend the hearing but are barred from voicing their concerns about the proposed zoning amendments. Accordingly, the Court of Appeals upheld the validity of an informal hearing after determining that – unlike here – parties could "make full statements without interruption." *State ex rel. Swofford v. Randall*, 236 S.W.2d 354, 356 (Mo. App. 1950).

¹¹ The notice and hearing requirement applicable to Franklin County under §64.875, R.S.Mo., is equivalent in relevant respects to that applicable to cities and towns under §89.050, R.S.Mo.

Other states have recognized that zoning hearings must provide members of the public an opportunity not just to attend, but to speak their concerns. The Georgia Supreme Court invalidated a zoning amendment where opponents had notice of and attended the public hearing, but were precluded from voicing their opposition to the amendment.

Proper notice and a proper hearing are mutually dependent. The opportunity to be heard cannot benefit a party who lacks knowledge of the opportunity. Likewise, *notice of a hearing is worthless to the party who, after responding to the notice, is denied the opportunity to speak.*

Yost v. Fulton County, 348 S.E.2d 638, 640 (Ga. 1986).

It is broadly recognized that “a failure of the legislative body to conduct an appropriate [zoning] hearing...will render the regulation invalid.” 83 Am.Jur.2d Zoning and Planning §508 (2012). “The statutory notice and hearing requirements concerning proposed zoning amendments have a dual function; notices and hearings ensure that citizens have an opportunity to express their views regarding zoning amendments, and a hearing serves to inform members of a municipal legislative body regarding the views of the affected community members.” *Id.* §522. As the Pennsylvania Supreme Court explained in invalidating a zoning ordinance enacted after defective notice of a public hearing:

A “hearing” contemplates more than mere *attendance* by the public; it connotes a meeting which the public has the right to attend *and* the right to be *heard*.

Appeal of Kurren, 208 A.2d 853, 856 (Pa. 1965) (emphasis in original).

Count I of Labadie Neighbors' Petition alleges that while the members of the public could attend the hearing on the landfill zoning amendments, the County precluded them from voicing their concerns. The amendments designated one and only site for a coal ash landfill, yet the County prevented speakers from discussing their concerns regarding that site. The hearing did not provide members of the public the opportunity to "express their views, pro and con, on the proposed zoning legislation." *Appeal of Kurren*, 208 A.2d at 856.

That the County Commission accepted the submittal of documents without screening them for content does not remedy the Commission's refusal to hear the public's concerns about Ameren's proposal, its interruption of speakers, and the chilling effects of those actions. The purpose of a hearing is to enable the public to convey its concerns to County officials before they take action. There is no requirement that County Commissioners actually read any submitted documents. Moreover, the statutory requirement for a hearing implies an event where members of the public can stand up and speak directly to their officials before a decision is made. If the County had published notice of a hearing, and then stated at the outset that the public could not speak but could only submit their concerns in writing, it is inconceivable that this event would satisfy the statutory requirement for a hearing.

In short, the facts alleged in Count I establish that the County Commission failed to conduct a valid public hearing prior to adopting the zoning amendments. The Circuit Court erroneously dismissed Count I for failure to state a claim for relief.

Because the Circuit Court dismissed Count I on the pleadings without providing

Labadie Neighbors an opportunity to demonstrate on the merits that the “hearing” in this case was invalid, this Court should remand Count I for resolution on the merits by the Circuit Court. That is what routinely occurs when an appellate court reverses the grant of a motion to dismiss. *See, e.g., In re Estate of Austin*, 389 S.W.3d 168, 173 (Mo. banc 2013); *City of Lake Saint Louis v. City of O’Fallon*, 324 S.W.3d 756, 758, 764 (Mo. banc 2010).

In addition, the governing statute requires that challenges to county zoning decisions be resolved first at the circuit court level, with the right of appellate review thereafter:

Any owners ... aggrieved by any decision of the ...county commission ... may present to the *circuit court* of the county in which the property affected is located, a petition [for writ of certiorari], duly verified, stating that the decision is illegal in whole or in part, specifying the grounds of the illegality and asking for relief therefrom.... After entry of judgment in the circuit court in the action in review, any party to the cause may prosecute an appeal to the appellate court having jurisdiction in the same manner now or hereafter provided by law for appeals from other judgments of the circuit court in civil cases.

§64.870.2, R.S.Mo.

Even absent such an express statutory scheme, it is well-settled that appellate courts do not reach the merits when reviewing a circuit court’s dismissal for failure to state a claim. “It is not ... our function on review of a judgment of dismissal for failure to state a claim, to determine whether an appellant is entitled to relief on the merits.”

Chochorowski v. Home Depot U.S.A., Inc, 295 S.W.3d 194, 197 (Mo.App. 2012). See also *City of Creve Coeur v. Creve Coeur Fire Protection District*, 355 S.W.2d 857, 859-860 (Mo.1962); *Fenlon v. Union Electric Co.*, 266 S.W.3d 852, 854 (Mo.App. 2008); *Moore v. Missouri Highway and Transportation Comm'n*, 169 S.W.3d 595, 599 (Mo.App.2005).

Should this Court look beyond the pleadings and consider the County's Record in ruling on Point One, the Record demonstrates that: the County Commission's hearing concerned proposed zoning amendments to enable Ameren to build a coal ash landfill next to its Labadie plant; the public showed up in large numbers to register its concerns regarding Ameren's controversial proposal; yet the Commission precluded the public from addressing that proposal at the hearing.¹²

First, the proposed zoning amendments were designed specifically to enable Ameren to proceed with its proposed coal ash landfill at the Labadie site. Ameren drafted the proposed zoning amendments and submitted them to the County in April 2010. R. R.3658-62 (Vol.20) (email from Ameren's counsel to County, transmitting draft amendments). While not mentioning itself by name, Ameren's draft applied solely to its proposed Labadie landfill because it authorized coal ash landfills only if within 1,000 feet of an existing power plant and only if the landfill and power plant were under common

¹² While previous references to the Record focused on allegations in Appellants' Petition, citations in the remainder of the Point One argument reference material in the County's Record supporting those allegations.

ownership. R.3660 (Vol.20). Ameren’s Labadie power plant is the only power plant in Franklin County, and Ameren also owns the proposed landfill site adjacent to its Labadie plant. R.27 ¶78, R.100 ¶78 (Vol.1), R.611 (Vol.4), R.1113 (Vol.6). After receiving Ameren’s draft language, the County’s Planning Director responded that she was consulting with the County Counselor and County Commissioners, and “will let you know when we can get it on our agenda for public hearing.” R.3536 (Vol.20). The proposed amendments subsequently published for public hearing by the County contained the same Ameren-specific language as in Ameren’s draft. R.3664-65 (Vol.20). Ameren’s counsel conceded at the County Commission’s hearing that the zoning amendments applied solely and specifically to Ameren:

The way this ordinance in front of you is drafted, it requires utility waste landfills to be located within 1,000 feet of a utility, and *there is only one such site in the county...[I]t is the only game in town that’s affected by the utility waste section of this ordinance.*

R.1113-14 (Vol.6). Ameren’s Motion to Intervene in this action asserted that the Petition “seeks to challenge the validity of the Amendment Ordinance and Ameren Missouri’s right to create, operate, and maintain a UWL [utility waste landfill].” R.4736, ¶4 (Supp. Legal File). In addition, the County labeled its file on the zoning amendments “Ameren.” R.1210 (Vol.7).

Second, Ameren had publicized its plan to build a coal ash landfill next to the Labadie plant, and the Commission was well-aware of the controversy that had been generated. By the time the County Commission commenced its hearing regarding the

proposed coal ash landfill zoning amendments in December 2010, R.829 (Vol.5), Ameren had held two public information sessions (November 2009 and November 2010) regarding its proposed Labadie landfill. R.3656, 3666-92, 3691 (Vol.20).

To accommodate a large crowd, both sessions of the County Commission's hearing were held at the local community college. R.829 (Vol.5), R.457 (Vol.3). The County Commission apparently knew that the public was showing up in large numbers at the hearings in order to express concerns about Ameren's proposed Labadie landfill. There is no indication in the Record of any other controversial aspect of the proposed zoning amendments. It is telling that the only project that the County directed the public *not* to discuss was Ameren's proposed Labadie landfill – the only project authorized by the coal ash landfill amendments.

Third, notwithstanding the strong public interest in and concern about Ameren's proposed landfill, the County precluded the public from addressing that proposal at the hearing. As he opened the hearing, the County's Presiding Commissioner stated that comments regarding Ameren's proposal were off-limits, and that he would interrupt speakers who sought to discuss that proposal.

And by the way, just so everybody understands, this really doesn't have anything to do with any fly ash or anything like that. ...

So if we start going off referring to Ameren and the proposal, right there is no proposal. There hasn't been anything filed yet, so that's going to be a totally separate issue. ...

If we go off on a tangent about Ameren or about fly ash and all that, I

don't want to do that, but I will interrupt you ...

R.849 (Vol.5).

The County's attempt to justify its prohibition against discussing Ameren and its Labadie landfill proposal on the ground that there was "no proposal" is a direct assault on the hearing requirement. Of course Ameren had not yet filed a formal proposal with the County; the existing zoning regulations did not allow landfills. That is why Ameren drafted the zoning amendments for the County, and the purpose of the zoning amendments was to enable Ameren to proceed with its Labadie landfill proposal. Moreover, Ameren clearly did have an active landfill proposal – which it had announced to the public and for which it had commenced the permitting process with the Missouri Department of Natural Resources ("DNR"). Ameren's November 2009 public information session was in conjunction with DNR's required preliminary site investigation, R.3666-92 (Vol.20), §260.205.3(2), R.S.Mo., and the November 2010 session was triggered by the DNR-required Detailed Site Investigation process. R.3691 (Vol.20), §260.205.3(3), R.S.Mo. The proposed zoning amendments were the County's proposal to allow Ameren to proceed with its Labadie landfill plans. There was no legitimate reason for the County to prohibit the public from addressing the landfill plans at the heart of the zoning amendments.

After announcing the no-Ameren rule and threatening to interrupt speakers to cut them off if they violated the rule, the Presiding Commissioner and County Counselor followed through on that threat. When a speaker tried to inform the Commission that coal ash leakage from Ameren's existing ash ponds at the Labadie plant might also be

contaminating the proposed landfill site in the Labadie Bottoms (i.e., Missouri River floodplain in Labadie), the Presiding Commissioner and County Counselor interrupted him three times during his allotted seven-minute presentation. R.1029 (Vol.6) (Presiding Commissioner interrupting speaker: “We are not on any proposal that Ameren has submitted or things like that.”); R.1037 (Vol.6) (County Counselor interrupted speaker attempting to discuss leakage from Ameren’s existing ash ponds); R.1039 (Vol. 6) (“We are talking about Labadie Bottoms again, and I’m going to object.”). The audience registered its frustration with the interruptions. R.1039 (Vol.6) (“Multiple complaints from the audience.”). The Presiding Commissioner again instructed the audience to “testify about the regulation and not about Ameren or anything like that.” R.1044-45 (Vol.6).

The interruptions continued, as the County Counselor prevented a speaker from discussing increased truck traffic associated with proposed landfill:

There is no proposed landfill. That’s the one thing we’re trying to keep everyone from talking about. ... Coal ash is proper, but ... [w]e’re just not talking about truck traffic from a project that does not exist.

R.1051 (Vol.6). The Presiding Commissioner interrupted another speaker attempting to express his concerns about Ameren’s proposal to build a coal ash landfill in the Missouri River floodplain. R.1103-05 (Vol.6).

When counsel for Appellant Labadie Environmental Organization (“LEO”) attempted to object to the County’s interruptions precluding speakers from addressing Ameren’s proposed landfill, the County told her “[y]ou don’t have a right to object,” tried

to prevent her from making a record of LEO's objections to the County's no-Ameren rule, and told her to sit down or "I will ask security to remove you." R.1031-35, 1051-53 (Vol.6).

The County's refusal to allow the public to discuss Ameren's proposal to build a landfill next to the Labadie plant is inconsistent with its public notice of the subject matter of the hearing: "The proposed amendments involve Article 2 (Definitions) and Article 10 (Supplementary Use Regulations) in regard to utility and non-utility waste landfills and the definition *and locations thereof*." R.1253 (Vol.7). The public's attempts to address Ameren's proposal sought to highlight its risky location, in the Missouri River floodplain and at a site that may already be contaminated by leakage from the plant's existing ash ponds. After proposing zoning amendments that allow a utility waste landfill at only one location – adjacent to Ameren's Labadie plant, and after notifying the public that the hearing would consider "locations" of utility waste landfills, the County repeatedly precluded the public from expressing its concerns about Ameren's proposed Labadie location.

The totality of circumstances – opening the hearing by telling the audience members that they could not discuss the concerns that brought them there, followed by numerous interruptions of speakers who treaded on forbidden turf – undoubtedly chilled an untold number of speakers from even attempting to voice their concerns regarding the "location" of Ameren's proposed landfill. It is not difficult to imagine citizens intimidated by these circumstances, as many people are nervous about public speaking, could not use the remarks they had prepared, and could not voice their true concerns.

At bottom, the Record demonstrates that while the zoning amendments were drafted to apply solely to Ameren’s proposed Labadie landfill, the Commission prohibited testimony on precisely that – and only that – subject. The hearing was thus not “on” the proposed amendments, and did not satisfy the hearing requirements under §64.875, R.S.Mo., and Article 14, §323, of the Franklin County Zoning Regulations.

Appellants urge the Court, as the Court of Appeals decided, to reverse the Circuit Court’s dismissal of Count I. If the Court rules on the merits of Count I, the Record supports a ruling in favor of Labadie Neighbors.

II. THE CIRCUIT COURT ERRED IN UPHOLDING THE FRANKLIN COUNTY COMMISSION’S DECISION TO ADOPT THE COAL ASH LANDFILL ZONING AMENDMENTS BECAUSE THE AMENDMENTS ARE UNLAWFUL IN THAT THEY FAIL TO PROMOTE THE COUNTY’S HEALTH, SAFETY, AND GENERAL WELFARE.

If the Court reverses the Circuit Court’s dismissal of Count I or rules in favor of Labadie Neighbors on the merits, it need not consider Count II because an invalid hearing nullifies the zoning amendments. Even if the Court reaches Count II, however, the County Commission’s decision to adopt the amendments was still unlawful because they do not promote the county’s health, safety, and general welfare.”

A. Standard Of Review

There are two aspects to the standard of review. One is straightforward, the other charts new territory.

The straightforward aspect is that this Court reviews the decision of the County Commission, not that of the Circuit Court. *State ex rel. Remy v. Alexander*, 77 S.W.3d 628, 629-30 (Mo.App. 2002); *State ex rel. Cooper v. Cowan*, 307 S.W.2d 676, 678-79 (Mo.App. 1957).

Less well-settled is the test the Court applies in reviewing the County's decision. This appears to be the first opportunity for this Court to consider the issue since holding that certiorari is the sole remedy for challenging such decisions. *Gash v. Lafayette County*, 245 S.W.3d 229, 232-34 (Mo. banc 2008). This Court should inquire whether the County's decision is supported by substantial and competent evidence in the County's Record. *State ex rel. Remy v. Alexander*, 77 S.W.3d at 629-30. The Court is to "decide whether such tribunal could have reasonably made its findings, and reached its result, upon consideration of all of the evidence before it; and to set aside decisions clearly contrary to the overwhelming weight of the evidence." *State ex rel. Cooper v. Cowan*, 307 S.W.2d at 679.

Prior to *Gash*, parties typically challenged legislative zoning decisions in declaratory judgment and injunction proceedings. In those cases, appellate courts applied a "fairly debatable" standard of review on a de novo basis. *See, e.g., Fairview Enterprises, Inc. v. City of Kansas City*, 62 S.W.3d 71, 76-77 (Mo.App. 2001). In contrast, appellate courts applied the substantial and competent evidence test when reviewing quasi-judicial or administrative decisions of boards of zoning adjustment. Such cases involve de novo review, based on the zoning board's record. *See, e.g., State ex rel.*

Dierberg v. Board of Zoning Adjustment of St. Charles County, 869 S.W.2d 865, 868 (Mo. App. 1994).

Gash held that under §64.870.2, R.S.Mo., the statutory provision under which Count II in this case also arises, a certiorari petition is the sole means of challenging all county zoning decisions – regardless of whether a party is challenging a quasi-judicial or administrative zoning decision such as a ruling on a zoning permit or variance, or a legislative decision such as an amendment to zoning regulations. *Gash v. Lafayette County*, 245 S.W.3d at 232-34.¹³

Key to the standard of review is the Court’s holding that the plain language of §64.870.2 eliminates the distinction between legislative versus quasi-judicial zoning decisions by requiring certiorari review for all zoning decisions. *Id.*, 245 S.W.3d at 233-34. Thus, the precedential value of pre-*Gash* zoning cases would seem to turn not on whether they involved legislative or quasi-judicial decisions, but rather whether they involved certiorari review.

One of the few pre-*Gash* cases that involved certiorari review of a legislative zoning decision exemplifies the approach going forward. In *State ex rel. Cooper v. Cowan*, the Court reviewed de novo the decision of the county zoning body (known then

¹³ Franklin County adopted its zoning regulations under the “alternate zoning” enabling provisions in §§64.800-64.905, R.S.Mo.; judicial review by certiorari is in §64.870.2, R.S.Mo. R.1776 (Vol.10). Similar certiorari review provisions appear in the other zoning enabling statutes applicable to counties. *See* §§64.120.3 and 64.660.2, R.S.Mo.

as the county court) rather than the decision of the circuit court, and it applied the substantial and competent evidence test to its review of the county's record. 307 S.W.2d at 677-79.

Because of the certiorari context, the Circuit Court's review of the merits of the Commission's zoning decision was limited to the Record submitted in response to the Court's Writ of Certiorari. Thus, this Court sits in the same position as did the Circuit Court in reviewing the County's Record to determine whether the Franklin County Commission acted lawfully in amending its zoning regulations to allow Ameren's proposed landfill. And, because Count II focuses solely on the County's Record, the standard of review applicable in record review cases – i.e., the substantial evidence test – applies here.

Even if this Court applies the fairly debatable test here,¹⁴ the County Commission's decision to adopt the landfill zoning amendments should be reversed because there is no evidence in the Record establishing that they promote the health, safety, and welfare of the County.

¹⁴ The "fairly debatable" test applied in pre-*Gash*, non-certiorari, legislative zoning cases requires the party challenging the zoning decision first to overcome a presumption of reasonableness. Then, the court determines whether the zoning decision was fairly debatable. See, e.g., *Fairview Enterprises, Inc. v. City of Kansas City*, 62 S.W.3d 71, 76-77 (Mo.App. 2001).

B. The County Commission's Intentional Decision To Shield Itself From Learning About The Coal Ash Landfill Amendments Overcomes Any Presumption Of Reasonableness That Might Otherwise Apply To Its Decision.

The manner in which the Commission handled the zoning amendments defeats any contention that it acted reasonably. As set forth above, the Commission knew that the proposed amendments were designed solely and specifically to enable Ameren to build a coal ash landfill alongside its Labadie plant. Yet the Commission expressly denied the existence of Ameren's proposal, pretended that the amendments were only generic in nature, and prevented the public from discussing Ameren's proposed landfill at the public hearing.

The County Commission's refusal to hear testimony about Ameren's proposed landfill and about risks associated with Ameren's Labadie Site overcomes any presumption of reasonableness that might otherwise attach to the Commission's decision. There is no rational justification for an elected official's insistence on *not* learning about the nature and impacts of his or her decision. Yet that is precisely what the County Commission did in this case. Moreover, given the risks at issue – e.g., contamination of residents' drinking water wells and potentially enormous clean-up liability imposed upon the County – it was irrational for the Commissioners to refuse to hear testimony discussing the risks associated with the sole project that they were fixing to approve.

C. The Zoning Amendments Are Unlawful Under Franklin County Regulations Because They Do Not Promote The County's Health, Safety, And General Welfare.

Franklin County's zoning regulations establish a legal test for zoning amendments: any amendment adopted by the Commission "*must promote* the health, safety, ... and general welfare of Franklin County." R.1927 (Article 14, § 325) (Vol.10).

The County's zoning regulations do not define the term "promote." Thus, its ordinary meaning governs. "Words and phrases shall be taken in their plain or ordinary and usual sense." §1.090, R.S.Mo. When a statute does not define a term, "the text's 'plain and ordinary meaning' ... may be derived from a dictionary." *Gash v. Lafayette County*, 245 S.W.3d at 232.

The plain meaning of "promote" is "to contribute to the growth or prosperity of: further." MERRIAM-WEBSTER DICTIONARY, at <http://www.merriam-webster.com/dictionary/promote>.¹⁵ "Promote" is a positive term; it connotes making something better.

Nothing in the Record demonstrates that the coal ash landfill zoning amendments contribute to the growth or prosperity of Franklin County. As lengthy as the Commission's Record is, it contains no evidence that the amendments are beneficial to

¹⁵ See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED: "Promote" means "to contribute to the growth, enlargement, or prosperity of: further; encourage.

Franklin County. To the extent there is a debate regarding Ameren's proposed landfill, it is limited to the degree of the risks posed by that proposal. Utterly absent from the Record is any evidence that the zoning amendment authorizing Ameren's proposed coal ash landfill will *promote* the County's health, safety, and general welfare.

1. The Record Contains No Evidence That The Zoning Amendments Conserve Or Protect Property Values In Franklin County.

The County's zoning regulations require that amendments promote public health, safety, and general welfare by, among other things, "conserving and protecting property and building values." R.1927 (Vol.10). The Record contains undisputed evidence that the coal ash landfill amendments threaten property values, and it contains no evidence that the amendments protect property values.

Public knowledge of Ameren's proposed coal ash landfill has already adversely affected the real estate market in Labadie. Roberta Rollins, an experienced real estate broker in Franklin County, informed the Commission that one family with whom she was working abandoned its plan to purchase land and build a home in Labadie upon learning about the proposed landfill. R.1291 (Vol.7). Another broker lost a sale for the same reason. *Id.* Ameren's landfill could inhibit property sales indefinitely insofar as property owners must disclose environmental concerns that may affect the property, including the existence of a coal ash landfill in the area. R.1292 (Vol.7).

The Commission was also informed that landfills depress property values up to 5.7 miles from the Site. R.1291 (Vol.7). High-volume landfills that receive at least 500 tons

of waste per day have the most significant impacts on property values. *Id.* Ameren's Labadie plant currently generates 1,850 tons of coal ash per day. R.3685 (Vol.20).

Numerous residents expressed concerns about the impact of the proposed landfill on their property values. *See, e.g.*, R. 509-10, 513, 529-31, 559 (Vol.3); R.591, 747 (Vol. 4); R.873-74 (Vol.5); R.973-74 (Vol. 6); and R.1429-30 (Vol.8). Dave Greeley, who lives on the bluffs with a view of the Missouri River floodplain, testified that the assessor had specifically included the value of his property's "panoramic view" in the property assessment. R.509-10 (Vol. 3).

We worry about our property values. Will our panoramic view of a landfill reduce our property's value and the enjoyment of our home? If our property value is decreased, [sic] certainly will also reduce the property tax paid to the County. Certainly there is a stigma of living next to a landfill.

R.513 (Vol.3).

In addition, the Record establishes without dispute that Ameren's proposed coal ash landfill will make the surrounding farmland less valuable. According to Dr. Robert Criss:

[T]he upflow of groundwater will be impeded directly beneath the large landfill, so upwelling water will be displaced laterally, particularly to the remaining agricultural lands to the northeast. This displaced flow will further increase the water table beneath those fields, increasing waterlogging of the soils, and will impede the use of farm machinery, effectively shortening the growing season.

R.2359 (Vol.13). *See also* R.186-87 (Vol.2), R.1075 (Vol.6).

The Record is devoid of evidence that the landfill zoning amendments conserve and protect property values. Nothing in the Record refutes the evidence that the proposed landfill has already resulted in two lost property sales, and that the landfill will harm surrounding farming operations. The Record contains no evidence that the proposed landfill will be beneficial to property values. To the contrary, the evidence in the Record establishes that the Commission acted unlawfully in adopting the amendments because it lacked substantial and competent evidence that the amendments would conserve and protect property values. The Record also demonstrates that the Commission acted unlawfully in adopting the amendments because it was not even fairly debatable that the amendments would conserve and protect property values. *See Fairview Enterprises, Inc. v. City of Kansas City*, 62 S.W.3d 71, 77-80 (Mo.App. 2001) (overturning Kansas City's decision to allow an asphalt plant to relocate where numerous landowners testified that the plant could adversely affect their property values).

**2. The Record Contains No Evidence That The Zoning Amendments
Promote The Health And Safety Of Franklin County.**

The Record contains no evidence that the zoning amendments promote or enhance the health and safety of Franklin County. To the contrary, coal ash contains toxins that can leach out and endanger health when ingested or inhaled. The sole site designated by the Commissioners' zoning amendments for a coal ash landfill (i.e., Ameren's Labadie Site) might as well be labeled "Beware: Risks of Groundwater and Surface Water Contamination." It is in the floodplain and floodway of the Missouri River, in a seismic

impact zone, and has an unusually-high groundwater table. While each of these features alone would be cause for concern, their combined impact magnifies the risk that the amendments will result in contaminated groundwater and surface water. R.181-97 (Vol.2). Although Ameren attempted to downplay the risks posed by these features of the Site, the extent of the risk is ultimately beside the point for purposes of this case (but not in the Labadie Neighbors' lives). The key fact here is that the Record provides no evidence that the zoning amendments' designation of the Labadie Site for a coal ash landfill will enhance or promote the County's health and safety.

a. Coal Ash Contains Harmful Toxins That Can Contaminate And Have Contaminated Groundwater And Surface Water.

The Record contains uncontroverted evidence that coal ash contains numerous toxins. As Dr. Greg Evans, Director of the Public Health Program at St. Louis University School of Public Health, told the Commission:

Typically coal ash contains arsenic, lead, mercury, ... chromium, and selenium as well as a number of other metals. All of these substances can be toxic.

R.565 (Vol.4). *See also* R.566-7 (Vol.4), R.1136-37 (Vol.6), R. 2409 (Vol.13), R.3453 (Vol.19); R.3702-06 (Vol.20), R.4162-9 7(Vols.22-23). Ameren's consultant, Dr. Lisa Bradley, agreed: "Arsenic, barium, cadmium, and chromium, many of the constituents that we've talked about tonight, these are all considered to be trace constituents of coal ash." R.1136-37 (Vol.6).

Dr. Bradley's effort to minimize the hazards of coal ash misses the mark. Her claim that any substance can be toxic depending on the amount of exposure (R.1131-33) (Vol.6) is belied by the fact, noted by Dr. Evans, that "many of the substances in coal ash can be harmful at very low levels." R.565 (Vol.4). As to her claims that the toxins in coal ash are "not dissimilar to" – although in admittedly greater concentrations than – some materials naturally occurring in soil (R.282-83 (Vol.2)), toxins in coal ash pose a much greater health threat than when present in soil. As Charles Norris, a hydrogeologist with extensive experience involving coal ash landfills, explained to the Commissioners:

CCWs [coal combustion wastes, also known as coal ash] are ... loaded with many toxins and substantial masses of toxins. The toxins that are in them may be in the general range of those in the soils; although they're typically higher than those in soils. But more important, they're in a material and in a form that they are far more mobile than they are in soils. That's why they leach readily from coal ash, and that's why they are mobile in water.

When they mobilize, when they move, they contaminate groundwater and surface water at levels that are toxic to humans and the environment. ...

[I]t's not a matter of if the toxins and the CCW in a landfill will get out into the surface water and groundwater affecting...human health and environment. They will.

R.1227-28 and 1233 (Vol.7).

The Record contains numerous reports of such contamination occurring all over the country, and in concentrations far exceeding health and environmental standards for drinking water. R.707-09 (Vol.4), R.3184-3453 (Vols.18-19), R.3719-48 (Vol.20), R.3749-3890 (Vols.20-21), R.3891-3960 (Vol.21), R.4184-90 (Vol.23).

One example of particular relevance is Ameren's Venice plant across the Mississippi River from downtown St. Louis. Although Ameren stopped burning coal and disposing of coal ash at that plant in 1977, toxins including arsenic, selenium, boron, iron, and manganese continue to leak from the ash ponds into the groundwater. The concentrations of arsenic are 38 times higher than federal drinking water standards as far away as 400 feet downstream from the ponds. R.712-15 (Vol.4), R.3270-74 (Vol.18).

In Oak Creek, Wisconsin, twelve private wells within a two to five mile radius of coal ash landfills were contaminated with coal ash toxins, forcing residents to rely on bottled water for drinking water. R.3444-52 (Vol.19). In Pines, Indiana, the Environmental Protection Agency ("EPA") found that arsenic, boron, lead, and molybdenum exceeded health-based standards in off-site residential wells, and required the responsible parties to provide alternate water supplies and conduct other cleanup activities under the federal Superfund law. R.3927-28 (Vol.21).

b. The Toxins In Coal Ash Can Cause Serious Health Problems When Ingested.

The Record contains uncontroverted evidence that the heavy metals that leach out of coal ash and contaminate groundwater and surface water can cause a wide variety of serious health problems, including cancer, brain damage, and respiratory illness. R.2439-97 (Vol.14), R.4170-74 (Vol.22).

One of the most serious health risks associated with exposure to coal ash toxins is cancer. Several reports submitted to the Commissioners document that chronic exposure to arsenic, cadmium, and chromium can cause several kinds of cancer, including skin, bladder, lung, stomach, intestinal, and kidney cancers. R.2393-2407, 2419-31 (Vol.13), R.2439-97 (Vol.14), R.4162-97 (Vols.22-23). As Dr. Evans explained to the Commissioners:

The scientific literature also indicates that living next to a coal ash disposal site can increase one's risk of cancer or other diseases. This is particularly true for individuals who get their drinking water from wells. It has been determined that people exposed to coal ash can have as much as 1 in 50 chance of getting cancer from drinking water contaminated by arsenic, one of the most common and dangerous pollutants in coal ash.

R.565 (Vol.4). In Uniontown, Ohio, where extensive groundwater contamination resulted from an industrial coal ash landfill, local authorities documented a high incidence of cancer in several nearby neighborhoods, including reports of cancer in nearly everyone home in one of those neighborhoods. R.3351-62 (Vol.18).

The risks associated with coal ash are by no means limited to cancer. As Dr. Evans explained to the Commissioners:

[T]he substances in coal ash have been shown to cause several types of cancer, heart damage, lung disease, kidney disease, reproductive problems, gastrointestinal illness, birth defects, impaired bone growth in children,

nervous system impacts, cognitive deficits, developmental delays and behavioral problems.

As you can see, coal ash has the potential to injure all of the major organ systems of the body, damage physical health and development, and even contribute to death.

R.566-67 (Vol.4).

In sum, numerous reports in the Record, and the testimony of public health expert Dr. Evans, make clear that coal ash is harmful to people, particularly when ingested through contaminated drinking water. *See, e.g.*, R.561-67 (Vols.3-4), R.2393-2407, 2419-31 (Vol.13), R.2439-97 (Vol.14), R.4162-97 (Vols.22-23).

c. Airborne Coal Ash Can Cause Serious Health Problems.

The Record also contains uncontroverted evidence that airborne coal ash can cause serious respiratory damage. Janet Dittrich, a Labadie resident and teacher, summarized for the Commissioners an EPA study highlighting the air pollution risks associated with coal ash landfills.

I want to specifically talk about my concerns about how landfills can harm the air quality in Franklin County. ...

According to the EPA, with dry landfills coal combustion waste will be emitted into the air by loading, transporting, unloading and wind erosion. Once in the air, it will likely migrate off-site as fugitive dust. As a result, workers and nearby residents could be exposed to significant amounts of coarse particulate matter and fine particulate matter.

... The air pollution associated with the coal ash landfills, particularly the fine particulate matter,... is especially harmful to human health...

The EPA summarizes the health threats posed by fine particulate pollution as follows: When breathed in, these particles can reach the deepest regions of the lungs. Scientific studies have found an association between exposure to particulate matter and significant health problems, including aggravated asthma, chronic bronchitis, emphysema, lung cancer, irregular heartbeat, heart attacks, congestive heart disease, and stroke.

This fine particulate pollution is of special concern here in Franklin County because we currently do not meet the ... national air quality standards for fine particulate matter. The Labadie Power Plant already emits significant amounts of fine and coarse particulate pollution, as well as enormous amounts of sulfur dioxide, which contributes to fine particular pollution in the air.

This means we already have a high level of fine particles in our air, and adding on to this can only increase the health risks previously mentioned to the Franklin County residents.

R.1181-83 (Vol.7).

d. The Zoning Amendments Designate A Landfill Site Packed With Inherent Risks That Coal Ash Toxins Will Escape And Contaminate Groundwater And Surface Water.

The fact that coal ash contains harmful toxins is no theoretical matter for Labadie Neighbors and other Franklin County residents. The Site is replete with risks that coal ash will escape the landfill and contaminate groundwater and surface water.

i. The Site Has An Exceptionally-High Groundwater Table, Exacerbating The Risk Of Groundwater Contamination.

The Record contains undisputed evidence that the Site is awash in groundwater, heightening the risk that coal ash toxins will leak out of the landfill and contaminate the groundwater. R.2263, 2358-59 (Vol.13). The high groundwater table is due in large part to the fact that the Site was actually within the Missouri River until recent times. “[T]his area was the site of where the river channel formerly was, even within the last century, and so the water table is exceptionally high.” R.182 (Vol.2). *See also* R.3485-91 (Vol.19). Groundwater at the Site is close to the surface, and regularly comes above the ground surface.

[W]e have groundwater in this area commonly surfacing coming all the way to the topographic surface. It happens every year.

R.183 (Vol.2). *See also* R.376 (Vol.3), R.1079 (Vol.6), R.2359 (Vol.13). Nothing in the Record refutes this.

The high groundwater table poses a significant risk of coal ash contaminating the groundwater in at least two respects. First, groundwater will come up directly to the

landfill's liner and can come into contact with coal ash through defects in the landfill's liner. R.187 (Vol.2), R.1079 (Vol.6), R.2359 (Vol.13). As hydrogeologist Charles Norris informed the Commission, landfill liners do not prevent groundwater contamination:

All landfills leak, and when they leak, the toxins get out of them. Liners in landfills help. They slow down the rate of migration. They don't stop it. Clay liners slow the movement away from landfills, but they don't stop it. They delay the problem. Synthetic liners, they too slow it, but they don't stop it. Synthetic liners leak. They leak at measurable quantities. They leak because there are manufacturing flaws, they leak [because] there are construction flaws, they leak because toxins defuse through the plastic, even if there's no hole there, and ... plastic liners deteriorate. They don't last forever. The toxins in the CCW do.

R.1230-31 (Vol.7).

Second, there is a risk that the proposed landfill will actually be sitting in the groundwater. Ameren's plans depict the base of the landfill lying four to five feet below the top of the groundwater table in places. R.2263, 2290 (Vol.13), 4116-17 (Vol.22). Proposed federal regulations require the base of a coal ash landfill to be at least two feet above the upper limit of the groundwater table. R.4075 (Vol.22).

In addition, because the Labadie plant's existing ash ponds have been leaking since 1992, and groundwater moves from the ash ponds toward the proposed landfill Site during portions of the year, the groundwater at the Site may already be contaminated or at

risk of contamination. R.2261-62 (Vol.13), R.3711-13 (Vol.20). The Record contains no dispute on these points.

ii. The Site Is In The Floodplain And Floodway Of The Missouri River.

The Record establishes that the Site is in the 100-year floodplain and floodway of the Missouri River as determined by the Federal Emergency Management Agency (“FEMA”). R.4305 (Vol.23). The County Commissioners were well aware of this fact before they adopted the zoning amendments. R.4303-05 (Vol.23). FEMA held a public information session on draft revisions to its floodplain/floodway maps in the County government building in January 2010. *Id.* Five months prior to adopting the coal ash landfill zoning amendments, the County adopted the revised FEMA maps into the floodplain appendix to its zoning regulations. R.2009 (Vol.11), R.4303-05 (Vol.23). LEO highlighted to the Commission the risks associated with siting a coal ash landfill in the floodway:

The floodway is the area where flood waters flow with the greatest velocity and are most destructive. ... Fast-moving waters in the floodway will increase the risk that flooding will spread toxic heavy metals from the landfill, threatening contamination of groundwater, farmland, and property throughout the area.

R.4303-04 (Vol.23). LEO provided the Commissioners with a map locating Ameren’s proposed landfill Site within both the 100-year floodplain and the regulatory floodway on the FEMA maps adopted by the Commission. R.4305 (Vol.23).

The risks associated with building a coal ash landfill in the floodway were also highlighted for the Commissioners. Dr. Criss, an expert on the Missouri River and its floodplain, testified:

[A] flood way... must be kept free of encroachment. ... [T]he flood way is the designated region where the hundred-year flood has to go. ... [I]f you start encroaching on the flood way by building stuff, the river doesn't have enough room to move its water, ...and so you ... will tend to pile up water upstream in places such as Augusta and Labadie or anybody upstream is...potentially going to experience problems with flood way encroachment.

R.183-85 (Vol.2).

Dr. Criss also described the risks associated with siting a coal ash landfill in the Missouri River floodplain. Flooding in this area has occurred approximately every 14 years over the historical record; the Site was flooded most recently in 1986 and 1993.

R.181 (Vol.2), R. 1073 (Vol.6), R.2352-57 (Vol.13).

This area has been recurrently flooded, it will be flooded in the future, and there is no levee or structure that man can build that's going to change the geologic reality because it's a flood plain.

R.1073 (Vol.6). The extent of Missouri River flooding in the Labadie area has been steadily increasing since recordkeeping began in the late 1800s, and is predicted to continue to do so. R.1075-77 (Vol.6); R.2352-57, 2383 (Vol.13).

iii. The Amendments' Requirement Of A Berm Around The Landfill Does Not Alleviate Flood Concerns, And Will Actually Increase Flood Risks.

While the zoning amendments require a berm around the landfill, the Record contains undisputed evidence that a berm will not alleviate the risks of flooding at the Site and will increase flooding elsewhere in the area. FEMA warns that berms or levees cannot eliminate flood risks:

All levees are designed to provide a specific level of protection and can be overtopped in larger flood events. Levees require regular maintenance to retain their level of protection. The fact is, levees can and do decay over time, and maintenance can become a serious challenge.

R.2929-30 (Vol.16). While levees require regular maintenance, the zoning amendments do not require Ameren or anyone else to maintain the berm – of particular concern after the Labadie plant closes and the landfill is no longer in use. R.156-63 (Vol.1).

Over time, levees fail or are overtopped by water. R.1065 (Vol.6), R.2918, 2929, 2933 (Vol.16). Levee failure can be catastrophic, causing worse flood damage than if the levee was not there in the first place. R.2918, 2929 (Vol.16).

Even when berms or levees are functioning as intended, they displace flood waters that would otherwise flow through the “protected” area and thereby increase flooding in surrounding areas. R.183-85 (Vol.2), R.1065-68 (Vol.6). The Association of State Flood Plain Managers (“ASFPM”) explains as follows why levees should not be used to protect undeveloped land for proposed development – the precise situation here.

It has long been recognized that flood protection provided by levees is a double-edged sword. On one hand, levee systems have provided flood protection. On the other hand, given enough time levees either will be overtopped or will fail – leading to severe flood impacts on an unsuspecting population. Unlike a natural flood, levee failure flooding is often rapid, forceful, extremely damaging, and occurs with little or no warning.

Because of the nature of levee failure flooding, the ASFPM believes that *levees are not a wise community choice and should never be used to protect undeveloped land so development can occur in the flood risk area behind the levee.*

Levees by their very nature adversely affect properties that are upstream, downstream, and adjacent to or across the waterway. Levees transfer flood waters onto other property or communities,...generally increase the depth and velocity of flood waters....

R.2918, 2927 (Vol.16).

iv. The Designated Landfill Site Is In An Earthquake Hazard Area.

The Site is in an earthquake hazard zone at risk of liquefaction according to the Missouri Department of Natural Resources. R.2354, 2418 (Vol.13). Liquefaction means that during intense shaking caused by an earthquake, the soil will “turn to goo.” R.201 (Vol.2). Liquefaction could cause the berm to fail, the landfill’s liners to crack, and the

landfill to slump, all of which could release coal ash toxins into the environment.

R.2256, 2354 (Vol.13).

- e. Groundwater Contamination At The Site Could Result In Contamination of Nearby Residents' Wells.

All of the above risks that characterize the Site – high groundwater table, location in floodplain and floodway, and location in earthquake hazard zone at risk of liquefaction – individually and collectively create a likelihood that the proposed landfill will result in groundwater contamination.

Groundwater contamination at the Site could harm nearby residents, who rely on groundwater for drinking water and other domestic purposes. As depicted on a map provided to the County Commission, numerous groundwater wells are in the immediate vicinity of the Site. R.4265 (Vol.23). Because the groundwater that supplies those wells is connected to the groundwater at the Site, the wells are at risk of contamination if toxins leak out of the landfill. R.2257-59, 2358-62 (Vol.13). Dr. Criss warned that these wells are at risk of contamination if the proposed landfill is constructed at Ameren's Labadie Site. R.195, 197 (Vol.2), R.2358-62 (Vol.13).

There are private wells very, very close to the plant facility. ... *So any contamination in the floodplain could easily get into private wells.*

R.195, 197 (Vol.2). *See also* R.2358-62, 2387 (Vol.13).

Several residents voiced concerns about their drinking water wells becoming contaminated by the proposed coal ash landfill. *See, e.g.,* R.511-13 (Vol.3), R.569-71, 747 (Vol.4), R.2304 (Vol.13), R.3482 (Vol.19), R.4228, 4237 (Vol.23).

The Record here vividly demonstrates that the zoning amendments' selection of a single, risky Site for the construction of a coal ash landfill endangers the County's health and safety. The Record lacks any evidence that the zoning amendments' selection of the Labadie Site for the only allowable coal ash landfill promotes the County's health and safety, as is required of zoning amendments under Article 14, § 325, of the County's Zoning Regulations. Any conflicting evidence at best creates a question about the extent of the health and safety risks. The complete absence of evidence indicating that the amendments promote the County's health and safety renders the issue not even fairly debatable.

3. The Zoning Amendments Do Not Promote The General Welfare Of Franklin County.

a. The Landfill Zoning Amendments Expose The County To Potential Liability For Contamination Caused By The Labadie Landfill.

The Record is devoid of evidence that the zoning amendments promote the general welfare of Franklin County. In fact, in the event that Ameren's coal ash landfill causes environmental contamination, the County could be held liable for enormous cleanup costs under the Comprehensive Environmental Response, Compensation, Liability, and Recovery Act, 42 U.S.C. §9601, *et seq.* ("Superfund"). The federal Superfund law imposes strict liability for cleanup costs on, among others, parties deemed to be current or prior "operators" of contaminated sites, 42 U.S.C. §9607(a)(1) and (2), and parties that "arrange" for the disposal of hazardous substances, 42 U.S.C. §9607(a)(3).

Franklin County could be held liable as an operator under Superfund because the Commission, through the zoning amendments, selected the Site for a coal ash landfill. As Ameren’s attorney stated, Ameren’s proposed Labadie landfill Site is “the only game in town that’s affected by the utility waste section of this ordinance.” R.1114 (Vol.6). When the State of California played a key role in the siting of a landfill (among other activities), it was later held liable under Superfund for sixty-five percent of the costs of cleaning up contamination attributable to the landfill. *United States v. Stringfellow*, 1995 WL 450856 **2, 5 (C.D.Cal. Jan. 23, 1995) (adopting Special Master’s Report and Recommendation, *United States v. Stringfellow*, 1993 WL 565393 (C.D.Cal. Nov. 30, 1993)).

Douglas Drysdale, a local resident and attorney representing large companies in Superfund lawsuits, warned the Commission of such potential liability:

[I]f a Coal Combustion Waste landfill built under the Proposed Amendments were to negatively affect human health and the environment, now or in the future, it is assured that lawsuits will follow and Franklin County would likely be a defendant.

Under Federal Superfund Law, a “State”, “municipality”, “commission”, and/or “political subdivision of a State” may be held liable for costs to clean-up a hazardous waste site if it arranged for disposal or treatment of hazardous substances at the site. *See* 42 U.S.C. 9601(21) and 9607(a)(1).

...[S]uch liability has been imposed where the state “select[ed],

investigat[ed], design[ed], and supervis[ed] construction of the Site.” *AMW Materials Testing, Inc. v. Town of Babylon*, 584 F.3d 436, 447, fn.9 (2d Cir. 2009). ...

Under the Proposed Amendments..., the County exerts measures of control over the design, investigation, and/or supervision of a Coal Combustion Waste landfill, and most importantly, effectively selects the Missouri River bottoms in Labadie as *the site* for a Coal Combustion Waste landfill

R.3641-44 (Vol.20) (emphasis in original).

Waste disposal cleanup lawsuits can involve hundreds of millions of dollars.

R.3641 (Vol.20). In exposing the County to such enormous potential liability, the Commission’s adoption of the zoning amendments threatens rather than promotes the County’s general welfare.

b. The Landfill Zoning Amendments Will Increase Truck Traffic Through Downtown Labadie.

The Record contains undisputed evidence that the County’s decision to authorize a coal ash landfill in Labadie will undermine ongoing efforts to improve the downtown Labadie business district. R.793-803 (Vol.5). Downtown Labadie helps to maintain and promote the economy of Franklin County. R.793, 799 (Vol.5). It attracts tourists visiting the region for its food and wine. R.793 (Vol.5). In 2007, the County applied for and was awarded a “Great Streets” grant from the East-West Gateway Council of Governments to enhance downtown Labadie. R.483-85 (Vol.3), R.793-95 (Vol.5), R.3708 (Vol.20).

However, increased truck traffic from the construction of the coal ash landfill could undermine the Great Streets initiative. R.485 (Vol.3), R.801 (Vol.5). Downtown Labadie lies close to the Labadie Plant. R.799-801 (Vol.5), R.3507 (Vol.19). The road that runs through downtown Labadie is the only all-weather route leading to and from the plant and the proposed landfill Site. R.801 (Vol.5). The road is already deteriorated, and additional truck traffic will continue to deteriorate the roads through and discourage the redevelopment of downtown Labadie. R.801 (Vol.5), R.3708 (Vol.20), R.4144 (Vol.22).

The County's decision to adopt the zoning amendments, exposing the County to potentially enormous liability and undermining economic development efforts in downtown Labadie, violates the requirement that zoning amendments promote the County's general welfare. The Record is devoid of any – let alone substantial and competent – evidence that the landfill would promote the welfare of the County. Accordingly, this issue is not fairly debatable.

4. The Zoning Amendments Do Not Conform To The County's Master Plan.

The County's zoning regulations require that amendments “must promote the health, safety...and general welfare of Franklin County ... in accordance with the master plan adopted by Franklin County.” R.1927 (Vol.10). But the Record contains uncontroverted evidence that the zoning amendments do not conform to the County's Master Plan.

The Master Plan's goals include protecting and preserving Franklin County's rural character; this is described as the strongest common value among County residents. R.1515 (Vol.8). The zoning amendments undermine, rather than further, that goal. Dan

Lang, a planner who was one of the principal authors of the Master Plan, R.4139 (Vol.22), concluded that the proposed coal ash landfill “does nothing to further the goal of protecting and preserving the rural character of the County.” R.4148 (Vol.22). To the contrary, Ameren’s proposed coal ash landfill would replace 400 acres of productive farmland in the middle of an active agricultural area. R.249 (Vol.2), R. 559 (Vol.3), R.873-84 (Vol.5).

Another goal of the Master Plan is to “[m]inimize ground contaminants to protect groundwater resources.” R.1523 (Vol.8). As explained in detail above, the Record contains extensive evidence that the zoning amendments threaten groundwater contamination. In addition, the amendments promote development in the floodplain, directly undermining the Master Plan’s action item to “[k]eep development out of flood-prone areas.” R.1584 (Vol.9).

As Mr. Lang told the Commissioners: “the proposed project is inconsistent with your current Master Plan. ... That’s my opinion as a professional planner.” R.397 (Vol.3). *See also* R.4148-49 (Vol.22).

5. Precedent Supports Holding The Amendments Unlawful Because The County Lacked Any Evidence That They Promote The County’s Health, Safety, And General Welfare.

While zoning decisions are notably fact-specific, *see, e.g., Allega v. Associated Theatres, Inc.*, 295 S.W.2d 849, 858 (Mo.App. 1956), there is ample precedent for holding the County’s decision unlawful where zoning amendments fail to promote the County’s health, safety, and general welfare.

In *State ex rel. Cooper v. Cowan*, 307 S.W.2d 676, 678, 680 (Mo.App. 1957), the Circuit Court and Court of Appeals found that the record lacked substantial and competent evidence to support a zoning change allowing a gas station in a residential area. The record contained testimony that the gas station would create fumes, a fire hazard, a traffic hazard, and other safety hazards, and failed to show that the proposed zoning change furthered the public health, safety, morals, or general welfare.

Similarly, the Court invalidated Kansas City's zoning change that would have allowed the relocation of an asphalt plant. *Fairview Enterprises, Inc. v. City of Kansas City*, 62 S.W.3d 71 (Mo.App. 2001). Property owners living near the rezoned area and proposed plant relocation site had expressed concerns regarding increases in traffic, smoke, dust, noise, and fumes that would result from the rezoning and plant relocation. *Id.* at 78-79.

“If a decision bears no substantial relationship to the public health, safety, morals, or general welfare, this Court will consider it arbitrary and unreasonable.” *State ex rel. Helujon Ltd.*, 964 S.W.2d at 536. Having reviewed the record and the arguments advanced by the Appellants, we are unable to discern any substantial relationship between the City's decision to allow relocation of the asphalt plant and the public health, safety, morals or general welfare.

Id. at 83.

The Court also invalidated Jackson County's decision to change the zoning of a 150-acre area from agricultural to residential where, as here, opponents documented

potential health risks from the sewage disposal associated with the new residences, proponents failed to show a benefit to the County, and the County's decision therefore lacked competent and substantial evidence in the record and was arbitrary and capricious. *Plaas v. Lehr*, 538 S.W.2d 919, 922 (Mo.App. 1976).

Notwithstanding "rather sharp conflict" in the testimony, the courts invalidated a zoning change from residential to commercial to allow a drive-in movie theater. *Allega v. Associated Theatres, Inc.*, 295 S.W.2d 849, 856, 857-58 (Mo.App. 1956). The Court of Appeals held the rezoning ordinance unlawful because allowing the drive-in theater in this context, nearby a residential area, "would not lessen congestion in the streets, but would increase the same; ... would not tend to secure safety from fire, panic and other danger, but would increase the same; ... would not facilitate the adequate provision of transportations, schools, parks, etc., but would restrict, hamper, and interfere with the full uses thereof." *Id.* at 857.

In this case, the zoning amendments do not promote Franklin County's health, safety, and general welfare, do not conserve and protect property values, and are not consistent with the Master Plan. No evidence disputes that the amendments will hurt Franklin County's general welfare, undermine its property values, and deviate from its Master Plan. The only dispute is over how serious are the health and safety risks. The Record here is devoid of any evidence that the zoning amendments *promote* the County's health, safety, and general welfare.

CONCLUSION

Appellants Labadie Neighbors respectfully request that this Court reverse the Circuit Court’s Order dismissing Count I of the Petition. Labadie Neighbors have pled an actionable claim that the “hearing” at which the Franklin County Commission refused to let the public discuss Ameren’s proposed landfill, the subject of the zoning amendments, was not a valid public hearing as required by §64.875, R.S.Mo., and Article 14, §323, of the Unified Land Use Regulations of Franklin County, R.26 ¶¶ 74-75 (Vol.1).

Appellants Labadie Neighbors respectfully request that this Court reverse the Judgment entered by the Circuit Court in favor of Respondents on Count II of the Petition. Reversing the Circuit Court’s dismissal of Count I and remanding for a resolution on the merits of Count I renders any determination as to Count II premature. A ruling in Labadie Neighbors’ favor on the merits of Count I nullifies the zoning amendments and renders a ruling on Count II unnecessary. If the Court reviews Count II on the merits, the absence of evidence that the zoning amendments promote the health, safety, and general welfare of Franklin County renders them unlawful under Article 14, §325, of the Unified Land Use Regulations of Franklin County. R.1927 (Article 14, § 325) (Vol.10). In accordance with §64.870.2, R.S.Mo., the Court should reverse the Circuit Court’s Judgment on Count II.

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that this Appellants' Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b).

Relying on the word count feature of Microsoft Word 2010, the undersigned certifies that the total number of words contained in this brief, exclusive of the cover, certificate of compliance and service, signature block, and appendix, is 15,273.

The undersigned hereby certifies that an electronic copy of the above Substitute Brief of Appellants Ruth Campbell et al., together with the accompanying Appendix to Appellants' Substitute Brief, was served by e-filing on this 29th day of August, 2014 to counsel for Respondent County Commission of Franklin County

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