

IN THE SUPREME COURT OF MISSOURI

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MAURICE GASH and NANCY GASH, )  
 )  
 Plaintiffs-Respondents-Crossappellants, )  
 )  
 vs. ) SC# 88437  
 )  
 LAFAYETTE COUNTY and )  
 LAFAYETTE COUNTY COMMISSION, )  
 )  
 Defendants-Appellants-Crossrespondents. )

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APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY  
HONORABLE LARRY HARMAN, JUDGE

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DEFENDANTS-APPELLANTS-CROSSRESPONDENTS' SUBSTITUTE BRIEF

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## **JURISDICTIONAL STATEMENT**

This action is the appeal of a civil case involving zoning issues. Plaintiffs' claim below was that, acting in a legislative capacity, Lafayette County improperly zoned their property by refusing to rezone it from Lafayette County Zoning District A to Lafayette County Zoning District B-2. Plaintiff's requested relief included a declaratory judgment that the zoning was improper, an injunction against Lafayette County, damages for the improper zoning decision, and damages for inverse condemnation based on a regulatory taking. Lafayette County filed a counterclaim in which Lafayette County alleged that Plaintiffs failed to obtain building permits as required by Section 64.865, RSMo.<sup>1</sup> On motion by Defendants, the trial court dismissed all claims as to damages, including the claim for inverse condemnation. After trial, judgment was entered in favor of Plaintiffs on both their claim and Defendants' counterclaim. (L.F. 4, 132-41).<sup>2</sup> Notice of appeal

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<sup>1</sup> All references to statutes are to the current version of the Revised Statutes of Missouri unless otherwise unspecified. To the best of the Defendants' knowledge, none of the relevant statutes have been amended since Plaintiffs acquired the property in issue in 2001.

<sup>2</sup> All references to the original Legal File in this cause shall be abbreviated as "L.F." All references to the Supplemental Legal File in this cause shall be abbreviated as "Supp. L.F." All references to the transcript of the trial and motion for new trial or amended judgment in this cause shall be abbreviated as "Tr." All references to the transcript of the motion to dismiss in this cause shall be abbreviated as "Supp. Tr." All references to the

was timely filed by Defendants, and a notice of appeal was also filed by Plaintiffs within the time for filing a cross-appeal (L.F. 5, 146, 149).

This appeal does not fall with any of the categories establishing exclusive jurisdiction with this Court. Mo. Const. art. V, § 3. However, this Court has transferred this cause from the Court of Appeals, Western District, and, as such, this Court has jurisdiction over this appeal. Mo. Const. art. V, § 10, Rule 83.04, Missouri Rules of Court.

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exhibits in this cause shall be abbreviated as “Exh.” All references to the Plaintiffs’ Substitute Brief shall be abbreviated “Pl. Br.” All references to the opinion of the Court of Appeals in this cause shall be abbreviated as “WD Op.”

## STATEMENT OF FACTS

In the early to mid-1980s, the voters of Lafayette County established planning and zoning pursuant to Chapter 64 of the Revised Statutes of Missouri (Tr. 107). As part of the planning and zoning process, in 1987, Lafayette County adopted a Comprehensive Plan (hereinafter the 1987 Plan) (Tr. 109-110, Exh. 3). As with most comprehensive plans, the 1987 Plan contained maps projecting and designating areas for potential development and text explaining those maps and the policies to be followed in implementing that development. In particular, those maps designated an area along Interstate 70 near Odessa as an “Initial Urban Growth Area” (Exh. 3 at Plate 10-3) with potential use being “Higher Intensity Uses (Mixed)” (Exh. 3 at Plate 10-4). Alternative potential uses included both “Industrial” and “Commercial” (Exh. 3 at Plate 10-4). Chapter 10 of the 1987 Plan explained these maps and also included restrictions on and pre-conditions for the proposed development. Chapter 3 of the 1987 Plan contained policies and goals regarding various types of development.

At the time of the 1987 Plan, a set of zoning regulations was adopted (Tr. 109-10). In 1999, a new set of zoning regulations was adopted (Exh. A). The 1999 Zoning Regulations recognized twelve different zoning districts, designated as Districts A, RA, RE, R, R-1, R-2, R-3, B-0, B-1, B-2, M-1, and M-2 (Exh. A at Part I, Title I, Article III, §1.5 – p. 14). A use chart (shown in two formats, one by use and one by district) designates which uses are permitted in each zoning district (Exh. A at Part IV, pp. 83-

144).<sup>3</sup> For district A (the most common district in Lafayette County), the use chart has twenty-seven “primary uses,” sixty-five “conditional uses,” five “accessory uses,” and four “conditional accessory uses” (uses permitted only if accessory to the primary use but which require a conditional use permit) (Exh. A at Part IV, Title III, Article I – pp. 107-110). Traditional farming uses constitute only three of the twenty-seven “primary uses” (Exh. A at Part IV, Title III, Article I, § 1 -- p. 107).

The Regulations designated the Zoning Administrator as the permit officer (Exh. A at Part I, Title I, Article V, § 1.3 – p. 18) with the County Commission authorized to establish a schedule of fees (Exh. A at Part I, Title I, Article V, § 2 – p. 18). Shortly after adopting the revised Regulations, Lafayette County adopted a schedule of fees for permits (Exh. O). As required by state law, this schedule imposed a fee for the

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<sup>3</sup> The Use Chart designates five different designation indicating the permissibility of a proposed use. “Primary Uses” are those uses permitted as one of the main uses of the property without needing to obtain a conditional use permit. “Conditional Uses” are those uses which are permitted as one of the main uses on a property but a conditional use permit is required. “Accessory uses” are those uses which are only permitted if accessory to one of the main uses without needing to obtain a conditional use permit. “Conditional Accessory Uses” are those uses which are only permitted if accessory to one of the main uses but also require a conditional use permit. Finally, a “planned group use” is a use which is permitted only as part of a planned group development (primarily permitted in residential districts) (Exh. A at Part IV – p. 82-84, 107-144).

construction of new and accessory buildings but exempted “farm structures” (Exh. O). The schedule also imposed a “late fee” if construction began without a permit (Exh. O).

In 2001, Plaintiffs purchased property located at the intersection of State Route M and the South Outer Road of Interstate 70 (Tr. 271-72, 362). At the time that Plaintiffs purchased this property, its zoning was District A (Exh. A at maps). When Plaintiffs asked about the possibility of rezoning to District B-2, they were told that there should be no problems getting approved (Tr. 180, 272). Plaintiffs did not ask for rezoning at the time that they purchased the property (Tr. 277).

Instead, Plaintiffs decided to construct some buildings on the property – two residences and four other buildings (Tr. 292-93, 299). At the time that they began construction (Tr. 354), Plaintiffs knew that, if they wanted to build houses, they had to build them prior to being rezoned (Tr. 356). They also knew that building permits were required to construct buildings in District B-2. By constructing the buildings when they did, Plaintiffs desired to get around the restriction on residences in District B-2 and to avoid having to pay for permits for the four other buildings (Tr. 355-56, 362). They did obtain permits for the two residences, but did not get permits for the other four buildings (Tr. 313, 355-56, 362). At that time Mr. Gash told the Zoning Administrator that these four buildings were “farm” or “agricultural” buildings (Tr. 313, 355, 362). However, Mr. Gash has never farmed this property (Tr. 290).

While construction was still in progress, Plaintiffs completed an application to rezone the property to District B-2 (Tr. 292-93). In that application, Plaintiffs listed their intended uses of the property if it were rezoned to District B-2 (Exh. K, Tr. 337).

A public hearing was held by the Planning and Zoning Commission in February 2002 (Tr. 362). At that hearing, Mr. Gash presented his intentions as to the use of the property (Exh. K, L, Tr. 337). His intentions as presented at the hearing were less definitive than the intentions stated in the application (Exh. K, L). However, both the application and the presentation included proposed uses which are not permitted in District B-2 (Exh. K, L). At the public hearing, several neighbors complained about Plaintiffs' having built their commercial structures prior to getting the property rezoned (Exh. K, L, Tr. 298). The neighbors also objected to several potential uses that are permitted in District B-2 (Exh. K, L, Tr. 296).

Under the by-laws of the Lafayette County Zoning Commission, decisions are typically made at a business meeting conducted one week after the public hearing (Exh. N). Between the date of the hearing and the business meeting, an inspection was done of Plaintiffs' property. Based on that inspection, the Zoning Administrator made a determination that the houses which had been constructed violated the Zoning Regulations (Exh. K, Tr. 304-05). The violations alleged that both residences did not meet the minimum setbacks of the Zoning Regulations and that the relative sizes of the two residences were not correct (Exh. K, Tr. 305).<sup>4</sup> The application was tabled while the violations were pending (Tr. 304, 228-29).

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<sup>4</sup> Under the Lafayette County Zoning Regulations, a caretaker/guest cottage is permitted in Zoning District A as an accessory use (Exh. A at Part II, Title I, Article II, § 6 – p. 41). At the time that the process began a caretaker/guest cottage could be no more

The issue of the violation was first appealed to the Board of Zoning Adjustment (Tr. 305). The Board found in favor of Plaintiffs on the setback of the main house but against Plaintiffs on the other violations (Tr. 305, 366-67). The Plaintiffs then sought judicial review of the decision of the Board of Zoning Adjustment (Tr. 305, 367).

While the application for judicial review of the zoning violations was still pending in front of the Honorable Hugh Harvey, Plaintiffs requested that a decision be made on their zoning application (Tr. 359, 369). At that time, no decision had been made on the violations issue by Judge Harvey (Exh. K, 34). Despite the fact that the violations were still pending, the application was placed back on the agenda at the next meeting of the Zoning Commission (Tr. 359, 369). At that meeting, members of the Lafayette County Zoning Commission expressed the opinion that, if there were violations, there should be some sanction for them and indicated concern that granting the application might excuse such violations (Exh. K, M, Tr. 310-11). After having discussed the violations issue, the Zoning Commission rejected Plaintiffs' application in June 2003 (Exh. K, M Tr. 308, 369-70). Under the Zoning Regulations, an applicant must wait six months to reapply after a denial (Exh. A at Part I, Title I, Article III, § 3.5 – p. 16).

After the decision by the Zoning Commission, a fire occurred at Plaintiffs' "main" house (Tr. 307-08, 370). In response, Plaintiffs expanded the size of the main residence

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than 50% of the size of the main residence (Exh. A at Part I, Title I, Article II, § 2 – p. 4, Tr. 305). While the violation was pending, the Zoning Regulation was amended to increase the permissible size to 60% of the main residence (Exh. 9).

(Tr. 308, 370). The effect of the addition to the house resolved any dispute over that zoning violation (Tr. 307-08). Likewise, after the hearing with the Board of Zoning Adjustment, Plaintiffs had a formal survey done of their property which revealed an error as to the assumed property line (Tr. 307). This survey placed the rear property line further away from the residences than the assumed property line which had been used at the hearing of the Board of Zoning Adjustment. The distance between the assumed property line and the survey property line was sufficient to bring the accessory residence into compliance on the setback requirements (and to give space for the construction of the proposed addition to the main residence).

After the fire but before a permit was obtained to build the addition to the main residence, Judge Harvey ruled in favor of Plaintiffs on the “size” finding an ambiguity as to whether the finished basement counted in determining the size of the main house and in favor of the Zoning Administrator on the setback issue (Tr. 307). These decisions were appealed, but both the appeal and the cross-appeal were dismissed after the additions were completed.

In October 2003, after obtaining a permit to build the addition to the main house but prior to completion of that construction and prior to the expiration of the six month waiting period to reapply, Plaintiffs filed the present case (L.F. 1, Tr. 370). In this petition, Plaintiffs noted that the reason given for the rejection of the rezoning was the zoning violations (L.F. 10). In this Petition, in relevant part, Plaintiffs requested a declaratory judgment as to the validity of the current zoning, injunctive relief, and a finding that the refusal to rezone constituted a taking (L.F. 11-21).

In November 2003, Defendants filed an Answer (L.F. 1). That answer included a counterclaim based on the failure of Plaintiffs to obtain permits for the four “other” buildings built on the property (L.F. 37-39). Defendants also filed a motion to dismiss (L.F. 1). In relevant part, the motion to dismiss noted that Plaintiffs’ claim for inverse condemnation was not ripe (L.F. 47-50). In one paragraph, Defendants alleged that Plaintiffs could not meet the test for a total taking due to the residence that they had built on the property (L.F. 50). Defendants also file a motion asking the trial court to strike allegations from the Petition referring to settlement offers made during the violations case (L.F. 1, 52-43).

In December 2003, Plaintiffs filed an Answer to the counterclaim (L.F. 2, 54-56). The Answer did not include any affirmative defenses (L.F. 54-56).

Subsequent to the filing of the initial pleadings, the addition to the “main” house was completed (Tr. 371). Despite this addition resolving the alleged reason for rejection of the initial rezoning application, Plaintiffs did not reapply for rezoning (Tr. 229).

After a hearing conducted on March 4, 2004 (Supp. Tr. 6-14), the trial court entered an order on May 6, 2004, dismissing the claim for inverse condemnation (L.F. 3, Supp. L.F. 4).

On January 19, 2005, a trial was held on this matter. The evidence presented consisted of fourteen witnesses, thirty-one exhibits introduced by Plaintiffs, and nineteen exhibits introduced by Defendants (Tr. i-viii). Prior to the start of the trial, an Amended Petition was introduced that noted that Plaintiffs were suing in their capacity as trustees of their respective trusts (the actual landowner) (Tr. 2). By agreement of the parties, the

Amended Petition deleted the claims which had previously been dismissed by the trial court (Tr. 2-3).

One group of witnesses provided “expert” testimony as to the ability to use the land for “agricultural” as opposed to “commercial” purposes. These witnesses (Mr. Frank Riekhof, Mr. Rehmsmeyer, Mr. Cramer, and Mr. Shutt), consistently, in their testimony, discussed “farming” and “commercial” uses (Tr. 18, 28-29, 45-46, 53, 57-59, 182-83). For the most part, their terminology and evaluation was based on concepts from tax and real estate appraisals, not on any examination of the Lafayette County Zoning Regulations or familiarity with the uses permitted in individual zoning districts under the Zoning Regulations (Tr. 54, 57-59, 67, 182-83). All of these witnesses concluded that the Plaintiffs’ property could not be used as a farm, but gave no opinion as to the adequacy of other uses permitted in District A.

A second group of witnesses testified as to their interpretation of the 1987 Plan and the history of development in Lafayette County (Tr. 79-136). Both of these witnesses (Mr. Goodloe and Mr. Meyer) had served as Zoning Administrator in the 1980s and early 1990s (Tr. 81, 83, 107). Neither was able to testify as to changes in practices after they left the position (Tr. 96, 123).

The last group of witnesses was the members of the County Commission and the Zoning Commission. The members of the County Commission testified as to their involvement in the violations case in their executive capacity (Tr. 257, 261). They further testified that Plaintiffs’ rezoning application never got to them in their legislative capacity (Tr. 265). The members of the Zoning Commission testified about their

consideration of Plaintiffs' rezoning application. They all noted that the desire to first resolve the zoning violations was significant with a belief that, if that process indicated that there were violations, there should be some sanction for such violations (Tr. 156-59, 191, 216). Besides the pending zoning violations, there were other issues of concern with the property including the presence of the two residences and a stable in what was proposed to be rezoned to B-2 and also potential sewage and traffic issues (Tr. 159-60, 174, 192-93, 207-08, 215, 218, 231). Many of these issues were not unique to the Plaintiffs' property, but had been raised in other applications which had also been rejected (Exh. B-J, Tr. 173-74, 231-37). In addition, there were concerns about the amount of B-2 property that was unused or under used (Tr. 193, 223).

The last witness was Mr. Gash. Mr. Gash testified about other applications that had been granted, many prior to 1999 (Tr. 283-86, 312-19, 327). He further testified as to the opposition that was stated as to his application at the public hearing (Tr. 296). He also testified that many of the Zoning Commissioners stated, at the time that the rezoning was denied, that there should be a penalty for the alleged zoning violations and that they believed that the violation was intentional (Tr. 310-311). He also testified as to the intended uses of the buildings at the time that they were constructed and what they would have been used for if the property had been rezoned to B-2 (Tr. 337-45). His testimony differed from the uses stated on the application and in his presentation to the Zoning Commission (Exh. K, L, Tr. 336-45). He also admitted that the property could be used if it was rezoned to District B-1 but that his plan required a zoning of B-2 (Tr. 345-46). He also admitted that his true purpose in constructing the four "other" buildings, contrary to

what he told the Zoning Administrator, were for commercial purposes, not agriculture (Tr. 355). According to his own testimony, Mr. Gash never provided any information to the Zoning Commission demonstrating why he could not have used any of the under-utilized lots which had previously been zoned B-2 or why this lot would have been viable as a B-2 property (Tr. 357-58).

Several exhibits were introduced by both sides as evidence supporting their claim. Plaintiffs introduced a photographic exhibit showing properties zoned B-2 along Interstate 70 (Exh. 1). Many of these photographs show minimal or no use of particular lots. In addition, Plaintiffs introduced the applications and ordinances approving them from several rezoning files and the staff reports on some of the applications (Exh. 4, 5, 13, 14, 15, 17, 19, 19, 20, 22, 23, 24, 25, 25-A, 26, 27, 28, and 29). Plaintiffs also introduced the Comprehensive Plan (Exh. 3) and, over objection, a letter proposing a settlement from the violations case (Ex. 31). Defendants introduced the Zoning Regulations (Exh. A) and excerpts from nine other zoning files in which the Zoning Commission had either rejected the application or recommended to the County Commission that the application be denied (Exh. B-J). Defendants also introduced the file from Plaintiffs' rezoning application including the tapes of the public hearing on the application and the business meeting at which the application was rejected (Exh. K, L, M). Other exhibits included the by-laws of the Zoning Commission (Exh. N), the schedule of fees (Exh. O), a copy of the rezoning application form (Exhibit Q), the tax records for the property (Exh. R), and a sketch of the location of the buildings on the property (Exh. S).

On February 23, 2005, the trial court entered its judgment (L.F. 4). Defendants filed a motion for new trial or amended judgment (L.F. 5). Among the claims raised in the motion for new trial were the admission into evidence of a settlement offer in the related zoning violations case and objections to the proposed injunction for being overbroad and mandating a specific rezoning (L.F. 142-45). The motion for new trial was overruled (L.F. 5).

## POINTS OF ERROR

**Cross-Respondents' I. THE TRIAL COURT DID NOT ERR IN DISMISSING THE CLAIM FOR INVERSE CONDEMNATION BECAUSE THE PLAINTIFFS FAILED TO PLEAD SUFFICIENT FACTS TO STATE A CLAIM IN THAT PLAINTIFFS' PLEADINGS ADMITTED THAT THE REGULATIONS PERMITTED SOME DEVELOPMENT AND MERELY STATED THE CONCLUSION THAT SUCH RESTRICTIONS DEPRIVED THEM OF REASONABLE INVESTMENT-BACKED EXPECTATIONS. (Responds to Cross-Appellant's I)**

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

*Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)

*Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005)

*Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)

**Cross-Respondents' II. THE TRIAL COURT DID NOT ERR IN DISMISSING THE CLAIM FOR INVERSE CONDEMNATION BECAUSE THE CLAIM WAS NOT RIPE IN THAT, WHILE THERE WAS A FINAL DECISION ON PLAINTIFFS' INITIAL APPLICATION, THERE WAS NOT A FINAL DECISION ON THE SCOPE OF DEVELOPMENT WHICH WOULD BE PERMITTED (Responds to Cross-Appellant's III).**

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

*MacDonald, Sommer & Frates v. County of Yalo*, 477 U.S. 340 (1986)

*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1998)

**Appellants' I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFFS ON DEFENDANTS' COUNTERCLAIM FOR FAILURE TO OBTAIN A BUILDING PERMIT FOR FOUR BUILDINGS BECAUSE: 1) DEFENDANTS PROVED THE ELEMENTS OF THEIR CAUSE OF ACTION IN THAT MR. GASH ADMITTED UNDER OATH THAT HE DID NOT OBTAIN PERMITS FOR THOSE BUILDINGS AND 2) BECAUSE THE BUILDINGS DID NOT FIT WITHIN THE FARM BUILDING EXEMPTION IN THAT THE INTENDED USES OF THOSE BUILDINGS AS TESTIFIED WAS NOT FOR THE PURPOSES CONTAINED IN THE STATUTE AND PLAINTIFFS FAILED TO PLEAD THE AFFIRMATIVE DEFENSE OF THE EXEMPTION.**

*Premium Standard Farms, Inc., v. Lincoln Township of Putnam County*, 946 S.W.2d 334  
(Mo. banc 1997)

*Steward v. Baywood Villages Condominium*, 134 S.W.3d 679 (Mo. App. E.D. 2004)

*Branson Properties USA, L.P., v. Director of Revenue*, 110 S.W.3d 824 (Mo. banc 2003)

Section 64.865, Revised Statutes of Missouri

Section 64.890, Revised Statutes of Missouri

Rule 55.08, Missouri Rules of Court

Part I, Title I, Article V of the Lafayette County Zoning Regulations

**Appellants' II. THE TRIAL COURT ERRED, ABUSED ITS DISCRETION, AND EXCEEDED ITS JURISDICTION IN GRANTING AN INJUNCTION PRECLUDING THE ENFORCEMENT OF ALL ZONING REGULATIONS BECAUSE: 1) SAID INJUNCTION EXCEEDED THE SCOPE OF THE PLEADINGS AND PROOF IN THAT PLAINTIFFS' COMPLAINT WAS LIMITED TO THE FAILURE TO REZONE THEIR PROPERTY TO B-2; AND 2) PLAINTIFFS FAILED TO PROVE IRREPERABLE HARM IN THAT THEY INTRODUCED NO EVIDENCE INDICATING THAT THERE WERE INDIVIDUALS PREPARED TO USE THE PROPERTY BUT FOR ITS CURRENT ZONING OR THAT THEY HAD BEEN COMPELLED TO REJECT ANY INTERESTED PERSON BECAUSE OF THE ZONING.**

*Williams v. Williams*, 99 S.W.3d 552 (Mo. App. W.D. 2003)

*Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006)

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

**Appellants' III. THE TRIAL COURT ERRED, ABUSED ITS DISCRETION, AND EXCEEDED ITS JURISDICTION IN GRANTING AN INJUNCTION PRECLUDING THE ENFORCEMENT OF ALL ZONING REGULATIONS UNTIL THE PROPERTY WAS REZONED TO B-2 BECAUSE SAID CONDITION WAS IMPROPER IN THAT IT EFFECTIVELY ORDERED AND COERCED DEFENDANTS TO ENACT A PARTICULAR ZONING.**

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

*Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. banc 2003)

*Williams v. Williams*, 99 S.W.3d 552 (Mo. App. W.D. 2003)

*Metmor Financial, Inc. v. Landoll Corp.*, 976 S.W.2d 454 (Mo. App. W.D. 1998)

**Appellants' IV. THE TRIAL COURT ERRED IN ADMITTING PLAINTIFFS' EXHIBIT 31 AND IN GIVING WEIGHT TO THAT EXHIBIT IN ITS JUDGMENT BECAUSE THE ADMISSION OF THE EXHIBIT VIOLATED THE RULE AGAINST ADMITTING EVIDENCE OF SETTLEMENT OFFERS IN THAT THE EXHIBIT WAS A LETTER PROPOSING TO RESOLVE A ZONING VIOLATIONS CASE WITH PLAINTIFFS.**

*State ex rel. Malan v. Hueseman*, 942 S.W.2d 424 (Mo. App. W.D. 1997)

*Massman Construction Company v. Missouri Highway & Transportation Commission*,  
835 S.W.2d 465 (Mo. App. W.D. 1992)

**Appellants' V. THE TRIAL COURT ERRED IN FINDING THAT ZONING DISTRICT A WAS NOT REASONABLE AND ENTERING JUDGMENT FOR PLAINTIFFS BECAUSE PLAINTIFFS FAILED TO REBUT THE PRESUMPTION OF REASONABLENESS IN THAT THE ONLY EVIDENCE THAT DISTRICT A WAS UNREASONABLE WAS: 1) EVIDENCE THAT FARMING OR RAISING LIVESTOCK WAS NOT A VIABLE USE OF THE LAND (WHICH EVIDENCE DID NOT CONSIDER OTHER USES PERMITTED IN DISTRICT A) AND 2) PLAINTIFFS' PERSONAL PLANS THAT REQUIRED USES OTHER THAN THOSE PERMITTED IN DISTRICT A.**

*State ex rel. Barber & Sons Tobacco Co. v. Jackson County*, 869 S.W.2d 113 (Mo. App. W.D. 1993)

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

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

Part IV, Title III, Article I of the Lafayette County Zoning Regulations

**Appellants' VI. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANTS FAILED TO DEMONSTRATE THAT THE VALIDITY OF THE CURRENT ZONING WAS FAIRLY DEBATABLE BECAUSE DEFENDANTS INTRODUCED BOTH SUFFICIENT TESTIMONY AND SUFFICIENT EVIDENCE BY MEANS OF EXHIBITS TO DEMONSTRATE THAT THE VALIDITY OF THE CURRENT ZONING WAS FAIRLY DEBATABLE IN THAT: 1) THE ALLEGED ZONING VIOLATIONS JUSTIFIED KEEPING THE CURRENT ZONING UNTIL THE VIOLATIONS PROCESS WAS CONCLUDED, 2) THE PROPOSED REZONING WAS NOT IN HARMONY WITH THE COMPREHENSIVE PLAN, 3) THERE WERE CONCERNS ABOUT SEWAGE, RUNOFF AND TRAFFIC, 4) THE REZONING WOULD HAVE CREATED A NON-CONFORMING USE, AND 5) THERE WAS AN ISSUE REGARDING UNUTILIZED B-2 PROPERTY AND THE VIABILITY OF B-2 ZONING AT THIS LOCATION.**

*Acton v. Jackson County*, 854 S.W.2d 447 (Mo. App. W.D. 1993)

*Heidrich v. City of Lee's Summit*, 916 S.W.2d 242 (Mo. App. W.D. 1995)

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

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

Missouri Approved Instructions 2.01

**Appellants' VII. THE TRIAL COURT ERRED IN FINDING THAT THE CURRENT ZONING WAS INVALID BECAUSE THERE WAS A RATIONAL BASIS FOR KEEPING THE CURRENT ZONING IN THAT THE EVIDENCE DEMONSTRATED AN ALLEGED ZONING VIOLATION, THAT THE PROPOSED ZONING WAS NOT IN FULL CONFORMITY WITH THE COMPREHENSIVE PLAN, UNADDRESSED ISSUES ABOUT SEWAGE AND RUN-OFF, THAT THE PROPOSED REZONING WOULD CREATE A NON-CONFORMING USE, AND AN ABUNDANCE OF UNUTILIZED B-2 PROPERTY WITH INSUFFICIENT EVIDENCE DEMONSTRATING THAT A B-2 ZONING WOULD BE VIABLE.**

*Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1991)

*United States v. Carolene Products, Co.*, 304 U.S. 144 (1938)

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

*Jacobson v. Massachusetts*, 197 U.S. 11 (1905)

## ARGUMENT

**Cross-Respondents’ I. THE TRIAL COURT DID NOT ERR IN DISMISSING THE CLAIM FOR INVERSE CONDEMNATION BECAUSE THE PLAINTIFFS FAILED TO PLEAD SUFFICIENT FACTS TO STATE A CLAIM IN THAT PLAINTIFFS’ PLEADINGS ADMITTED THAT THE REGULATIONS PERMITTED SOME DEVELOPMENT AND MERELY STATED THE CONCLUSION THAT SUCH RESTRICTIONS DEPRIVED THEM OF REASONABLE INVESTMENT-BACKED EXPECTATIONS. (Responds to Cross-Appellant’s I)**

The standard of review for an appeal of a dismissal for failing to plead a cause of action is whether the facts as plead in the petition, along with all reasonable inferences, are sufficient to state a cause of action. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 463-64 (Mo. banc 2001). A court does not consider legal conclusions, but only factual allegations. *Tolliver v. Standard Oil Company*, 431 S.W.2d 159, 162-63 (Mo. 1968).

At various times, there have been three forms of inverse condemnation based on “regulatory takings.” These types of takings are: 1) “total” takings -- exemplified and first defined by the case of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); 2) “partial” takings – exemplified and first defined by the case of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); and 3) takings based on the

invalidity of the regulations – suggested by the decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). There have also been suggestions that there may be a separate category for “temporary” takings. See, e.g. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

It is unclear which of these theories Plaintiffs allege was validly plead at the trial court level. In their argument, it appears that Plaintiffs’ primary allegation is a temporary taking (App. Br. at 45-47). In passing, however, Plaintiffs also refer to claims under *Lucas* and *Penn Central* (App. Br. at 47). As such, Defendants will address each of these theories in turn. Before turning to the temporary takings issue, however, it is necessary to first address the *Agins* theory of taking.

#### 1. *AGINS* AND TEMPORARY TAKINGS

In *Agins*, the U.S. Supreme Court suggested that, in a case in which a zoning regulation failed the substantial basis test for the validity of the ordinance, the invalid ordinance would constitute a taking. 447 U.S. at 260-61. This statement was, to some extent dicta, as the *Agins* Court had found that the ordinance at issue was valid, and, therefore there was no taking. *Id.* at 261-63.

In 2005, the U.S. Supreme Court re-examined the *Agins* test. In the case of *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), the U.S. Supreme Court found that, to the extent that *Agins* suggested a takings could be found if an ordinance violated a substantial basis due process test, that suggestion was erroneous. 544 U.S. at 540-48. The bottom line of *Lingle* was to limit regulatory takings to the *Lucas* and *Penn Central* theories

(excluding the separate issue of exactions which is not alleged as a theory by Plaintiffs).  
*Id.* at 548.

The demise of *Agins* impairs the temporary takings theory of *First English*. The facts of *First English* do not clearly establish whether *First English* alleged a temporary taking based on the invalidity of the ordinance or based on a total taking. 482 U.S. at 308-11, 320. To the extent that *First English* talks about a taking based on the substantial due process test of *Agins*, such a taking – whether temporary or permanent – is no longer a valid theory. This leads then to the issue of total takings under *Lucas*.

## 2. TOTAL PERMANENT AND TOTAL TEMPORARY TAKINGS

The alternative theory in *First English* alleged a total deprivation of use. 482 U.S. at 308, 311, 321. This Court need not reach this second alternative from *First English* for the same reason it need not consider a takings under *Lucas* – namely that the pleadings of Plaintiffs affirmatively preclude a colorable claim of a total taking.

Since *First English*, the U.S. Supreme Court has considered two significant cases involving allegations that there was a permanent total taking. Like the situation in *First English*, the regulation involved in *Lucas* precluded all development in a certain zone. 505 U.S. at 1008-09, 1011-14, 1019-20. This important element of a claim for a total taking was key to the later decision of the U.S. Supreme Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

In *Palazzolo*, the land-owner sought, in relevant part, to be compensated for a total taking under *Lucas*. 533 U.S. at 615-16. While finding that the land-owner had stated a *Penn Central* claim, the U.S. Supreme Court rejected the *Lucas* claim noting: “This is

not the situation of the landowner in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property ‘economically idle.’” *Id.* at 631.

Based on their own pleadings, Plaintiffs are in the same circumstances as the plaintiff in *Palazzolo*. While Plaintiffs do not accurately state the full scope of uses permitted in District A in their petition, they do acknowledge that District A permits “one residence and an accessory dwelling” (L.F. 8). Based on this admission, Defendants, as a matter of law under *Palazzolo*, do not have a claim for a *Lucas*-type total takings – either as a temporary taking or as a permanent taking.

### 3. *PENN CENTRAL* PARTIAL TAKINGS AND TEMPORARY PARTIAL TAKINGS

In their argument, Plaintiffs point to language from Count IV of their petition as stating a claim for a taking (App. Br. at 41-42). These paragraphs mimic the legal language of part of the *Penn Central* test (L.F. 20). Every one of these pleadings is a conclusion of law, not a fact. Unlike federal courts which use “notice pleading,” Missouri requires fact pleading. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 379 (Mo. banc 1993). In determining whether sufficient facts have been plead, conclusions unsupported by factual allegations are ignored. *Tolliver v. Standard Oil Company*, 431 S.W.2d 159, 162-63 (Mo. 1968); *Solberg v. Graven*, 174 S.W.3d 695, 699-700 (Mo. App. S.D. 2005). It is not enough to state the general conclusion that there has been an inverse condemnation. Plaintiffs are required to note the facts that demonstrate harm. *In re Transit Casualty Co.*, 43 S.W.3d 293, 302

(Mo. banc 2001). Such factual pleading is entirely absent from Plaintiffs' Petition. Instead, Plaintiffs' Petition is essentially a notice pleading that they are asserting a claim under *Penn Central*. Such a petition is insufficient in Missouri.

In *Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency*, 535 U. S. 302 (2002), the U. S. Supreme Court considered claims of temporary partial takings based on delays in the planning and zoning process. In that case, there were a series of moratorium on development that precluded development for over two years prior to the start of litigation. 535 U. S. at 310-313. In its decision, the U. S. Supreme Court examined its prior holdings in *First English* and *Lucas*. *Id.* at 320-333. In doing so, they found that claims for temporary takings were best analyzed under *Penn Central* not *Lucas*. Furthermore, the U. S. Supreme Court looked to its ripeness jurisprudence which effectively imposes delays (often lengthy) in the making of zoning decisions. *Id.* at 339-40. While it did not create a categorical rule on how lengthy a delay is too long, it did note that it would be perverse to encourage delay to reach a well-reasoned decision under ripeness analysis while at the same time punishing that delay by using it to find a temporary taking for the period of that delay. *Id.* at 340. The delay in this case is substantially shorter than the delay in *Tahoe-Sierra* (only 23 months from the filing of the application to the filing of the lawsuit by Plaintiffs in this case as compared to a 32 month moratorium in *Tahoe-Sierra*).

Because the admissions in Plaintiffs' Petition demonstrate that Plaintiffs do not have a claim for a taking under *Lucas* and the facts pled are insufficient to state a claim

for inverse condemnation (either under *Lucas* or *Penn Central*), the judgment dismissing Count IV should be affirmed.

**Cross-Respondents' II. THE TRIAL COURT DID NOT ERR IN DISMISSING THE CLAIM FOR INVERSE CONDEMNATION BECAUSE THE CLAIM WAS NOT RIPE IN THAT, WHILE THERE WAS A FINAL DECISION ON PLAINTIFFS' INITIAL APPLICATION, THERE WAS NOT A FINAL DECISION ON THE SCOPE OF DEVELOPMENT WHICH WOULD BE PERMITTED (Responds to Cross-Appellant's III).**

When the facts are undisputed, a challenge based on ripeness may be reviewed de novo. *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10, 22 (Mo. banc 2003). If the facts are disputed, however, the decision is reviewed for abuse of discretion.<sup>5</sup>

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<sup>5</sup> A dismissal for lack of ripeness is a dismissal without prejudice. *Missouri Soybean*, 102 S.W.3d at 29. A dismissal without prejudice is normally not reviewable on appeal unless there are no additional facts that would allow the filing of an amended petition. For the purposes of this brief, Defendants will assume that Plaintiffs claim that there are no such facts and that, therefore, this Court does have jurisdiction over this issue.

Part of the confusion in this case is that there were two separate and distinct ripeness issues in *Williamson Planning Commission v. Hamilton Bank*, 473 U. S. 172 (1985). One part of *Williamson* dealt with the issue of whether the plaintiffs in that case needed to pursue a state remedy for takings prior to filing a federal suit under Section 1983. 473 U. S. at 194-197. Defendants have never relied on this part of the *Williamson* decision.

The other part of *Williamson* deals with what constitutes a final decision by a local zoning board. 473 U.S. at 186-94. It is this part of *Williamson* that is at issue in this case.

The second area of confusion is a by-product of the dicta in *Agins* that has now been rejected. As noted above, dicta in *Agins* suggested that there was a takings claim based solely on the invalidity of an ordinance or regulation. It should not be a surprise that courts would hold that an *Agins* taking claim was part of the same cause of action as the attack on the validity of the statute. In *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315 (Mo. banc 2002), this Court held that res judicata precluded a second suit for a takings claim after the first suit on the validity of the zoning. It appears that the claim in *Chesterfield Village* was an *Agins*-type claim. Because a major element of an *Agins* takings claim is that the ordinance was invalid, it follows logically that courts would hold that an *Agins*-type claim had to be raised in the same case as the declaratory judgment action. The same is not necessarily true of takings under *Lucas* and

*Penn Central*.<sup>6</sup> To the extent that *Chesterfield Village* can be interpreted as holding to the contrary, it should be revised.

The third area of confusion is the concept of a “final decision.” There are two different types of “final decisions” in planning and zoning cases. The first type of final decision is the final decision on a particular application. In this case, there is no dispute that the Zoning Commission rejected Plaintiffs application to rezone to B-2 prior to correcting any violations in the current use of their property. Plaintiffs were legally entitled to seek judicial review of the validity of that decision.

The second type of final decision takes a broader view of land use. This type of final decision is concerned with the ultimate scope of development that will be permitted on the property, not with one particular proposal. It understands that the value of the land for takings analysis is not the value of the land to a particular plaintiff but, instead, the fair market value. Just because a plaintiff may not be able to proceed with their “dream” development does not mean that another application – whether by the same developer or by another developer – proposing a “second best” development would not be accepted. Because the fair market value of the land under an alternative development proposal may be sufficiently similar to the fair market value under the original development proposal, the ripeness analysis found in the cases of the U. S. Supreme Court dictate that it is

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<sup>6</sup> In fact, *Williamson* specifically states that the filing of a declaratory judgment action challenging the validity of the zoning decision is not required before filing an inverse condemnation case raising these types of claims. 473 U.S. at 193.

necessary to get a final decision of this second type to determine if the regulations involved really qualify as a taking.

In *Penn Central*, while not specifically describing it as a ripeness requirement, the U. S. Supreme Court noted “[w]hile the Commission’s actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the terminal.” 438 U. S. at 136-37 (emphasis in original). As such, it has been clear from the beginning of modern regulatory takings jurisprudence that the mere denial of one application was insufficient to support a takings claim.

The *Williamson* case is very close to being directly on point. In *Williamson*, the takings claim was based on a plat which was rejected for not being in compliance with the zoning regulations (with eight specific problems being noted). 473 U. S. at 187-88. In this case, as alleged by Plaintiffs, the rezoning application was rejected because of alleged existing violations on the property (L.F. 10). The *Williamson* Court held that the initial rejection of the plat was not a final rejection for ripeness purposes because the applicant had not completed the administrative process for obtaining a variance from those requirements. *Id.* at 188-91. Under the reasoning of the *Williamson* Court, until a decision was made on the granting of the variances, it was impossible to know which of those objections, if any, would stick. Because the takings claim was based on the assumption that plaintiff would have to correct each of the eight problems to get the plat approved, the *Williamson* Court was unable to determine that there would be a taking if a

variance was given allowing the applicants to re-submit their application without correcting one or more of the eight problems. Similarly, in this case, while Plaintiffs had begun the process of challenging the zoning violation, they insisted on a decision prior to the resolution of the administrative review of the violation (Exh. K, M, 34 Tr. 359, 369). As such, beyond speculation, it is impossible to determine how the Zoning Commission would have ruled once there was a final resolution of the administrative review of the alleged zoning violation.

Subsequent cases have refined the *Williamson* requirements. In *MacDonald, Sommer, & Frates v. County of Yolo*, 477 U.S. 340 (1986), the applicants sought approval of a proposed 159-lot subdivision. 477 U. S. at 342. This initial proposal was rejected. *Id.* at 342-43. Rather than submit an alternative proposal, the applicants filed suit seeking damages under a takings theory. *Id.* at 343-44. The U. S. Supreme Court held that the rejection of one application did not equal a “final, definitive” decision on what development would be permitted. *Id.* at 351-52. In the absence of such a final decision, the takings claim was not ripe.

The *MacDonald* Court did leave two options open for developers to by-pass reapplying for alternative developments. However, Plaintiffs have pleaded insufficient facts to meet either of those exceptions. First, a plaintiff has the option of pleading facts showing that submitting a new application for a lesser development would be futile. *Id.* at 352 n. 8. Plaintiffs did not make any such pleading in their initial petition (L.F. 6-23). Likewise, a plaintiff can allege that any development less than the proposed development would constitute a taking. 477 U. S. at 352 n.8. Again, Plaintiffs did not make such an

application and specifically based their claim on the difference between their proposed development and the status quo, not between their proposed development and the next best alternative (L.F. 6-23). Either of these alternative forms of pleading would free Plaintiffs from what they contend in their brief is the unreasonable position of Defendants that Plaintiffs have to seek every possible zoning option (App. Br. at 56).

Defendants do not contend that Plaintiffs have to seek every possible option. Defendants do contend that Plaintiffs can't have it both ways. Either Plaintiffs must seek damages based on the theory that any lesser alternative would still be a takings or Plaintiffs must seek approval for those lesser alternatives. They may not allege that restricting Plaintiffs to the status quo is a taking without seeking approval of other development alternatives.

The situation in the present case can be clarified by comparing the steps taken by Plaintiffs to the steps taken by applicants who were found to have ripened their claims. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1998), the City had rejected nineteen different site plans over a five-year period (with each proposal being progressively smaller in terms of the number of lots). 526 U. S. at 695-98. In finding such a claim to be ripe, the lower courts had found that such circumstances brought the case within the *MacDonald* exception allowing the case to proceed without further applications. *Id.* at 698-99. Unlike the developers of the Del Monte Dunes project, Plaintiffs submitted just one application – an application which was conditionally rejected (L.F. 10).

In other cases, ripeness was found from a decision that unequivocally decided the scope of permissible development. In the case of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the decision by the state agency was sufficiently clear to indicate that no development proposal would be accepted. 533 U. S. at 618-22. Likewise, in *Suitum v. Tahoe Regional Planning Agency*, 520 U. S. 725 (1997), the U. S. Supreme Court found that the decision of the state agency was sufficiently clear to indicate that no development proposal would be accepted. 520 U. S. at 739. Again, in this case, the decision by the Lafayette County Zoning Commission was not so clear. According to Plaintiffs' own petition, the Lafayette County Zoning Commission rejected their application on the basis of an alleged zoning violation (L. F. 10). That decision does not in any way indicate that further applications would be rejected once the zoning violation was fixed or otherwise resolved.

The claims as stated in the current pleadings indicate why dismissal for lack of ripeness is normally considered to be a dismissal without prejudice. Plaintiffs' pleadings fail to contain sufficient facts to justify the failure to submit a second application under any of the *MacDonald* exceptions. While Plaintiffs have argued that they should not be required to submit multiple applications to determine what will be accepted (App. Br. at 56), they did not plead any facts indicating why such an application would be frivolous. Nor did they plead that requiring the resolution of the zoning violations case was in and

of itself a taking.<sup>7</sup> Nor did they plead that only permitting a lesser development would be a taking. Instead, Plaintiffs alleged that keeping the property zoned District A would be a taking (L.F. 7-15, 19-21). Under that state of pleadings, Plaintiffs had failed to take the steps necessary to demonstrate that Lafayette County would not rezone from District A to another district. As such, the claim of a regulatory taking was not ripe.

Therefore, the dismissal of Count IV should be affirmed.

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<sup>7</sup> To the extent that Plaintiffs may argue for such a position in their reply brief, such a claim would clearly be contradicted by the evidence at trial and would be factually false. Plaintiff has judicially admitted that he made changes to his main residence for reasons entirely unrelated to the decision of the Lafayette County Zoning Commission (Tr. 307-08).

**Appellants' I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFFS ON DEFENDANTS' COUNTERCLAIM FOR FAILURE TO OBTAIN A BUILDING PERMIT FOR FOUR BUILDINGS BECAUSE: 1) DEFENDANTS PROVED THE ELEMENTS OF THEIR CAUSE OF ACTION IN THAT MR. GASH ADMITTED UNDER OATH THAT HE DID NOT OBTAIN PERMITS FOR THOSE BUILDINGS AND 2) BECAUSE THE BUILDINGS DID NOT FIT WITHIN THE FARM BUILDING EXEMPTION IN THAT THE INTENDED USES OF THOSE BUILDINGS AS TESTIFIED WAS NOT FOR THE PURPOSES CONTAINED IN THE STATUTE AND PLAINTIFFS FAILED TO PLEAD THE AFFIRMATIVE DEFENSE OF THE EXEMPTION.**

The standard of review in a case tried to the court is set forth in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). The decision below will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law.

At trial, several facts were found by the trial court that are relevant to Defendants' Counterclaim. First, the trial court found that Mr. Gash built "five ordinary farm buildings on his property" (L.F. 135). Second, the trial court found that Mr. Gash planned to "complete and develop" those buildings "for commercial use" (L.F. 135). Third, the trial court found that the Lafayette County Zoning Regulations do not require a permit for "agricultural buildings in the Agricultural Zone" (L.F. 139). Fourth, the trial court found that the intended use of the buildings was irrelevant and what mattered was

their character when built (L.F. 139). While the first two of these “facts” are actually findings of fact, the last two of these facts are conclusions of law. Both of these conclusions of law are erroneous.

As an initial matter, Lafayette County’s counterclaim was not based on the requirements of the Zoning Regulations. It was based on state law (L.F. 38). Section 64.865 provides in relevant part: “[a]fter the appointment or designation of the [enforcement] officer or official, no building or other structure shall be erected, constructed, reconstructed, enlarged or altered or repaired . . . without a permit issued by the officer or official.” As such, to the extent that the trial court’s decision was based on a belief that the claim was governed by the County Zoning Regulations, such a decision was clearly erroneous.

There are only two aspects of county ordinances which are relevant to this issue. First, the statute is only triggered if the County has appointed an enforcement officer. It is undisputed that the Zoning Regulations designate the Zoning Administrator as the enforcement officer (Exh. A at Part I, Title I, Article V – pp. 17A-21). The second aspect is that the level of fees is not set by state law but instead, implicitly, is left to the local government to set. Again, it is undisputed that Lafayette County has enacted a schedule of fees for permits (Exh. O).

In the absence of case law stating the elements of a claim under Section 64.865, it is necessary to examine the statute to determine the elements. Assuming that the precondition of appointing an enforcement officer has been met, there are two express elements to the claim. First, Defendants must prove that a building was erected. Not

only did Mr. Gash admit that he built such structures (Tr. 289), but the Court expressly found that he built those structures (L.F. 135).

Second, Defendants must prove that no permits were obtained. In this case, the trial court's findings do not expressly state that Mr. Gash did not obtain the permits, but they do imply that finding (L.F. 139). Furthermore, Mr. Gash did admit that he did not obtain permits for these four buildings (Tr. 355-56). A party is bound by their own testimony as to admissions of fact. *Steward v. Baywood Villages Condominium*, 134 S.W.3d 679, 682-83 (Mo. App. E.D. 2004).

As such, the basic elements of the claim are met. Any ruling to the contrary by the trial court was an erroneous declaration of the law. The true issue in this case, however, is whether or not Plaintiffs were exempt from the requirements of Section 64.865.

To the extent that there is an exemption, it is contained in Section 64.890.2. That section, in relevant part, creates an exemption for the "erection . . . of farm buildings or structures." While there are cases interpreting the meaning of the exemption, there is no case law regarding whether the exemption is an affirmative defense or part of the case-in-chief of the County.

In its decision below, the Court of Appeals believed that the exemption was an affirmative defense (WD Op. at 29-31). Because no affirmative defense was plead, the Court of Appeals found that the trial court erred in basing its decision – either expressly or implicitly on the exemption (WD Op. at 31-32).

Generally, the burden of proof on claims of exemptions rests with the party asserting the exemption, (and therefore such claims are affirmative defenses). *See*

*Branson Properties USA, L.P., v. Director of Revenue*, 110 S.W.3d 824, 825 (Mo. banc 2003). In particular, the burden of proof on other claims of exemptions in the zoning context – such as claims of non-conforming uses – rests with the party asserting the exemption. *Storage Masters-Chesterfield, L.L.C., v. City of Chesterfield*, 27 S.W.3d 862, 865-66 (Mo. App. E.D. 2000); *Acton v. Jackson County*, 854 S.W.2d 447, 448 (Mo. App. W.D. 1993). As the statutory exemption for non-conforming uses is also found in Section 64.890, the burden of proof for both types of exemptions should be the same.

As noted in the opinion of the Court of Appeals, Rule 55.08 requires that all affirmative defenses be plead (WD Op. at 30). As no affirmative defense of an exemption was plead by Plaintiffs (L.F. 54-56), the failure to plead the affirmative defense justifies granting judgment on the issue of liability to Defendants. To the extent that this Court may rule that this defense is not subject to Rule 55.08 or that it is not an affirmative defense, the evidence clearly shows that Plaintiffs do not fit within the exemption.

This Court has previously defined the scope of the farm building exemption found in Section 65.677 (part of the enabling act for zoning in township counties). *Premium Standard Farms, Inc., v. Lincoln Township of Putnam County*, 946 S.W.2d 334 (Mo. banc 1997). The relevant language in Section 65.677 and Section 64.890 is roughly

similar. As such, the interpretation of Section 65.677 in *Premium Farms* should also govern claims raised under Section 64.890.<sup>8</sup>

In *Premium Farms*, Lincoln Township sought to regulate finishing buildings and sewage lagoons of a hog farming operation. 946 S.W.2d at 235-36, 237-38. This Court found that farm structures are buildings or structures which are incidental (or accessory) to a farming operation.

This logical conclusion from the language of Section 65.677 is even more compelled by the language of Section 64.890.2 The first sentence of Section 64.890.2 lists several farm operations – “the raising of crops, livestock, orchards, or forestry” – and further notes “rice farming” and “flood irrigation.” After the second sentence defines “rice farming” and “flood irrigation,” the third sentence contains the language about farm buildings and structures. In discussing farm buildings and structures, this third sentence

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<sup>8</sup> The decision of the Court of Appeals raises the interesting question of whether this language does create an exemption from the building permit requirements (WD Op. at 28-29). Unlike other subsections in Section 64.890 which have a cross-reference to other parts of the enabling act when talking about exemptions, the subsection for farms only expressly creates an exemption from “this section.” A literal reading of Section 64.890 would result in the interpretation that farms and farm buildings (and certain types of mines) are exempt from the exemption contained in Section 64.890. The parties in this case have acted as if the exemption for farm buildings was an exemption from the other sections of the enabling act including the permit requirement.

includes the modifying language “used for such purposes.” The only such purposes noted in Section 64.890.2 would be those farming operations contained in the first and second sentences of that subsection.

Having found that farm buildings and structures were those incidental to a farming operation, *Premium Farms* expressly noted that farming operations do not include those contracted to provide services to farms. 946 S.W.2d at 239.

Plaintiffs offered no evidence demonstrating a connection of these four buildings to a farming operation. Mr. Gash admitted that he was not a farmer and that the property is not being used as a farm (Tr. 289-90). The only structure on Mr. Gash’s property that colorably would qualify as a farming building is the fifth structure – a stable building (Tr. 344). In discussing his intended use when constructed, none of the proposed uses listed by Mr. Gash for the remaining four buildings would qualify as a farm use or as incidental to a farm use on this property (Tr. 338-45).

Mr. Gash offers only two theories to support his exemption – both of which are contrary to the decision in *Premium Farms*. His first theory is the tautology that an agricultural-style building built in District A is a farm building. Under *Premium Farms*, the issue is not the style of the structure, but rather its use. 946 S.W.3d at 239. More importantly, as will be discussed further, not all uses in District A in Lafayette County are farm uses (Exh. A at Part IV, Title III, Article I – pp 107-110). As such, the Lafayette County Zoning Regulations do allow the construction of non-farm buildings in District A.

His second theory is based on buildings which he claims are similar that were built by others without a permit. In particular, he relies on the testimony of Frank Riekhof. Mr. Riekhof testified about a building that he had constructed on his property (Tr. 21-23). According to the testimony of Mr. Riekhof, it was determined that he did not have to get a permit because it was an agricultural building (Tr. 21-23). There are several flaws in the use Plaintiffs wish to make of this testimony. First, there was no evidence on when the Riekhof building was constructed. To the extent that it was built prior to the *Premium Farms* ruling, Plaintiffs could not claim that the decision on Mr. Riekhof's building serves as any type of decision that buildings like Plaintiffs fit within the rules of *Premium Farm*. Second, the original intended use (the storing and sale of seed) of the Riekhof building was much closer to a farm use than Plaintiffs' intended uses. Third, even if the uses were exactly the same, the fact that the Zoning Administrator made an erroneous decision when Mr. Riekhof built his structure would not preclude the application of the correct rule of law in this case. Since this case involves a state statute, not a county ordinance, the interpretation put on the statute by the Zoning Administrator is due no weight.

Under the evidence in this case, Mr. Gash has failed to prove that these four buildings were exempt from the permit requirement. His own admissions demonstrate that they were not exempt. Under the schedule of permit fees (Exh. O), the base fee for a permit for these buildings is \$100.00. As such, at a minimum, Defendants should be awarded a judgment on the counterclaim in the amount of \$400.00.

Furthermore, the schedule of fees includes a late fee in the amount of \$200.00 per building. Mr. Gash specifically stated to the Zoning Administrator that these buildings were intended as agricultural or farm buildings (Tr. 312, 355) even though the intended use was commercial (Tr. 294, 338-45, 355). Thus, Plaintiffs are not entitled to rely on any argument that they were told that the permits were not necessary to avoid the late fee charge. As such, Defendants are entitled to an additional judgment on the counterclaim in the amount of \$800.00, for a total judgment of \$1,200.00.

Therefore this Court should reverse the judgment as to the counterclaim and remand with orders to enter judgment in favor of Lafayette County in the amount of \$1,200.00 on the counterclaim. In the alternative, this Court should reverse the judgment as to the counterclaim and remand for the trial court to determine whether the appropriate amount of the judgment is \$400.00 or \$1,200.00.

**Appellants' II. THE TRIAL COURT ERRED, ABUSED ITS DISCRETION, AND EXCEEDED ITS JURISDICTION IN GRANTING AN INJUNCTION PRECLUDING THE ENFORCEMENT OF ALL ZONING REGULATIONS BECAUSE: 1) SAID INJUNCTION EXCEEDED THE SCOPE OF THE PLEADINGS AND PROOF IN THAT PLAINTIFFS' COMPLAINT WAS LIMITED TO THE FAILURE TO REZONE THEIR PROPERTY TO B-2; AND 2) PLAINTIFFS FAILED TO PROVE IRREPERABLE HARM IN THAT THEY INTRODUCED NO EVIDENCE INDICATING THAT THERE WERE INDIVIDUALS PREPARED TO USE THE PROPERTY BUT FOR ITS CURRENT ZONING OR THAT THEY HAD BEEN COMPELLED TO REJECT ANY INTERESTED PERSON BECAUSE OF THE ZONING.**

The standard of review for the granting of an injunction is whether the injunction is supported by the evidence and is within the scope of the pleadings. *City of Kansas City v. New York-Kansas Building Associates L.P.*, 96 S.W.3d 846, 853-54 (Mo. App. W.D. 2002).

A party is limited to the relief requested in the pleadings. *Id.* In this case, the facts as plead by Plaintiffs indicated that Plaintiffs sought a declaratory judgment that Defendants improperly refused to change the zoning on their property from District A to District B-2 and that Defendants should rezone the property to District B-2 (L.F. 57-72).

In its judgment, the trial court enjoined the enforcement of all zoning regulations (L.F. 140) on Plaintiffs' property. While Plaintiffs did include in their prayer for relief a

request for such a broad injunction, their factual pleadings did not challenge the validity of the zoning regulations as a whole, just the particularized zoning of their property (L.F. 57-72).

This distinction is crucial when one considers the scope of the injunction. Both by their pleadings and by their evidence, Plaintiffs concede that Defendants should not be required to allow uses more intense than those permitted in District B-2 or to allow Plaintiffs to develop their lot under dimensional requirements (e.g. yard sizes, lot coverage, building sizes) more relaxed than the rules in District B-2. However, the trial court judgment does just what Plaintiffs concede is inappropriate. It allows Plaintiffs to conduct uses not only more intense than those permitted in District B-2, but also uses more intense than is permitted without a conditional use permit in any zone.

“The purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, not being used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong.” *Williams v. Williams*, 99 S.W.3d 552, 560 (Mo. App. W.D. 2003). The wrong alleged by Plaintiffs was enforcing parts of the Zoning Regulation that were more restrictive than the Zoning Regulations which apply to properties in District B-2. The injunction in this case prevents much more than the conduct Plaintiffs alleged was wrong.

When the validity of legislation is challenged, the remedy should not exceed the alleged flaw in the legislation. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, slip op. at 7 (2006). The flaw identified by Plaintiffs was the failure to

rezone to B-2. Defendants specifically asked the trial court to reform its judgment to limit its remedy to correcting that flaw (L.F. 142, Tr. 424, 429).<sup>9</sup>

Beyond being too broad, the injunction was not supported by the evidence. One element of a claim for injunctive relief is proof that “irreparable harm will result if the injunction is not granted.” *New York-Kansas Building Associates*, 96 S.W.3d at 855. Such proof must demonstrate the threat of *future* irreparable harm. *Herron v. Sisk*, 625 S.W.2d 909, 911 (Mo. App. W.D. 1981). It is not to remedy for past harms. *Williams*, 99 S.W.3d at 552.

In the present case, Plaintiffs presented no evidence that they had parties currently interested in using the property that could not use it as currently zoned. The only business that they claimed to have lost by the denial of the rezoning was Mahindra (Tr. 295), but they presented no evidence showing that rezoning was necessary for Mahindra to have used the property. In fact, the only evidence regarding how Mahindra may have used the property was introduced by Defendants during the motion for new trial (Tr. 398-400). That evidence indicated that Mahindra did not need the property to be rezoned (Tr. 398-400, Exh. A at Part IV, Title III, Article I – pp. 107-10). As such, not only was there

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<sup>9</sup> Alternative language could have corrected the flaw. Instead of providing that Lafayette County was “enjoined from enforcing its zoning ordinance,” the judgment could have provided that Lafayette County was “enjoined from enforcing any provision of its zoning ordinance more restrictive than the provisions applicable in zoning district B-2.”

no evidence of future harm from the failure to grant rezoning, there was not even substantial evidence of a past harm.

In addition, as the facts indicate, the procedural posture in this case was unusual. Typically, before being entitled to an injunction, if there are alternative procedures, Plaintiffs are required to exhaust those procedures or present proof of their futility. At the time of Plaintiffs' original rezoning request, there was a finding of violation which was still in effect at the time that the request was rejected (Exh. K, M). According to the Plaintiffs, that finding of violation was the reason for the rejection (L.F. 61). Subsequent to the rejection, the dispute over the violation was resolved by changes to the main residence (Tr. 369-71).<sup>10</sup> Having resolved the one issue that was, according to Plaintiffs, the sole reason for the denial, Plaintiffs did not reapply but rather pursued this litigation. Plaintiffs presented no actual evidence indicating that a reapplication would be futile but instead presented Mr. Gash's unsupported idiosyncratic belief that he would not receive a fair hearing. Under such circumstances, Plaintiffs have failed to prove that an injunction was appropriate. *Cf. Farm Bureau Town and Country Insurance Co. v. Angoff*, 909 S.W.2d 348, 354 (Mo. banc 1995).

Finally, Missouri statutes require public hearings and notice to the neighbors prior to adopting a new zoning for a property. §§ 64.815, 64.863, 64.875. Given the

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<sup>10</sup> Given the confusion in the testimony over the time line in this case, a time line and the docket sheets from the violations case are included in the Appendix as an aid to the Court even though not a formal part of the record (Appendix at A-1 through A-11).

combination of the by-laws of the Zoning Commission (Exh. N) and these notice requirements, the earliest that a new zoning could have been adopted for Plaintiffs property after the entry of the judgment would have been April or May.

Given this delay mandated by state law, rather than establishing an immediate injunction, the better approach would have been to delay the implementation of the injunction to give Lafayette County a chance to comply with the finding that the property was not properly zoned. As noted in *Committee for Educational Equality v. State*, 878 S.W.2d 446, 453 (Mo. banc 1994), there are cases in which the principles of judicial economy are best served by staying declaration or execution of judgment. This principle is especially true when the challenge is to the constitutionality of one aspect of a complex scheme, such as zoning regulations, and the decision will require action by a legislative body. When legislative action is required, the best approach is to give the legislative body time to take action, and stay a decision on remedial action until the legislative body has failed to act. *Cf. Lenette Realty & Investment Co. v. City of Chesterfield*, 35 S.W.3d 399, 408-09 (Mo. App. E.D. 2000 (order that city rezone property to reasonable classification within reasonable time was appropriate with other remedies to be considered only if the city did not act)).

Especially in the absence of evidence indicating that potential tenants were waiting for a decision to begin renting, there were no facts justifying not giving Defendants sufficient time to comply with state law prior to the effective date of the injunction. The granting of an immediate injunction was an abuse of discretion.

As the injunction was not supported by the evidence, this Court should find that the injunction was void. In the alternative, this Court should find that the injunction exceeded the scope of the pleadings and the evidence and hold that, to the extent that the injunction purports to have exempted Plaintiffs from complying with the entirety of the Zoning Regulations, it was void.

**Appellants' III. THE TRIAL COURT ERRED, ABUSED ITS DISCRETION, AND EXCEEDED ITS JURISDICTION IN GRANTING AN INJUNCTION PRECLUDING THE ENFORCEMENT OF ALL ZONING REGULATIONS UNTIL THE PROPERTY WAS REZONED TO B-2 BECAUSE SAID CONDITION WAS IMPROPER IN THAT IT EFFECTIVELY ORDERED AND COERCED DEFENDANTS TO ENACT A PARTICULAR ZONING.**

Review of the scope of an injunction is for abuse of discretion. *Edmunds v. Sigma Chapter of Alpha Kappa*, 87 S.W.3d 21, 29 (Mo. App. W.D. 2002); *Newmark v. Vogelsang*, 915 S.W.2d 337, 339 (Mo. App. E.D. 1996).

In the case of the injunction entered by the trial court, it is important to note an important element of the case law on zoning. Under the case law, a trial court may not order the enactment of a specific zoning classification. *Lenette Realty*, 35 S.W.3d at 408-09. While there are many reasons for this rule (including judicial restraint and deference to legislative body), a primary one is the one forgotten by the trial court. A zoning

classification need only be a reasonable classification. It does not have to be the most appropriate zoning, just an appropriate zoning.

Lacking the jurisdiction to directly order Defendants to zone Plaintiffs property to B-2, the trial court judgment effectively gives an indirect order by means of the terms of the injunction. Such an indirect order is a clear abuse of discretion.

In particular, the trial court made extensive findings that the proper zoning of the property was B-2 (L.F. 134, 135, 138, 139, 140). Having made such findings, the trial court stated the injunction would only be lifted when classified “in accordance with the above findings that specify that the best use is commercial B-2” (L.F. 140).

Despite whatever Plaintiffs have argued in the past and may argue in response, there is only one way that the language of the injunction can be interpreted if you consider the courses of action open to Defendants in response. First, Defendants could refuse to consider rezoning. Under those circumstances, the injunction stays in place. Second, Defendants could rezone the property to something other than B-2. Under those circumstances, Defendants have to come back to court to seek to have the injunction lifted. The injunction would stay in place until the trial court decided whether the new zoning was valid, and, if the trial court rejected the new zoning, Defendants would be back to square one. Third, Defendants could rezone the property to B-2. Only under those circumstances, would the injunction be lifted immediately. It is a fraud on this Court for Plaintiffs to pretend that the injunction was anything but a command to rezone the property to B-2.

Furthermore, the terms of the injunction effectively coerced Defendants to take immediate action on the rezoning to B-2. By precluding the enforcement of any zoning regulations, the injunction exceeded the permissible scope of an injunction. An injunction is designed to “restrain real or threatened acts that constitute a real injury.” *Metmor Financial, Inc., v. Landoll Corp.*, 976 S.W.2d 454, 463 (Mo. App. W.D. 1998). It should “be framed to afford relief to which complainant is entitled and not to interfere with legitimate and proper action by those against whom it is directed.” *Id.* An injunction is overbroad and improper if it could “interfere with legitimate and proper action by the defendants in the future.” *Doe v. TCI Cablevision*, 110 S.W.3d 363, 375 (Mo. banc 2003). Even assuming that Plaintiffs were entitled to be subject only to the provisions of the Zoning Regulations that apply to property zoned B-2, this injunction gave them substantially more – exempting them from all provisions of the Zoning Regulations including those that applied to property zoned B-2. In doing so, it interfered with “legitimate and proper actions” by Lafayette County enforcing those provisions in the Zoning Regulations which apply to all properties regardless of zoning.

Furthermore, an injunction is not supposed to be used to “compel persons to do right.” *Williams*, 99 S.W.3d at 560. In the absence of the ability to hold Plaintiffs to the same rules that apply to all other citizens of Lafayette County, the injunction forced Lafayette County to take the only action that would clearly result in the lifting of the injunction.

Ignoring any evidence of Plaintiffs’ cavalier attitude toward the zoning rules from Mr. Gash’s own testimony, the testimony at the hearing on the motion to amend the

judgment clearly demonstrated the bind that the injunction placed on Lafayette County. During the very short time period between the judgment and the hearing, Plaintiffs constructed a sign on their property without obtaining a building or sign permit (Tr. 405-06, Exh. T). The provisions of the Zoning Regulations that apply to all districts require a sign permit for all signs (Exh. A at Part I, Title II, Article V, § 3 – p. 38). State law also requires a building permit for all structures. Section 64.865. In response to this evidence, Plaintiffs took the position that the injunction allowed them to engage in such actions until the property was rezoned to B-2 (Tr. 401, 403, 404).

Facing this situation, Lafayette County was left with no true choice by the injunction. Either they could allow Plaintiffs to continue to operate completely exempt from the Zoning Regulations, or they could surrender to the command in the injunction to rezone to B-2. By definition, such an alternative is a coercive injunction and is improper.

Therefore, Defendants request that this Court hold that the injunction was void to the extent that it purported to preclude the enforcement of all Zoning Regulations and to authorize Plaintiffs to engage in actions which were not permitted by state law or the Zoning Regulations applicable to all districts or applicable to District B-2.

**Appellants' IV. THE TRIAL COURT ERRED IN ADMITTING PLAINTIFFS' EXHIBIT 31 AND IN GIVING WEIGHT TO THAT EXHIBIT IN ITS JUDGMENT BECAUSE THE ADMISSION OF THE EXHIBIT VIOLATED THE RULE AGAINST ADMITTING EVIDENCE OF SETTLEMENT OFFERS IN THAT THE EXHIBIT WAS A LETTER PROPOSING TO RESOLVE A ZONING VIOLATIONS CASE WITH PLAINTIFFS.**

The standard of review on admission of evidence is abuse of discretion with the party complaining of the ruling having the burden to show both abuse of discretion and prejudice. *Cotner Productions, Inc. v. Snadon*, 990 S.W.2d 92, 100 (Mo. App. S.D. 1999).

In this case, the trial court admitted Exhibit 31 over objection (Tr. 330). An objection was also made when Plaintiffs asked witnesses about the letter (Tr. 257-58). In objecting to the question asked to the witness, Defendants' objection was that "[t]his was a plea offer and a, or a settlement offer in a companion case" (Tr. 257-58). In objecting to the actual exhibit, the objection was that the exhibit was "a separate proposal in a companion case" (Tr. 330). In Defendants' motion for a new trial, Defendants alleged trial court error in "allowing the introduction of evidence regarding a settlement offer in a related case" because it "violated the rule against the admissibility of settlement negotiations" (L.F. 144). In addition, Defendants had filed a pre-trial motion to strike allegations regarding this exhibit from the pleadings as improper use of settlement negotiations in a related case (L.F. 52-54). As such, the nature of Defendants complaint

about this exhibit was clearly before the trial court and this issue was preserved for appeal.

Exhibit 31 was a letter from the Zoning Administrator (the “executive” branch of zoning) to Plaintiffs. The essence of this letter was a response to a request from Plaintiffs for a resolution of what was then an administrative finding of a zoning violation (Exh. 31).<sup>11</sup> The letter discussed what the Zoning Administrator perceived as available alternative dispositions and proposed what the Zoning Administrator believed to be an appropriate settlement (Exh. 31). This letter was specifically noted in two findings of the trial court to support the trial court’s conclusion that the County (implicitly the Zoning Commission as the “legislative” branch of zoning) had no real interest in health or safety.

The general rule regarding offers of settlement is that they are not admissible in the case in which the offer was made or in any other case. *State ex rel. Malan v. Hueseman*, 942 S.W.2d 424, 427-28 (Mo. App. W.D. 1997); *Massman Construction Company v. Missouri Highway and Transportation Commission*, 835 S.W.2d 465, 467-68 (Mo. App. W.D. 1992). The policy reason for the rule is to encourage settlements. *Malan*, 942 S.W2d at 427. Allowing settlement offers in one case to be used in related

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<sup>11</sup> For some reason, Plaintiffs’ counsel, having introduced the entirety of this letter, now wants this Court to ignore parts of it as “self-serving” hearsay. Of course, contrary to any such argument, Mr. Gash admitted to having made attempts to resolve the zoning violation (Tr. 358).

cases would discourage settlements. *Id.* at 429. The use of the settlement offer in this case by Plaintiffs and by the trial court indicates exactly why the rule exists.

As the trial testimony indicates, Plaintiffs initially obtained permits to construct two houses on their property (Tr. 362). While not specifically noted at trial, the applications for those permits did indicate that the houses would comply with the Zoning Regulations. When Plaintiffs soon thereafter applied for rezoning, concerns were noted at the hearing regarding the development of the property (Tr. 362, Exh. K). Between the hearing and the business meeting, three potential violations related to the two houses were noted. These violations were the main house being slightly too close to the presumed rear property line, the “accessory” house being substantially too close to the presumed rear property line, and the relative sizes of the two houses (Tr. 304, 363).<sup>12</sup> Having had the issue of potential violations raised, the Zoning Commission tabled the decision on the rezoning to give the enforcement action time to proceed and be resolved (Tr. 362-63, Exh. K).

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<sup>12</sup> The Zoning Regulations limit owners to one principal dwelling per lot in Zoning District A (Exh. A at Part II, Title I, Article III, § 1.1 – p. 41). However, owners are allowed to construct a guest house or caretaker’s cottage as an accessory use (Exh. A at Part II, Title I, Article II, §6 – p. 41). The Zoning Regulations define the maximum size of such an accessory house as a percentage of the size of the main house (Exh. A at Part I, Title I, Article II, § 2 – p. 4).

Lafayette County has established procedures for the handling of zoning violations (Exh. A at Part I, Title I, Article V, § 6 – p. 19). Initially, the Zoning Administrator makes a tentative or initial finding of a violation based on what they discover in investigating an alleged violation (Exh. A at Part I, Title I, Article V, § 6.1 – p. 19). After being given notice of the alleged violation, the property owner is given the chance to present additional information in response before the Zoning Administrator makes a final decision (Exh. A at Part I, Title I, Article V, § 6 – p. 19). If the final determination is that a violation has occurred, this decision may be appealed to the Board of Zoning Adjustment (Exh. A at Part I, Title I, Article V, § 6.5 – p.19) with subsequent judicial review of the decision of the Board of Zoning Adjustment authorized by state statutes. This process can take (and in this case did take) a substantial period of time (Appendix at A-1 through A-11). Under the Zoning Regulations, the quasi-criminal county ordinance offense of violating the Zoning Regulations does not begin until after there is a final decision by the Board of Zoning Adjustment (Exh. A at Part I, Title I, Article V, § 6.6 – p. 19). In other words, if the zoning violation is remedied before the decision of the Board of Zoning Adjustment, there are no potential charges for violating the Zoning Regulations.

Faced with an initial finding of violations and this extended procedure, a Zoning Administrator has to decide the appropriate course of action in dealing with someone who wants to discuss a resolution of the alleged violations. In determining the appropriate course of action, one would naturally expect a Zoning Administrator to consider both the seriousness of the alleged violation and the appropriate use of the

resources of that office. As the evidence showed, the violations in this case involved two houses (both single family residences) that had substantial value – somewhere between \$200,000.00 (Tr. 300) and \$300,000.00 (Exh. R). In light of these facts, the question becomes what were the Administrator’s reasonable options.

It is on this question that the two parties disagree. The approach taken by Plaintiffs and the trial judge essentially leave an Administrator with two options – find that the violations are de minimis or accept nothing less than full abatement. Defendants disagree and believe that there is a third option based on a realistic appreciation of the purposes of ordinances and statutes.

Any legislative scheme involves the drawing of lines to either avoid harms or promote benefits. Where a line should be drawn is a matter left to the sound discretion of the legislative body. In many cases, the legislative scheme draws a bright line. However, not all violations of that bright line are equally severe. First, some violations are de minimis. Such violations are appropriately not sanctioned. Second, there are violations which are substantial and cause the exact type of harm which the legislative scheme is intended to prevent. Such violations do deserve very strict enforcement. Plaintiffs’ position (and the trial court’s findings) implies that these are the only two possible types of violations. Defendants believe that there is a third category --violations which are substantial but do not cause any significant harm to the goals of the legislative scheme. It is Defendants’ position that such violations deserve some kind of penalty to avoid degrading the importance of the legislative rule but that something less than full and strict enforcement should be available to reflect the relative seriousness of the violation.

The Zoning Administrator had the opportunity to review the violations and determine how to characterize them. She apparently believed that the violations fell within the third category and that a stiff fine was both an appropriate resolution and the way to reach a quick settlement. Plaintiffs, as was their right, rejected the proposed settlement.

If the trial court had followed the normal rules of evidence, that offer would not have been considered at trial. Under the normal rules of evidence, the evidence would have been limited to the status of the violations as of the date that the Zoning Commission rejected Plaintiffs' application – namely that as of June 12, 2003, the last decision was the Board of Zoning Adjustment's finding that Plaintiffs were in violation of the Regulations in two aspects. Instead, the trial court allowed the evidence of the position taken by the Zoning Administrator in the violations case and then used that evidence to impart an ill-motive to the Zoning Commission – an entirely separate body – and to find that there were no valid concerns of the Zoning Commission related to the violations, contrary to the testimony of the Zoning Commissioners.

If this Court finds that the use of such settlement negotiations is proper, it will send a clear message to zoning administrators around the state. That message will be that the only proper settlement offer of a zoning violation is no offer because any leniency will be used against you later. Under this new rule, a zoning administrator is not to exercise any discretion as to the seriousness of the violation, the equities involved, the strength of the case, or the desire for a speedy resolution. Instead, a zoning administrator is to insist on full compliance with the regulation with the violation to be abated and to

reserve the right to use all actions, both civil and criminal, to force the property owner to abate the violation. Under this new rule, any offer other than a demand for full and immediate compliance is evidence that the concern about the violation is not real. Such a message will, of course, increase litigation and discourage settlements. As the reason for the current rule is to discourage unnecessary litigation and encourage settlements, Plaintiffs' proposed rule is contrary to public policy.

This Court should find that Plaintiffs have not offered any good reason why the rule should not apply to this case. It should hold that the trial court should have followed the rule precluding the use of such evidence, that the admission of the settlement offer was erroneous, and the trial court should not have considered and given weight to Exhibit 31 in its judgment.

As such, this Court should in its conduct of the review of the judgment below evaluate the evidence without considering Exhibit 31.

**Appellants’ V. THE TRIAL COURT ERRED IN FINDING THAT ZONING DISTRICT A WAS NOT REASONABLE AND ENTERING JUDGMENT FOR PLAINTIFFS BECAUSE PLAINTIFFS FAILED TO REBUT THE PRESUMPTION OF REASONABLENESS IN THAT THE ONLY EVIDENCE THAT DISTRICT A WAS UNREASONABLE WAS: 1) EVIDENCE THAT FARMING OR RAISING LIVESTOCK WAS NOT A VIABLE USE OF THE LAND (WHICH EVIDENCE DID NOT CONSIDER OTHER USES PERMITTED IN DISTRICT A) AND 2) PLAINTIFFS’ PERSONAL PLANS THAT REQUIRED USES OTHER THAN THOSE PERMITTED IN DISTRICT A.**

As zoning is a legislative act, the decision of the trial court is reviewed de novo, with due deference to the ability of the trial court to assess the credibility of the witness. *Fairview Enterprise, Inc. v. City of Kansas City*, 62 S.W.3d 71, 76 (Mo. App. W.D. 2001). The zoning ordinance is presumed to be valid and any uncertainty about validity is to be resolved in the government’s favor. *Id.* at 77.

The current law on zoning has a two-part substantial basis test. The first step is whether the party challenging the zoning decision “has presented sufficient evidence to rebut the presumption that the zoning is reasonable.” *Id.* (citing *Lenette Realty*, 35 S.W.3d at 405-06.). This test weighs the harm to the land owner against the benefit to the general public. *Fairview Enterprise*, 62 S.W.3d at 77.

To support its conclusion that Plaintiffs had met the test, the trial court cited to the testimony of nine witnesses (L.F. 133-36). Likewise, the trial court found that the

property could not produce enough income as “agriculture” to pay its property taxes (L.F. 138). The trial court’s reliance on these findings to support the conclusion that plaintiff had met its burden under the first part of this test is fatally flawed.

The approach taken by Plaintiffs and the trial court is similar to the approach taken by the complaining parties in *State ex rel. Barber & Sons Tobacco Company v. Jackson County*, 869 S.W.2d 113 (Mo. App. W.D. 1993). In *Barber*, as in the present case, evidence was presented as to the unsuitability of the property for agricultural use. *Id.* at 118. On appeal, it was noted that such evidence ignored uses permitted under Jackson County’s special use permit provisions. *Id.* The *Barber* Court held that such uses needed to be considered in determining the reasonableness of the current zoning. *Id.* at 118-19.

In the present case, like in *Barber*, contrary to the assumptions of Plaintiffs’ witnesses, the Zoning Regulations allow a multitude of uses in District A. The Zoning Regulations list approximately four hundred uses of which approximately two hundred thirty uses are related to sales or the service industry (Exh. A, Part IV, Title II, § 2 – pp. 84-106). Of the four hundred uses listed, only two are crop farming and raising live stock (three if you include feed lots and ten if you include raising other types of plants and animals – such as beekeeping and growing plants for plant nurseries) (Exh. A., Part IV, Title II, § 2 – pp. 105-06). In District A, approximately ninety-five uses are permitted, including sixty-four uses related to sales or the service industry (Exh. A, Part IV, Title III, Article I – pp. 107-110). Plaintiffs made no attempt to show that the “commercial uses” permitted in District A are so limited as to make the current zoning unreasonable.

Instead of attacking the real regulations governing District A, Plaintiffs attacked a phony District A defined by terms from the real estate appraisal/tax assessment profession. In particular, Plaintiffs emphasized that you could not make a living farming or raising live stock on this property (Tr. 45-47, 63). When specifically asked, the appraisers indicated that they were using traditional appraisal terminology, not the Zoning Regulations, to define agricultural and commercial (Tr. 54, 65-67).

Furthermore, in discussing taxes on the property, Plaintiffs and the trial court ignored that most of the taxes for this property are attributable to the two residences that Plaintiffs have constructed on the property. If this evidence supports a claim for rezoning, then any party seeking to rezone property from a “residential” district to a “commercial” district would meet the first element of the test – especially if you do not consider the financial benefits of owning your own residence in the equation. Defendants would contend that those benefits exceed the taxes on this property (Exhibit R).

If you strip these two phony contentions from Plaintiffs’ case, Plaintiffs have simply failed to prove any detriment. Plaintiffs made two additional arguments at the trial level. Neither of these additional arguments have any further validity than the previous arguments.

First, Plaintiffs claimed that they had lost business due to the failure to rezone. While Plaintiffs have some plans for zoning district B-2, the existence of such plans are not sufficient to meet their burden of proof. If they were, every party challenging a rezoning application would meet the first-part of the test. There was no evidence that Plaintiffs lost business because of the current zoning. The only evidence presented about

actual interest (as opposed to theoretical interest) in renting the property indicated that both potential tenants who had contacted Plaintiffs proposed uses which were permitted in District A (Tr. 287-88, 295, 397-400).

Second, based on assumptions about the likelihood of success if rezoned to District B-2, Plaintiffs assert a higher property value if the property were rezoned to District B-2. As Plaintiffs conceded at trial, they have not done any study to confirm their assumptions about the viability of this property for B-2 uses (Tr. 357-58). Even if these assumptions were supported by such evidence, this evidence would not be conclusive on this issue. As the *Barber* Court noted, it is normal for land zoned for more intense development to be more valuable than land zoned for less intense development. 869 S.W.2d at 117-18. If this type of evidence were the determining factor in the first part of the test, it would be difficult for a government to ever successfully defend a less intense zoning district. *Id.*

As the tax records show, the development on Plaintiffs' property had substantial value for the uses permitted under Zoning District A (Exh. R). The difference between that value and Plaintiffs' speculation as to value if rezoned to District B-2 is insufficient to show that the failure to rezone caused detriment to the Plaintiffs.

The simple fact in this case is that both Plaintiffs' witnesses and the trial court assumed that zoning district A and "agricultural" uses were synonymous and that zoning district B-2 and "commercial" uses were synonymous. As the Zoning Regulations conclusively show, both assumptions were incorrect. Lafayette County has opted to draft an ordinance that allows broad uses in District A. It was error by the trial court to

analyze the validity of the zoning of Plaintiffs' property as if the uses permitted in District A were limited to farming. In conducting its de novo review, this Court should find that Plaintiffs have failed to rebut the presumption that the current zoning is reasonable.

**Appellants' VI. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANTS FAILED TO DEMONSTRATE THAT THE VALIDITY OF THE CURRENT ZONING WAS FAIRLY DEBATABLE BECAUSE DEFENDANTS INTRODUCED BOTH SUFFICIENT TESTIMONY AND SUFFICIENT EVIDENCE BY MEANS OF EXHIBITS TO DEMONSTRATE THAT THE VALIDITY OF THE CURRENT ZONING WAS FAIRLY DEBATABLE IN THAT: 1) THE ALLEGED ZONING VIOLATIONS JUSTIFIED KEEPING THE CURRENT ZONING UNTIL THE VIOLATIONS PROCESS WAS CONCLUDED, 2) THE PROPOSED REZONING WAS NOT IN HARMONY WITH THE COMPREHENSIVE PLAN, 3) THERE WERE CONCERNS ABOUT SEWAGE, RUNOFF AND TRAFFIC, 4) THE REZONING WOULD HAVE CREATED A NON-CONFORMING USE, AND 5) THERE WAS AN ISSUE REGARDING UNUTILIZED B-2 PROPERTY AND THE VIABILITY OF B-2 ZONING AT THIS LOCATION.**

As zoning is a legislative act, the decision of the trial court is reviewed de novo, with due deference to the ability of the trial court to assess the credibility of the witness.

*Fairview Enterprise, Inc. v. City of Kansas City*, 62 S.W.3d 71, 76 (Mo. App. W.D. 2001). The zoning ordinance is presumed to be valid and any uncertainty about validity is to be resolved in the government’s favor. *Id.* at 77.

As noted in the previous point, the current law on zoning has a two-part substantial basis test. The second step is whether, once the party challenging the zoning has presented sufficient evidence to rebut the presumption of reasonableness, there is sufficient evidence that “the reasonableness of the zoning is ‘fairly debatable.’” *Id.* (citing *Lenette Realty*, 35 S.W.3d at 405-06.). This part of the test looks to whether the current zoning serves a valid public interest. *Fairview Enterprise*, 62 S.W.3d at 80.

In addition to the testimony of the witnesses, both on direct and cross-examination, the evidence in this case included 50 exhibits. Exhibits are evidence. If this case had been tried to a jury, they would have been instructed “[t]he evidence may include the testimony of witnesses . . . and exhibits, such as pictures, documents, and other objects.” MAI 2.01. In viewing exhibits, the meaning of a document is properly characterized by looking at the document itself, not the characterization of it by a witness, and is reviewed de novo on appeal. *General Motor’s Acceptance Corporation v. The Windsor Group*, 103 S.W.3d 794, 796-97 (Mo. App. E.D. 2003). When all of the evidence is considered, Defendants believe that there are at least five different valid concerns that made the rezoning fairly debatable.

The first valid concern was the alleged violation on Plaintiffs’ property. Contrary to the finding that the alleged violation (and the County’s position on it) revealed no real

public interest in denying the rezoning, the alleged violation was a valid reason for denying the rezoning.

Both Mr. Gash and the Zoning Commissioners testified that some members of the Zoning Commission believed that there should be some sanction for violating the Zoning Regulations (Tr. 156-61, 190-91, 310-12). At the time that the Zoning Commission made its decision, the last decision was the decision of the Board of Zoning Adjustment that there were violations.<sup>13</sup> In determining the validity of the decision rejecting the rezoning, this Court considers the facts as they existed on the day of the Zoning Commission decision. *Heidrich v. City of Lee's Summit*, 916 S.W.2d 242, 249 (Mo. App. W.D. 1995).

This belief that there should be some sanction for zoning violations is a valid concern that should be given weight by this Court. Plaintiffs have previously noted the belief that granting this rezoning would have had the effect of wiping out some or all of the violations. Assuming this claim to be true, their approach would send the message that it is all right to act first and get permission second. The Zoning Commission wanted

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<sup>13</sup> Mr. Gash takes the curious position that the County's concern about the violation was simply an extent to extort money while conceding that the County accepted a survey which was prepared after the conclusion of the Board of Zoning Adjustment. As a matter of law, the County was entitled to rely on the evidence as presented to the Board of Zoning Adjustment and was not required to accept the new survey as valid evidence. The willingness to accept the survey as proof of "abatement" of the violation supports the conclusion that the fine was merely suggested as an alternative to abatement.

to send a different message, namely that if you act first, you will either pay a penalty or have to bring yourself back into compliance.

The position taken by Plaintiffs would denigrate respect for the need to comply with the Zoning Regulations. Regardless of anyone's view of the seriousness of these violations, the Zoning Commission was entitled to insist that an applicant comply with the Zoning Regulations (or be penalized for failing to comply) before a rezoning would be granted. This interest alone makes the granting of the rezoning fairly debatable.

Second, the proposed rezoning was not consistent with the 1987 Comprehensive Plan. While Plaintiffs offered evidence trying to reinterpret the 1987 Plan, as noted above, the meaning of the 1987 Plan is for this Court to determine, not the witnesses.

Plaintiffs' emphasis at trial was on the map of future land uses contained in the 1987 Plan (Exh. 3-A). However, this map is merely part of the 1987 Plan and is not meant to be viewed in isolation. A map of future land use is merely a map showing areas that the planning body believes have the potential to develop over the life of the plan. It does not require the immediate rezoning of any parcel of property. The decision to rezone is guided by the text explaining the map and establishing development criteria.

In applying the criteria, a key fact is that (as is not unusual) the land shown as having the potential to develop was in excess of anticipated need during the life of the 1987 Plan (Exh. 3 at p. 10-8). Such a fact gives the zoning body some discretion in determining which sites are appropriate for development. Due to this fact, any interpretation of the plan (regardless of by whom) that suggests that the 1987 Plan called

for the entirety of the I-70 corridor to be rezoned to commercial or industrial uses by the end of the period covered by 1987 Plan is simply incorrect.

Another concern raised in the 1987 Plan was the desire to encourage the development of the incorporated areas as opposed to development in the unincorporated areas (Exh. 3 at pp. 3-4 through 3-9). Under the policies of the 1987 Plan, development was supposed to spread from the incorporated areas, not leap-frog from spot to spot (Exh. 3 at pp. 3-4 through 3-9). When rezonings did occur, they were supposed to include specific plans for development (Exh. 3 at p. 3-6).

In this case, not only did Plaintiffs proposal constitute a leap-frog, but their proposal was somewhat vague (Exh. K, L). Contrary to the finding of the trial court, it was not fully consistent with the 1987 Plan. Plaintiffs tried to evade this problem by citing to numerous rezonings, many of which occurred prior to the 1999 revisions to the Zoning Regulations. However, the rest of the evidence, particularly Defendants' exhibits, indicated that since the amendments to the Zoning Regulations at the end of 1999, the County has given more weight to the 1987 Plan (Exh. B-J). Furthermore, the criteria for granting a rezoning under the 1999 revisions particularly reference the comprehensive plan as a significant factor in determining whether to grant a rezoning application (Exh. A at Part I, Title I, Article III, § 5 – pp. 16). Under these criteria and the terms of the Comprehensive Plan, Defendants had valid reasons for denying Plaintiffs' application and the refusal to rezone was fairly debatable.

Third, both the 1987 Plan and recent decisions of the Zoning Commission reflect concerns about the negative impacts of development – particularly runoff, sewage, and

traffic. The 1987 Plan notes many potential problems that need to be considered such as runoff, sewage, and traffic (Exh. 3 at 3-5 through 3-10). These types of issues were used on numerous occasions to reject other applications around the time of Plaintiffs' application (Exh. B-J, Tr. 192-93, 230-37). These types of concerns were raised by members of the public when they testified at the Zoning Commission's hearing on Plaintiffs' application (Exh. K, L, Tr. 173-74). Plaintiffs introduced no evidence rebutting the concerns raised at the Zoning Commission hearing – either at while the rezoning application was pending or at the trial in this case. As such, the Zoning Commission was entitled to rely on the testimony given under oath at its hearing in denying the rezoning application of Plaintiffs and that testimony made the propriety of rezoning fairly debatable. *Cf. Heidrich*, 916 S.W.2d at 250-51 (failure to address neighbors' concern about traffic invalidated rezoning). In its judgment, the trial court ignored the testimony and information presented at the Zoning Commission hearing in opposition to the rezoning even though the full file of the rezoning application (including the tapes of the hearing) was introduced into evidence (Exh. K, L).

Fourth, the proposed rezoning would have created a non-conforming use on the property – the two residences and a stable. In his testimony, Mr. Gash conceded that his proposed rezoning would create a non-conforming use (Tr. 353). As noted by the decision in *Acton v. Jackson County*, 854 S.W.2d 447 (Mo. App. W.D. 1993), zoning regulations are designed to minimize non-conforming uses. *Id.* at 448. Like many zoning ordinances, the Lafayette County Zoning Regulations includes language as to when the right to continue a non-conforming use is lost by abandonment (Exh. A at Part

I, Title II, Article III – p. 29). All four of the Zoning Commissioners testified that this potential non-conforming use was something that they would have to consider in making a decision on a proposed rezoning (Tr. 159-60, 193, 207-8, 215, 218, 224-25).

To counteract this legitimate concern, Plaintiffs and the trial court cited to two properties that had been rezoned – the Lasure property and the Williams property (L.F. 135-36). However, there was no affirmative evidence that the residence was included in the part of the Williams property that was rezoned. As such, the only property that Plaintiffs indicated had been rezoned to B-2 that included a residence was the Lasure property which had been rezoned in 1995 (Exh. 29). To contradict the reliance of Plaintiffs on this one exception in over fifteen years of zoning, evidence was introduced that other rezonings had been turned down for this reason (Tr. 160).

While Plaintiffs may disagree with the County's position on residences in B-2, they did not challenge the validity of the use chart in their petition. As such, the fact that the Zoning Regulations prohibit residences on properties zoned B-2 was entitled to be given weight by the trial court. To use one decision made by a previous board approximately eight years before the decision in this case as justification for ignoring this issue is contrary to both reason and common sense.<sup>14</sup> Furthermore, as admitted by Mr.

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<sup>14</sup> Under Sections 64.805 and 64.860, the terms of members of the Planning and Zoning Commission are four years each. As such, between the time of the Lasure decision and the Gash decision, the terms of the members of the Planning and Zoning Commission would have expired twice for each position. Similarly, the positions of the

Gash, Plaintiffs delayed applying for rezoning so that they could create this non-conforming use (Tr. 356). Under those circumstances, this potential non-conforming use was a valid reason for rejecting the rezoning making the decision on the zoning fairly debatable.

Finally, there were valid concerns about the existence of underutilized property and the viability of B-2 zoning at this location. Plaintiffs introduced evidence regarding the property which had been zoned to a higher-intensity (business or industrial) use along Interstate 70 (Exh. 1). Looking at the photographs in Exhibit 1 and the properties contained within them reveals a key fact – in many cases, the actual use of the property is proportionate to their distance from the city limits of the closest town. In particular, the Lasure property and the Keyserling property (two properties that Plaintiffs emphasized as comparable at trial) are not being used in any substantial way.

The 1987 Plan cautions against creating too many underutilized B-2 locations. (Exh. 3 at p. 3-6). In particular, the 1987 Plan sets a standard that 90% of the property

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Associate Commissioners would have come up for election twice (in 1996 and 2000) and the position of the Presiding Commissioner would have come up for election twice (in 1998 and 2002). Not surprisingly, only one member of the Planning and Zoning Commission (Ms. Brown) and one member of the County Commission (Mr. Strodtman) were in office at the time of the Lasure decision. Despite this change in membership and the ability of any legislative body to change policies over time, Plaintiffs seek to bind Defendants to this policy decision from 1995.

zoned for higher uses should be so used (Exh. 3 at p. 3-6). As revealed by Exhibit 1, at the time of Plaintiffs' application, the percentage of B-2 locations being used for "commercial" purposes did not meet this standard, thereby indicating that close scrutiny was appropriate before creating additional B-2 properties.

In response to this standard, the application process has gotten tougher in recent years (Tr. 41-42). The instructions on the application specifically inform an applicant of the responsibility to provide information supporting their request (Exh. Q). Plaintiffs in their evidence tried to indicate that the Peters' application was very similar to Plaintiffs' (Tr. 242-45). This reliance was apparently abandoned when it was realized that there were differences between the two applications that justified approving the Peters' application while denying Plaintiffs' application. In particular, the difference was that the Peters complied with the instructions and provided information supporting the application in the form of viability studies (Tr. 247-51) which Plaintiffs did not do (Tr. 357-58).

Furthermore, the 1987 Plan indicates a very minimal need for additional commercial acreage in the county – a total of 100 acres over the life of the plan (Exh. 3 at p. 10-14). In light of the number of acres that had already been zoned B-2, it was reasonable to expect an applicant to provide real justification for why the existing commercial zoning was inadequate for the applicant's purposes. As acknowledged by Mr. Gash, he had never considered any alternative lot that was already zoned for B-2 nor did he have any evidence showing that such lots were inadequate beyond his own belief

as to their appropriateness (Tr. 356-58). Even if Mr. Gash had had such evidence, it was never presented to the Planning and Zoning Commission.

While it is not the role of zoning to pick winners or losers or to limit competition for the sake of limiting competition, there is a responsibility to avoid opening up property to inappropriate uses in the absence of a viable plan for development. Plaintiffs' emphasized a letter from Dr. Weir (their immediate neighbor) as supporting rezoning (Exh. 33). However, this letter included a condition on Dr. Weir's support – his desire that any rezoning would include a plan for development. As shown by the contradiction between the application (Exh. K), the testimony to the Zoning Commission (Exh. K, L), and the testimony at trial (Tr. 289, 294, 337-44, 348-52), Plaintiffs' plan for development was “build it and they will come” with no specific uses clearly in mind. As ultimately acknowledged by Mr. Gash, if the property was rezoned and he sold the property, a subsequent owner would be free to put in the undesirable uses that the neighbors opposed (Tr. 296, 379-80). Taking account of the potential for blight and concern about what uses may follow if the original proposal is not viable are valid issues that the Zoning Commission was entitled to consider. Plaintiffs introduced no evidence demonstrating that these concerns were not legitimate. As such, whether rezoning was appropriate was fairly debatable.

**Appellants’ VII. THE TRIAL COURT ERRED IN FINDING THAT THE CURRENT ZONING WAS INVALID BECAUSE THERE WAS A RATIONAL BASIS FOR KEEPING THE CURRENT ZONING IN THAT THE EVIDENCE DEMONSTRATED AN ALLEGED ZONING VIOLATION, THAT THE PROPOSED ZONING WAS NOT IN FULL CONFORMITY WITH THE COMPREHENSIVE PLAN, UNADDRESSED ISSUES ABOUT SEWAGE AND RUN-OFF, THAT THE PROPOSED REZONING WOULD CREATE A NON-CONFORMING USE, AND AN ABUNDANCE OF UNUTILIZED B-2 PROPERTY WITH INSUFFICIENT EVIDENCE DEMONSTRATING THAT A B-2 ZONING WOULD BE VIABLE.**

Review of the constitutionality of a law or ordinance is de novo with a strong presumption of constitutionality with due deference to the trial court as to the credibility of the witnesses. See e.g., *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. banc 1991); *Fairview Enterprise, Inc., v. City of Kansas City*, 62 S.W.3d 71, 76 (Mo. App. W.D. 2001); *St. Louis County v. Kienzle*, 844 S.W.2d 118, 122 (Mo. App. E.D. 1992).

The standard used in considering the validity of zoning decisions is a two-part “substantial basis” due process test. This test differs from the modern analysis used for most due process/equal protection challenges.

Most due process and equal protection cases use a rational basis test. Under this test, legislative acts are valid if they are reasonably related to a legitimate government

interest. *Blaske*, 821 S.W.2d at 829. Such laws are invalid only if they “rest on grounds wholly irrelevant to the achievement of a legitimate objective.” *Id.* “If any state of facts can be conceived to justify a classification, it will be sustained.” *Eastern Missouri Laborer’s District Council v. City of St. Louis*, 5 S.W.3d 600, 603-04 (Mo. App. E.D. 1999).

While Defendants believe that there evidence is sufficient to demonstrate that the rezoning is fairly debatable, Defendant believe that this Court should re-examine the issue of the appropriate standard to use in a zoning case. Under a rational basis standard, any of the issues noted in the previous section – the issue of non-conforming uses, the issue of the pending violations, the concerns about traffic, sewage, and run-off, the concerns noted in the Comprehensive Plan, and the concerns about unutilized or underutilized B-2 properties – are each an independent basis for finding the current zoning valid under a rational basis test.

In review under a rational basis test, Defendants have clearly shown that there was a rational basis for the decision denying rezoning and Plaintiffs have failed to overcome the presumption of constitutionality. Plaintiffs only challenged the zoning of their property (i.e. the map) and not the remainder of the Zoning Regulations (L.F. 57-73). As Plaintiffs acknowledge, there were alleged violations of the Regulations which were not corrected prior to the decision of the Zoning Commission on June 12, 2003 (Tr. 369). Plaintiffs had residences and a stable on their property and intended to continue that use if the rezoning had been granted (Tr. 343-45). However, such uses are not permitted and would be non-conforming uses in District B-2 (Tr. 353, Exh. A at Part IV, Title III,

Article X – pp. 126-31). Plaintiffs had no studies showing that this site was viable for the businesses allowed in District B-2 (Tr. 357-58). Likewise, Plaintiffs introduced no evidence responsive to the issues noted in the Comprehensive Plan or the concerns raised at the hearing in front of the Zoning Commission.

Defendants believe that the substantial basis test should be rejected for two reasons. First, it is an anachronism from a by-gone era that has only survived through mistaken citation back to that era. Second, it creates an illogical paradox in which the review of the constitutionality of an ordinance depends on the source of the authority for the enactment of the ordinance.

Missouri law on zoning in Missouri begins with the case of *Flora Realty & Investment Co. v. City of Ladue*, 246 S.W.2d 771 (Mo. banc 1952). In adopting the substantial basis test, *Flora Realty* cites as authority the decision of the United States Supreme Court in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). 246 S.W.2d at 778. Likewise, the first of the modern zoning decisions of the United States Supreme Court also cite back to *Nectow* and its immediate predecessor, *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926). *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 3-5 (1974). None of these cases, however, analyzed whether *Euclid* and *Nectow* were still valid precedents. It is the position of Defendants that they were not valid precedents as the test that they used came from non-zoning cases and the decisions from which the test arose have subsequently been overruled.

An examination of the precedents cited in *Nectow* and *Euclid* reveal that the ultimate source of the test is the case of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

*Nectow* cites *Euclid* as its authority for the substantial basis test. *Nectow*, 277 U.S. at 187-89. *Euclid* cites to *Jacobson* and to *Cusack Company v. City of Chicago*, 242 U.S. 526 (1917). *Euclid*, 272 U.S. at 395. *Cusack Company* also cites to *Jacobson* as the source of the test. *Cusack Company*, 242 U.S. at 531.

The decision in *Jacobson* was issued on February 20, 1905. Two months later, the United States Supreme Court issued the infamous decision of *Lochner v. New York*, 198 U.S. 45 (1905). An examination of the two decisions reveals that the two decisions applied the same test to different facts – with the only real difference being that the majority found the government justification to be adequate in *Jacobson* and inadequate in *Lochner*. Otherwise, the era of bad decisions between 1905 and 1935 might be known as the *Jacobson* era rather than the *Lochner* era. In *Jacobson*, a 7-2 majority found that the justification for requiring adult vaccination for smallpox during a smallpox epidemic was “real and substantial.” 197 U.S. at 30-33. When faced with a regulation of the hours worked by bakers, however, three judges switched sides and thus, by a 5-4 majority, the U. S. Supreme Court in *Lochner* found that the reasons asserted for such a regulation did not meet the same standard. 198 U.S. at 64.

As such, it is clear that the test currently applied to zoning decisions is nothing more and nothing less than the test of *Lochner*. That test was struck down by the decisions of the United States Supreme Court in the 1930s and 1940s and replaced by a rational basis test. See, e.g. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 (1938). In its decision, the *Carolene Products* Court noted a very tiny category of cases in which a higher level of scrutiny was appropriate. *Id.* at 152 n.4. In citing back

to *Euclid* and *Nectow* neither the Missouri Supreme Court nor the United States Supreme Court examined whether those decisions survived *Carolene Products*. Likewise none of these decisions considered whether zoning decisions alone among all types of economic regulations fit within one of the categories established by footnote 4.

Defendants do not believe that there is a valid basis for concluding that zoning is different from other restrictions on property rights. As such, Defendants ask this Court to hold that the decision in *Flora Realty* was erroneous and that the substantial basis test of *Lochner* is not the appropriate test for the validity of a zoning ordinance.

Aside from its discredited ancestry, the continued use of the substantial basis test for zoning decisions creates a very illogical system where the test applied depends on the source of a city or county's authority – even though the regulation examined is precisely the same. For example, zoning ordinances typically include regulations governing certain features of subdivisions such as roads and sewage disposal. Under current case law, the restrictions and requirements imposed on developers via zoning codes are subject to a substantial basis test. However, there are other mechanisms for governments to regulate such aspects of development outside of zoning codes. For example, Chapters 228, 229, and 230 give counties a great deal of authority over the construction of new roads. If a county were to impose a requirement on a developer seeking approval to open a proposed road under these provisions, such a requirement would be subject to a rational basis test instead of the substantial basis test applied to similar requirements imposed under a zoning regulations. Likewise, while regulations imposed on sewage as part of a zoning ordinance would be subjected to a substantial basis test, the same regulation

enacted as a health ordinance under Section 192.300 would be evaluated under the rational basis test. Such a system makes no logical or legal sense.

In overruling *Lochner*, the United States Supreme Court recognized that the proper remedy for parties who believed that the laws enacted by a government were wrong was to take their case not to the courts but to the voters. More strict judicial review was to be preserved for those cases in which there was a clear violation of the Bill of Rights or where there was a clear breakdown of the political process. *Carolene Products*, 304 U.S. at 152 n. 4. There was no allegation in this case of a breakdown of the political process, nor is there typically such a claim in any zoning case. This Court should, therefore, hold that the proper test for review of a zoning decision is the rational basis test. Using that appropriate level of scrutiny, this Court should find that the decision of the Lafayette County Zoning Commission rejecting Plaintiffs' first application was valid under the circumstances as they existed on June 12, 2003.

## CONCLUSION

Defendants, LAFAYETTE COUNTY et al., respectfully request that this Court:

- 1) affirm the dismissal of Count IV of Plaintiffs' Petition;
- 2) reverse the judgment below as to Count I of Defendants' Counterclaim and remand with directions to enter judgment in favor of Defendants in the amount of \$1,200.00 or, alternatively, remand with directions to enter judgment in favor of Defendants with the trial court to determine the appropriate damages;
- 3) reverse the judgment below as to the injunction entered by the trial court and find that said injunction was null and void or, alternatively, find that said injunction was null and void to the extent that it exempted Plaintiffs' property from the zoning regulations which apply in district B-2; and
- 4) reverse the judgment below as to Count I, II, and III of Plaintiffs' Petition and enter judgment finding that district A was a valid zoning of Plaintiffs' property.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the provisions of Rule 84.06. The total word count in this brief is 18,749 words. I further certify that a copy of this brief has been filed on a disk with this Court and that the disk has been scanned with no viruses detected by that scan.

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## CERTIFICATE OF SERVICE

I hereby certify that two complete and accurate copies of this brief, a virus-free disk containing a copy of this brief, and two complete and accurate copies of the separately bound appendix were hand-delivered or mailed to Mr. J. Armin Rust, 108 North College, Richmond, Missouri 64086, Attorney for Plaintiffs, this 16th day of July, 2007.

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