

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, MISSOURI  
HONORABLE LARRY HARMAN, JUDGE

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DEFENDANTS-APPELLANTS-CROSSRESPONDENTS'S  
SUBSTITUTE REPLY BRIEF

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## POINTS OF ERROR

**I. TO THE EXTENT THAT PLAINTIFFS' RESPONSE BRIEF STATES THE REASONING OF THE TRIAL COURT, THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFFS ON DEFENDANTS' COUNTERCLAIM AND ERRONEOUSLY DECLARED THE LAW BECAUSE:**

**1) THE TESTIMONY CITED BY PLAINTIFFS' WAS NOT RELEVANT IN THAT THE SCOPE OF THE EXEMPTION IS A QUESTION OF LAW NOT FACT; AND 2) THE PRESUMPTION THAT A JUDGE KNOWS THE LAW DOES NOT APPLY IN THIS CASE IN THAT THERE IS NO LEGALLY CORRECT THEORY UNDER WHICH PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THE COUNTERCLAIM (REPLY TO RESPONSE POINT I).**

*Premium Standard Farms, Inc., v. Lincoln Township of Putnam County*, 946 S.W.2d 334

(Mo. banc 1997)

Rule 55.08, Missouri Rules of Court

**II. THE TRIAL COURT ERRED IN ISSUING ITS INJUNCTION BECAUSE SAID INJUNCTION EXCEEDED ITS JURISDICTION AND USURPED LEGISLATIVE POWERS IN THAT IT EFFECTIVELY ORDERED A SPECIFIC ZONING (REPLY TO RESPONSE POINT II AND RESPONSE POINT III).**

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

**III. THE TRIAL COURT ERRED IN ADMITTING EXHIBIT 31 BECAUSE SUCH LETTER WAS INADMISSIBLE IN THAT IT WAS A SETTLEMENT OFFER AND NO EXCEPTION WAS OFFERED TO THE TRIAL COURT BY PLAINTIFFS (REPLY TO RESPONSE POINT IV).**

*State v. Sladek*, 835 S.W.2d 308 (Mo. banc 1992)

**IV. THE TRIAL COURT ERRED IN FINDING THAT THE CURRENT ZONING OPERATED TO THE DETRIMENT OF PLAINTIFFS BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF SUCH DETRIMENT IN THAT PLAINTIFFS ONLY SHOWED THAT SOME OF THE USES PERMITTED IN ZONING DISTRICT A WERE NOT VIABLE ON THIS PROPERTY (REPLY TO RESPONSE POINT V).**

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

*State Board of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003)

Section 137.016, Revised Statutes of Missouri

Title 20, Section 9.010(3)(B), Code of State Regulations

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

**V. THE TRIAL COURT ERRED IN FINDING THAT THE REZONING WAS NOT FAIRLY DEBATABLE BECAUSE THERE WAS SUBSTANTIAL EVIDENCE INTRODUCED DEMONSTRATING GROUNDS FOR DENYING REZONING IN THAT, ON THE DATE THAT REZONING WAS DENIED, THERE WAS A FINDING OF VIOLATION, PLAINTIFFS FAILED TO INTRODUCE EVIDENCE RESPONDING TO CONCERNS OF THE ZONING COMMISSION, AND BLIGHT IS A LEGITIMATE CONCERN (REPLY TO RESPONSE POINT VI).**

*Desloge v. County of St. Louis*, 431 S.W.2d 126 (Mo. 1968)

**VI. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFFS ON THEIR REZONING CLAIM BECAUSE THE TEST USED BY THE TRIAL COURT DOES NOT COMPLY WITH THE UNITED STATES OR MISSOURI CONSTITUTION IN THAT IT IS A LOCHNER-ERA TEST WHICH SHOULD NO LONGER BE FOLLOWED (REPLY TO RESPONSE POINT VII).**

## ARGUMENT

**I. TO THE EXTENT THAT PLAINTIFFS' RESPONSE BRIEF STATES THE REASONING OF THE TRIAL COURT, THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFFS ON DEFENDANTS' COUNTERCLAIM AND ERRONEOUSLY DECLARED THE LAW BECAUSE:**

**1) THE TESTIMONY CITED BY PLAINTIFFS' WAS NOT RELEVANT IN THAT THE SCOPE OF THE EXEMPTION IS A QUESTION OF LAW NOT FACT; AND 2) THE PRESUMPTION THAT A JUDGE KNOWS THE LAW DOES NOT APPLY IN THIS CASE IN THAT THERE IS NO LEGALLY CORRECT THEORY UNDER WHICH PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THE COUNTERCLAIM (REPLY TO RESPONSE POINT I).**

As conceded by Plaintiffs in their Response Brief, building permits are required in counties with zoning except for farm buildings (Pl. Resp. Br. at 27).<sup>1</sup> The issue in this case is what type of evidence proves that one or more of the five buildings that Plaintiffs

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<sup>1</sup> The following abbreviations are used in this brief: "L.F." for the Legal File; "Supp. L.F." for the Supplemental Legal File; "Tr." for the Transcript; "Supp. Tr." for the Supplemental Transcript; "Exh." for Exhibits; "Pl. Sub. Br." for Plaintiffs' Initial Substitute Brief; "Def. Sub. Br." for Defendants' Initial Substitute Brief; and "Pl. Sub. Resp. Br." for Plaintiffs' Substitute Responsive Brief.

constructed without first obtaining a permit are farm buildings and what legally qualifies as a farm building.

The essential problem with Plaintiffs' position (and the trial court's judgment) in this case is a basic misunderstanding that this issue is one of state law, not county law (Pl. Subs. Resp. Br. at 30, L.F. 139). Because it is an issue of state law, no weight is given to the interpretation of the state statute by the Zoning Administrator (either on these buildings or on other "similar" buildings). If appellate courts were to defer to local zoning administrators in determining the meaning of a state law, there would be approximately 80 different definitions of a "farm building."

As such, Plaintiffs' emphasis on the experience of Frank Reikhof (Pl. Subs. Resp. Br. at 27-30) is misplaced. Plaintiffs seem to believe that no permit was required for Mr. Reikhof's building because of the style of the building. However, if that was the reasoning of the Zoning Administrator for not requiring a permit from Mr. Reikhof, that reasoning is clearly contrary to the decision of this Court in *Premium Standard Farms, Inc., v. Lincoln Township of Putnam County*, 946 S.W.2d 334 (Mo. banc 1997), which held that the key factor under the statute was the purpose of the building. *Id.* at 235-38. The real question for both Mr. Reikhof's building and Plaintiffs' buildings was whether the intended use qualified as a farm building. It is not necessary for this Court to decide if the Zoning Administrator made the right decision or the wrong decision in not requiring Mr. Riekhof to get a permit. His intended use was not the same as Plaintiffs'

intended use. As such, the experience of Mr. Riekhof is not relevant to whether the intended use of Plaintiffs meets the statutory exemption.<sup>2</sup>

This fact flows into the second flaw in Plaintiffs' argument. They flip back and forth between whether the exemption is a matter of law or a question of fact. In one part, they claim that it is a question of fact and that this Court should defer to the trial court's credibility findings (Pl. Subs. Resp. Br. at 30-31). At another point, they claim that it is a question of law that need not be pleaded as an affirmative defense (Pl. Subs. Resp. Br. at 32-33).

As to the claim that this Court should defer to the findings of fact of the trial court, Plaintiffs point to no evidence that the trial court must have found credible supporting Plaintiffs' position beyond the testimony of Mr. Riekhof (Pl. Subs. Resp. Br. at 27-33). While this Court does defer to findings supported by the evidence, it does not defer to findings that are not supported by any evidence.

As to the claim that this is an issue of law, Plaintiffs assert that they should not have been required to plead an affirmative defense as they were exempt as a matter of

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<sup>2</sup> Even if the intended use were the same, the evidence of Mr. Reikhof's experience would still not help Plaintiffs as that would merely raise the issue of whether the Zoning Administrator was correct in her treatment of the Reikhof property. If Mr. Reikhof should have been required under state law to get a permit, the failure of the Zoning Administrator to correctly apply state law in that case would not excuse Plaintiffs from complying with state law on their property.

law (Pl. Subs. Resp. Br. at 32). This argument, however, assumes that Plaintiffs were, in fact, exempt as a matter of law. However, to be exempt, they have to meet the statutory exemption. Whether they meet the statutory exemption is a question of fact, and, as such, is an affirmative defense which must be pled and proved. Under Plaintiffs' theory, no affirmative defense would ever have to be pled as affirmative defenses excuse liability as a matter of law.

Rule 55.08 recognizes that its list of affirmative defenses is not exclusive. For the reasons stated in our initial brief, Defendants believe that the exemption claimed by Plaintiffs meets the traditional definition of affirmative defenses. Under this Court's holding in *Premium Standard Farms*, Plaintiffs' buildings were only exempt from the permit requirement of state law if they were intended to be used for farm purposes. In the absence of an allegation of that fact in Plaintiffs' Answer to Defendants' Counterclaim and in the absence of evidence supporting that defense, Plaintiffs were required by state law to obtain permits for at least four of the five buildings for which they did not obtain a permit.

Plaintiffs' other main response to this point is the presumption that a judge knows the law (Pl. Subs. Resp. Br. 31-32). The fact that no cases interpreting this presumption are included in Plaintiffs' Brief is telling.

The presumption that a judge knows the law is typically invoked in one of two situations – both normally arising in bench trials. In both of these situations, it is sometimes stated expressly as a presumption that the judge knows the law, but sometimes alternative language is used to express the same idea.

The first situation, as will be further discussed below in Point III, deals with erroneous rulings by the trial judge on evidentiary questions in bench trials. On review of such rulings, appellate courts begin with the assumption that, if the trial judge made a mistake in admitting evidence at trial, the judge self-corrected that mistake prior to entering his judgment on the case. *See, e.g., Worthington v. State*, 166 S.W.3d 566, 573 (Mo. banc 2005) (“judges are presumed to not consider improper evidence”). On this issue, this situation does not apply.

The other situation is where the judgment is unclear as to whether the correct legal standard was applied. Under those circumstances, appellate courts assume that the trial court did apply the correct legal standard. *State v. Roll*, 942 S.W.2d 370, 374 (Mo. banc 1997). This rule applies only where there is a basis in the evidence for the court to have reached the same result under the correct legal standard. It does not eliminate the requirement that the judgment be supported by sufficient evidence.

The rule proposed by Plaintiffs would effectively abolish appellate review. Under Plaintiffs’ theory, the presumption that a judge knows the law precludes an appellate court from finding that the trial court did erroneously declare the law or from finding a lack of sufficient evidence supporting the judgment. That is not the purpose of the presumption.

For the reasons stated above, and in Defendants’ original brief, Plaintiffs have failed to prove that four of the five buildings that they constructed without permits meet the legal definition of a farm building or structure as set forth by this Court in *Premium Standard Farms*. As such, they have failed to prove that those buildings are exempt from

the permit requirement. Therefore, the trial court erred in entering judgment in favor of the Plaintiffs on Defendants' counterclaim.

**II. THE TRIAL COURT ERRED IN ISSUING ITS INJUNCTION BECAUSE SAID INJUNCTION EXCEEDED ITS JURISDICTION AND USURPED LEGISLATIVE POWERS IN THAT IT EFFECTIVELY ORDERED A SPECIFIC ZONING (REPLY TO RESPONSE POINT II AND RESPONSE POINT III).**

Plaintiffs' argument in support of the trial court's order is to essentially cite to conflicting decisions of the Court of Appeals as to whether or not a trial court can order a specific legislative act (Pl. Resp. Br. at 33-37). This Court now has the opportunity to resolve those conflicts. For the reasons stated in Defendants' Brief, we believe that the proper exercise of judicial restraint dictates giving the legislative body the opportunity to address the rezoning first.

Plaintiffs' also seem to argue that the trial court's order was only a suggestion and not an order (Pl. Subs. Resp. Br. at 36-37). However, as Plaintiffs acknowledge, this "suggestion" left Defendants with only two options -- leaving the property exempt from the Zoning Regulations or rezone to B-2 (Pl. Subs. Resp. Br. at 37). Plaintiffs contend that such options are non-coercive in that Defendants were left with a choice as to which option to follow. What Plaintiffs refuse to recognize is that inappropriately restricting the options is an improper and coercive order.

As this Court noted in *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. banc 2003), an injunction that unnecessarily interferes with legitimate activities by a defendant is overbroad. *Id.* at 375. Lafayette County has the right to draft and enforce zoning regulations. As noted in the hearing on the motion for new trial, Plaintiffs had already taken actions demonstrating that they felt this injunction exempted them from all the reasonable restrictions that the Zoning Regulations, even those that applied to properties located in the higher intensity zoning districts (e.g. B-2, M-1, and M-2) (Tr. 400-01, 405-07). The choice created by the trial court was that either Lafayette County could waive its right to regulate these activities (a right not challenged by Plaintiffs) or it could rezone the property to B-2. An overbroad injunction which restricts the legitimate activities of a Defendant is, by its very nature, coercive.

The voters of Lafayette County have made clear that they wanted zoning for all of the unincorporated part of Lafayette County. Clearly, leaving one property as a “no-man’s land,” exempt from the rules that apply to all other similarly situated properties, would be a gross dereliction of duty by Defendants. As such, the “choice” posed by the trial court was not a choice in any meaningful sense of the terms. By restricting Defendants to these two options, the trial court interfered with the legitimate enforcement of those provisions of the Zoning Regulations which applied to all zoning districts.

Therefore, Defendants request this Court to find that the injunction was overbroad and void.

**III. THE TRIAL COURT ERRED IN ADMITTING EXHIBIT 31 BECAUSE SUCH LETTER WAS INADMISSIBLE IN THAT IT WAS A SETTLEMENT OFFER AND NO EXCEPTION WAS OFFERED TO THE TRIAL COURT BY PLAINTIFFS (RESPONSE TO RESPONSE POINT IV).**

Plaintiffs' first argument on this issue seems to be suggesting that Defendants' position on appeal is different from our position at the trial court (Pl. Subs. Resp. Br. at 38-39). As conceded in Plaintiffs' Brief, an objection was made at trial based on Exhibit 31 (a letter from the Zoning Administrator to Plaintiffs) being a settlement offer in a related case (Pl. Subs. Resp. Br. at 38). Somehow Plaintiffs interpret Defendant's brief as claiming that the settlement offer was made in the present case. Defendants are unable to determine the basis for that conclusion as Plaintiffs do not cite to a particular portion of Defendants brief as the source for their conclusion. Defendants believe that their brief was clear that the basis for objecting to Exhibit 31 was that it was a settlement in a related case (Def. Sub. Br. at 53-54, 58-59). The objection of Defendants to this exhibit on appeal is the same as the objection at trial.<sup>3</sup>

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<sup>3</sup> Plaintiffs also make an argument in passing that the only proof that they requested an offer was the self-serving assertion in the letter (Pl. Subs. Resp. Br. at 38). It is legally irrelevant whether Plaintiffs requested an offer or the offer was made on the Zoning Administrator's own initiative. Of course, it is curious that having introduced the letter, Plaintiffs now want to claim that parts of it are self-serving hearsay. The rule of

What has changed is the response of Plaintiffs. At trial, Plaintiffs' response to the objection was based on there not being an offer (Tr. 258). Now, Plaintiffs concede that it was an offer but claim that an exception to the general rule applied (Def. Subs. Resp. Br. at 39-40). This change is substantial. The two cases cited by Plaintiffs involve different exceptions, neither of which is applicable in this case.

In *McKeown v. Jon Nooter Boiler Works*, 237 S.W.2d 217 (Mo. App. 1951), the alleged "settlement offer" was considered to be an admission against interest and not a true settlement offer. In that case, the letter admitted that the money was owed and merely asked to be allowed to be paid a lesser amount. *Id.* at 223-24. Plaintiffs did not assert at trial nor do they now assert that part of this letter contained any admissions of relevance to this case. If they had made that response at trial, it would have been possible to redact the letter down to the admissible portion, if any.

In *Owen v. Owen*, 642 S.W.2d 410 (Mo. App. S.D. 1982), the claim was abuse of process and the proposed "settlement" was the very tortious act at issue in the case. *Id.* at 414-15. Unlike that case, in which the settlement offer was the actual subject of the case, here the settlement letter is being used as evidence of the motivations of particular

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completeness requires them to accept the good and the bad when they offered this letter. Furthermore, Mr. Gash did admit that he went to the Zoning Administrator seeking help (Tr. 358, Pl. Subs. Resp. Br. at 38). While he may have desired a different suggestion as help, this letter is the response that he got.

legislators. Plaintiffs' essential position is that a willingness to compromise an alleged violation proves bias.

Contrary to Plaintiffs' allegations, bias is not directly relevant in this case. The question for the trial court and for this Court (as discussed in the remaining part of this brief) is not whether the individual members of the Zoning Commission rejected the rezoning application for the right reason, but whether a zoning commission, under all the facts related to this property, had the authority and discretion to reject the rezoning application. Of course, the author of the letter was not a party to this case and, as such, it is hard to understand how her belief as to the appropriate disposition of the violations case can be imputed to the Zoning Commissioners.

Putting the issue of what the settlement offer proves to the side, it is hard to imagine a case in which the party offering the settlement letter could not find some reason why the letter is relevant. The reason for excluding settlement offers is not that they are irrelevant, but that admitting settlement offers would discourage attempts to settle a case. As noted above, the exceptions found in the cases cited by Plaintiffs – that the offer was not a true settlement proposal or that the settlement offer is the matter in dispute in the case – do not apply to this case. Plaintiffs have given no good reason why an additional exception should be created. Expansion of the exceptions as proposed by Plaintiffs to cover issues of bias would result in the exception swallowing the rule.

Furthermore, in this case, it is impossible to determine whether the settlement offer was appropriate without fully re-litigating the violations case. As noted in our previous brief, Defendants believe that there are times when a fine is an appropriate

sanction for a zoning violation. Plaintiffs offer no reason to hold to a stricter rule that would limit Zoning Administrators to the two options of demanding full abatement or waiving the violation. Often, a zoning violation will be based on the current zoning of the property as different rules apply in different zoning districts. In such circumstances, a demand that some sanction be imposed prior to the violation being remedied by rezoning serves a valid purpose of encouraging owners and occupiers of land to seek rezoning first instead of only applying if they are caught. In such circumstances, there are reasons for offering an option other than requiring full abatement. As noted in Point V below, we believe that the lack of a resolution to the violations process is a valid grounds for temporarily denying a rezoning. If offers of settlement of the violations can be used to show that the temporary denial of rezoning was improper (as was done in this case), the effect of such a rule would be to discourage settlement offers. As the public policy rationale behind the current rule is to encourage settlements, this Court should not create a new exception without more justification for that exception than Plaintiffs have offered in the present case.

As discussed earlier (in Point I), there is a presumption of non-prejudice on these issues. An exception to that presumption is when the trial court expressly relies on the inadmissible evidence in reaching its decision. “In a jury-waived case a certain amount of latitude in the admission of evidence is allowed, and even where an error is made in the admission of some evidence, *except where the trial court relied on that evidence in arriving at its findings of facts and conclusions of law*, such evidence is ordinarily held to be non-prejudicial.” *State v. Sladek*, 835 S.W.2d 308, 313 (Mo. banc 1992) (emphasis

added). However, if the court relied on the improper evidence in reaching its decision “the admission of the improper evidence [is] prejudicial.” *Id.* In this case, the trial court expressly cited to Exhibit 31 in its judgment (L.F. 137-38). As such, the erroneous admission of Exhibit 31 was prejudicial.

Because this Court reweighs the evidence on an appeal involving the constitutionality of an ordinance, the appropriate remedy is for this Court to exclude consideration of Exhibit 31 in its weighing of the evidence.

**IV. THE TRIAL COURT ERRED IN FINDING THAT THE CURRENT ZONING OPERATED TO THE DETRIMENT OF PLAINTIFFS BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF SUCH DETRIMENT IN THAT PLAINTIFFS ONLY SHOWED THAT SOME OF THE USES PERMITTED IN ZONING DISTRICT A WERE NOT VIABLE ON THIS PROPERTY (REPLY TO RESPONSE POINT V).**

In essence, the argument over this point is about the burden of proof and burden of persuasion on this issue. Case law in this area makes it clear that “[z]oning ordinances are presumed to be valid.” *Fairview Enterprises, Inc., v. City of Kansas City*, 62 S.W.3d 71, 77 (Mo. App. W.D. 2001); *Lenette Realty & Investment Co. v. City of Chesterfield*, 55 S.W.3d 399, 405 (Mo. App. E.D. 2000); *State ex rel. Barber & Sons Tobacco Co., Inc., v. Jackson County*, 869 S.W.2d 113, 117 (Mo. App. W.D. 1993). The party challenging the zoning classification has the burden of presenting sufficient evidence to

rebut the presumption that the zoning is reasonable. *Fairview Enterprises*, 62 S.W.3d at 77; *Lenette Realty*, 55 S.W.3d at 405-06; *Barber & Sons*, 869 S.W.2d at 117. The presumption of reasonableness is not to be “lightly cast aside.” *Id.* at 117.

To rebut the presumption of reasonableness, Plaintiffs must present sufficient evidence of private detriment. *Fairview Enterprises*, 62 S.W.3d at 76-77; *Lenette Realty*, 55 S.W.3d at 406; *Barber & Sons*, 869 S.W.2d at 117. Stripped of rhetoric, the evidence that Plaintiffs claim proved private detriment consisted of three types of evidence. First, Plaintiffs desired to make a different use of the property than the uses permitted under the Zoning Regulation. Second, those uses would have been available under a different zoning that the experts felt was a better zoning classification. Third, there were some uses permitted in the Agricultural Zone which could not be done on this property.

Clearly, the first two types of evidence are insufficient by themselves to meet the requirement for overcoming the presumption of reasonableness. If the first type of evidence was sufficient, then the presumption in favor of the validity of the ordinance would be overcome in every case in which a denial of rezoning was challenged. That type of evidence merely demonstrates the type of detriment “which we accept as a natural consequence of zoning.” *Barber & Sons*, 869 S.W.2d at 120. If the second type of evidence was sufficient then the presumption would again be easily overcome. This evidence merely indicates that different persons would have come to a different conclusion if they were the legislature. A different use being more reasonable does not prove that the current use is unreasonable. *Cf. Lenette Realty*, 55 S.W.3d at 406 (if courts employed a best use test, all zoning regulations could easily be overturned). Both of

these types of evidence invite the Court to sit as a Super Legislature free to set aside the decisions of the governing bodies of cities and counties on zoning issues at will.

The real dispute is about the third type of evidence. Plaintiffs contend that the courts are not required to determine whether a reasonable use could be made under the Zoning Ordinance (Pl. Subs. Resp. Br. at 45). However, how can a court determine the detriment to Plaintiffs without first determining the full impact of the current zoning. What Plaintiffs really mean (as is shown by the remainder of this paragraph) is that the burden of proving the reasonableness of the zoning belongs to the County. “It is up to . . . the County to put on testimony or some evidence as to what reasonable uses could be made.” Pl. Subs. Resp. Br. at 45-46. Here the true position of Plaintiffs is revealed. Plaintiffs believe that attacking one or two of the uses permitted in the Zoning District shifts the burden to Defendants to find a viable use. Such a shift is contrary to the presumption of constitutionality in that it allows Plaintiffs to overcome that presumption by attacking a phony ordinance.

Contrary to Plaintiffs argument, the Zoning Regulation is not a labyrinth on this issue. The uses permitted in Zoning District A are set forth in a list consisting of two columns taking up a total of just over three pages (Exh. A at Part IV, Title III, Article I – pp. 107-110). Despite the ease of finding this list, Plaintiffs’ evidence did not give any indication that a single one of their expert witnesses had read this list.

It is clear that the showing of private detriment must consider all of the uses available. As the Western District held in *Barber & Son*, “[i]dentifying the existing zoning of the land . . . without considering the special use permit covering the land,

mischaracterizes the actual use of the land allowed Barber.” 869 S.W.2d at 118.

Likewise, considering only farming and raising livestock (as Plaintiffs’ evidence did) mischaracterizes the actual use of the land allowed Plaintiffs.

As the courts of this state have recognized (most frequently in dealing with medical issues), when the testimony of experts involves applying legal standards to particular matters, that testimony must reflect an awareness of the appropriate legal standard. *Cf. State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 158-59 (Mo. banc 2003) (testimony of experts must demonstrate that they are using appropriate legal standard of care); *Birdsong v. Waste Management*, 147 S.W.3d 132, 138-39 & n. 2 (Mo. App. S.D. 2004) (medical expert appropriately allowed/required to give testimony based on legal definition of disability); *Ladish v. Gordon*, 879 S.W.2d 623 (Mo. App. W.D. 1994) (medical experts testimony on negligence must comply with appropriate standard of care). In this case, the need for such a connection between the law and the testimony of the experts is readily apparent.

Terms like “agricultural” and “commercial,” while having common uses, are also terms of art in certain fields. In particular, the law on assessment of real property gives very specific definitions for those terms when used by assessors. See Section 137.016, RSMo. Likewise, the rules governing appraisers give a specific definition for “agricultural.” 20 CSR 2245-9.010(3)(B). These definitions are not consistent with the zoning districts created in the Lafayette County Zoning Regulations. Most of the experts called by Plaintiffs came from the field of real estate and real estate appraisal. In reviewing their testimony, there is no indication that any of the experts were aware of the

difference between how those terms are used in their field of expertise and how Lafayette County has structured its zoning districts in the Lafayette County Zoning Regulations. It should not be a surprise that, as a result, these experts used the definition from their field of expertise rather than the actual zoning districts contained in the Zoning Regulations.

Plaintiffs seem to take the position that the lack of competency of these experts to discuss the effect of the Zoning Regulations on Plaintiffs' property simply should not matter. Under their interpretation of the burden of proof, once they proved that one or two of the uses in Zoning District A were not appropriate uses of Plaintiffs' property, they proved that the current zoning was detrimental and the burden shifted to Defendants. However, if that were the legal standard, than all Zoning classifications are presumptively invalid and the burden of proving constitutionality always rests with the government. Under Plaintiffs' theory, when the next owner of the property decides that they would rather be zoned M-2, that owner will merely need to find a handful of uses permitted in B-2 that are not viable on the property (e.g. Department Store, Banking Services, Florist, Photocopying, Employment Office), and then the burden would shift to the government to prove that the alternative uses are viable. Such a shift is not consistent with the rules as set forth in the current case law.

To be absolutely crystal clear, Defendants are not claiming that Plaintiffs needed to produce experts who would go down each use one-by-one and state why they were not

viable (although that would certainly be a permissible area of cross-examination).<sup>4</sup> What we do claim is the appropriate burden of proof is that such experts must indicate a sufficient familiarity with the current Zoning Regulations to be able to do a comparison between the various zoning districts. Without such familiarity, the witnesses simply do not demonstrate an adverse impact from the true current zoning and merely are proving the invalidity of an imaginary ordinance.

As such, Plaintiffs failed to carry their burden of proof on this issue and the judgment below should be reversed.

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<sup>4</sup> In fact when asked, one of Plaintiffs' experts did concede that in saying this property was better suited for "commercial", he would consider certain uses to fit within that term – all of which are permitted in the Agricultural Zoning District (Tr. 65-67). As such, to the extent that Plaintiffs claim that there was no evidence as to the appropriateness of other uses from the use chart that is incorrect.

**V. THE TRIAL COURT ERRED IN FINDING THAT THE REZONING WAS NOT FAIRLY DEBATABLE BECAUSE THERE WAS SUBSTANTIAL EVIDENCE INTRODUCE DEMONSTRATING GROUNDS FOR DENYING REZONING IN THAT, ON THE DATE THAT REZONING WAS DENIED, THERE WAS A FINDING OF VIOLATION, PLAINTIFFS FAILED TO INTRODUCE EVIDENCE RESPONDING TO CONCERNS OF THE ZONING COMMISSION, AND BLIGHT IS A LEGITIMATE CONCERN (REPLY TO RESPONSE POINT VI).**

There are two important questions presented by this case regarding the test for whether a zoning classification is fairly debatable. First, what date is the relevant date for this test? Second, what types of concerns make the rezoning fairly debatable?

The case law is clear that the relevant date for the test is the date that the rezoning was denied. “The pertinent inquiry is thus not what matters may have been literally or physically before the Council or present in the lawmaker’s minds, but rather whether the Council’s action when viewed in the light of the facts existent at the time of the enactment of the Ordinance was reasonably doubtful or fairly debatable.” *Desloge v. County of St. Louis*, 431 S.W.2d 126, 132 (Mo. 1968).

As such, the key date for analyzing whether the appropriateness of rezoning was fairly debatable is June 12, 2003, especially with regards to the zoning violation. On that date, the last decision about the validity of the zoning violation was from the Board of Zoning Adjustment. That decision found Plaintiffs to be in violation of the Zoning

Regulations. While later events may have resolved the issue without a final determination of the validity of those findings, on June 12, 2003, the Zoning Commission was entitled to rely on the finding of the Board of Zoning Adjustment that Plaintiffs had violated the Zoning Regulations with regards to the property in question. This case squarely presents the issue of whether a Zoning Commission has the authority to deny or delay a rezoning application pending the resolution of such violations. For the reasons previously cited, Defendants believe that it is essential to the effectiveness of zoning regulations to hold that zoning commissions have that authority. If not, it will be clearly better for land owners to ask for forgiveness after being caught rather than for permission prior to acting.

The second issue is whether a government can rest on general concerns in denying an application for rezoning when the applicant fails to provide any evidence addressing those concerns. There was substantial evidence (both documentary and from the witness stand) regarding this matter showing that both the Comprehensive Plan and the experience of the Zoning Commission dictated that the Zoning Commission should be concerned with issues like traffic, availability of utilities, and the ability to handle liquid and solid waste. Plaintiffs' contention is that such general concerns are not specific enough to justify a denial of rezoning. However, Defendants' burden is merely to show that the rezoning is "fairly debatable."<sup>5</sup>

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<sup>5</sup> In addition, there were the specific concerns raised by neighbors at the hearing on the rezoning application as indicated by the minutes of the hearing contained in Exhibit K

Defendants' position is that Plaintiffs get two opportunities to present evidence addressing these concerns. First, they get their chance to present information to the Zoning Commission. Second, they also can present that information later at a trial, since it is permissible to introduce additional evidence at trial beyond the records of the Zoning Commission. *See Heidrich v. City of Lee's Summit*, 916 S.W.2d 242, 249 (Mo. App. W.D. 1995). Since the test is whether the concerns are fairly debatable, it is not unfair to require the person seeking rezoning to present some evidence that these types of concerns do not truly apply to their property.

Finally, Plaintiffs contend that it is improper for a legislative body to be concerned about the potential for blight. They cite as support for their position two arguments – one of fact which is not properly before this court and one of law.

The factual claim is that the property is currently successful. Putting aside the issues of whether the property is successful and whether the current uses are appropriate for this property's location under the Comprehensive Plan, this information was, for obvious reasons, not present before the trial court. More importantly, it is not a "fact" which would have been available to the Zoning Commission on June 12, 2003. In making its decision, the Zoning Commission needed to determine if the land was suitable and appropriate for development on June 12, 2003. By necessity, any such determination

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and the tape of the hearing, Exhibit L. Plaintiffs also choose to ignore other documentary evidence submitted on this issue. Such matters are part of the evidence in this case and are entitled to be given weight in analyzing this issue.

is based on the facts as known at that time. The accuracy or inaccuracy of that determination is merely an after the fact justification for the rezoning. Using the subsequent history of this property as proof that rezoning was appropriate is like using the fact that drugs were found during a search to prove that the search was constitutionally permissible. As this Court frequently notes in search and seizure cases, the fact that drugs are found during a search does not prove that there was probable cause prior to the search. Likewise, the fact that a business succeeds at a location after a rezoning does not prove that such success was guaranteed at the time that a decision was made on the rezoning. This part of Plaintiffs' argument is simply irrelevant to this Court's decision.

The other argument claims to be a legal one. As noted in Plaintiffs' brief, zoning is not to be used to protect the competitive advantage of another property owner (Pl. Subs. Resp. Br. at 51-52).<sup>6</sup> Plaintiffs then try to equate Defendants' argument about blight to that rule. In doing so, they are setting up a straw man to attack.

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<sup>6</sup> Plaintiffs also claim that there was no evidence supporting this claim by Defendants. Defendants would refer this Court to the evidence introduced by Plaintiffs showing the current uses of property along I-70 as Exhibit 1. That evidence was in front of the trial court and this Court is allowed to draw reasonable inferences from that evidence (and Defendants are allowed to make arguments about that evidence) as were the concerns about destroying the economy of the municipalities of the County contained in the Comprehensive Plan (Exh. 3).

By its very nature, zoning involves determinations as to what locations are appropriate and suitable to development. When dealing with a zoning plan for a county, it is not unusual (especially in more rural counties) for such plans to want to encourage development inside or in close proximity to the incorporated areas of the county.

The reasons for such a plan are shown both by discussions within the Comprehensive Plan (Exh. 3), the Zoning Maps (Exh. A), and common sense. Most of the cities within Lafayette County are compact areas covering one or two square miles. For developments within those cities, emergency services are in close proximity to the property. Likewise, the density of development creates a compact tax base that can support the infrastructure necessary for individual developments. In addition, the population base of a city provides both a supply of potential customers and potential employees for businesses.

While developments near cities are not quite as desirable from a planning standpoint as developments within cities, several of the advantages of developments within cities still remain. For those services provided by rural districts (like fire and ambulance), these services are typically based within cities, and, thus, response time to developments near cities is still short. In addition, when necessary, the county and the city are authorized by law to enter into mutual aid agreement allowing other emergency services to be provided by the city when the county is unable to quickly respond. Likewise, the business is still in close proximity to potential customers and employees. Finally, while city-type infrastructure might not presently be available, when the

development reaches a sufficiently intense level, it is not unreasonable to expect the neighboring city to seek to annex such properties and provide such infrastructure.

When a development is not near a city, all of those advantages disappear. Lafayette County, for example, has 632 square miles. Even if you assume that the thirteen municipalities combined covered 30-40 square miles, you would still have almost 600 square miles for which the county is responsible for providing services. To some extent, Mr. Gash recognizes the difficulty that Lafayette County has in providing services like police protection to his property in his testimony as to why he needs to have residential structure near his businesses (Tr. 353). Allowing spot development of the type proposed by Mr. Gash can put a strain on the ability of a county to provide services to those developments.

As indicated by the testimony of many of the witnesses, Lafayette County has gone through a learning curve since the adoption of zoning. Several applications have been presented to the Zoning Commission and approved (as noted in Plaintiffs' evidence) on claims taken at face-value that certain areas would quickly develop. As shown by Plaintiffs' own evidence (Exh. 1), many of those properties have not developed at all. Having been burned by such self-serving assertions by previous developers, it is not unreasonable in response for Defendants to insist on something more when dealing with proposals such as Plaintiffs for spot development. As shown by the Peters application, when dealing with developments such as Plaintiffs, Lafayette County now desires more than the Plaintiffs' own belief that the property will succeed. We desire an actual study

(Tr. 247-48). By Mr. Gash's own admission, he had no such study at the time of trial, much less at the time that he requested rezoning (Tr. 357-58).

The reason for being concerned about the viability of this property for actual development is not to protect other locations from competition. The reason is concern about the impact of a failed development on this very piece of property and on its immediate neighbors. Lafayette County has a valid desire to avoid blight in the unincorporated part of Lafayette County. As shown by numerous statutes on economic redevelopment, blight is a legitimate concern. See, e.g. Sections 67.970-67.983, 67.1401-67.1571, 99.800-99.865, 100.300-100.620, RSMo.

One last point needs to be made crystal clear on this issue. Contrary to Plaintiffs' position, the question for this Court is not what facts or concerns were in the minds of the individual members of the Zoning Commission on June 12, 2003. If that were the case, most of Plaintiffs' evidence would be irrelevant as they did not present such information to the Zoning Commission. The question is whether, in light of the facts available to the Zoning Commission, an objective person would find that the appropriateness of rezoning could be fairly debatable. *Desloge*, 431 S.W.2d at 132. As such, this Court needs to consider all credible evidence in the record to determine if they reflect issues which would have justified a denial of rezoning. That record reveals substantial reasons, including the pending rezoning violation and the creation of non-conforming uses (an issue ignored by Plaintiffs in their brief), justifying a denial of the rezoning.

**VI. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFFS ON THEIR REZONING CLAIM BECAUSE THE TEST USED BY THE TRIAL COURT DOES NOT COMPLY WITH THE UNITED STATES OR MISSOURI CONSTITUTION IN THAT IT IS A LOCHNER-ERA TEST WHICH SHOULD NO LONGER BE FOLLOWED (REPLY TO RESPONSE POINT VII).**

In responding to this point, Plaintiffs prove Defendants' point. Every case cited by Plaintiffs adopted without question a test that arose during the *Lochner* era and uses *Lochner* era concepts. With the exception of zoning regulations, the courts in this country have rejected the application of those concepts to economic issues. This test has survived in the zoning arena solely because the original cases applying the test to zoning ordinances found the zoning ordinances to be valid. Since the abolition of *Lochner*, neither the U.S. Supreme Court nor this Court have specifically addressed the issue of whether the current test is constitutionally accurate or valid. Defendants now ask this Court to address that issue.

Plaintiffs have offered no reason why a higher level of scrutiny should apply to zoning cases. Going to the same test used to review almost every other legislative decision is not "reinventing the wheel," it's just replacing the wrong square wheel with the right round one. For the reasons noted in our original brief, we believe that under a rational basis test the decision to reject Plaintiffs' rezoning application was valid.

## CONCLUSION

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

- 1) 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;
- 2) 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
- 3) reverse the judgment below as to Counts 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 7,050 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.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that two complete and accurate copies of this brief and a virus-free disk containing a copy of this brief were hand-delivered or mailed to Mr. J. Armin Rust, 108 North College, Richmond, Missouri 64086, this 17th day of September, 2007.

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