

TABLE OF CONTENTS

Table of Authorities 7

Jurisdictional Statement 12

Statement of Facts 13

Points Relied On 26

Argument 32

I. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE DOWNZONING ORDINANCE WAS A TAKING UNDER THE MISSOURI CONSTITUTION AND VIOLATED RESPONDENTS’ RIGHT TO JUST COMPENSATION IN THAT IT DESTROYED THEIR RIGHT TO BUILD THEIR OFFICE, DEVALUED THEIR PROPERTY, COST THEM THOUSANDS OF DOLLARS IN OUT-OF-POCKET EXPENSES AND DID NOT ADVANCE A LEGITIMATE PUBLIC INTEREST. 32

A. Standard of Review 32

B. The Downzoning Ordinance Is a Regulatory Taking 32

C. Article I, Section 26 of the Missouri Constitution requires a different takings analysis than the analysis required under

the Fifth Amendment to the U.S. Constitution discussed in Penn Central due to the additional language “or damaged” included in the Missouri Constitution 49

D. Summary 52

II. THE TRIAL COURT DID NOT ERR IN FINDING THAT A PORTION OF RESPONDENTS’ DAMAGES (DIMINUTION IN VALUE OF PROPERTY) EQUALED \$65,300 BECAUSE THIS WAS A CORRECT MEASURE OF DAMAGE AND WAS SUPPORTED BY THE RECORD. 53

A. Standard of Review 53

B. Discussion 53

III. THIS COURT SHOULD UPHOLD THE TRIAL COURT’S AWARD OF RESPONDENTS’ ATTORNEY’S FEES AND COSTS BECAUSE: (1) APPELLANT HAS WAIVED ITS DEFENSE THAT ATTORNEY’S FEES AND COSTS MAY NOT BE ASSESSED AGAINST THE COUNTY IN THE ABSENCE OF STATUTORY AUTHORITY IN THAT THIS THEORY WAS NEVER RAISED AT THE

**TRIAL COURT LEVEL, AND, IN ANY EVENT,
THERE IS STATUTORY AUTHORITY, AND (2)
THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION IN AWARDING FEES AND COSTS IN
THAT UNUSUAL CIRCUMSTANCES EXIST THAT
WARRANT THE AWARD. 61**

A. Standard of Review 62

B. Appellant waived its argument against attorney’s fees and costs, and there is statutory authority supporting the award 62

C. The trial court’s award of attorney’s fees based on its balancing of the benefits was not an abuse of discretion and must be upheld 67

**IV. THE TRIAL COURT ERRED IN FAILING TO (1)
FIND THAT THE DOWNZONING ORDINANCE
WAS A SUBSTANTIVE DUE PROCESS VIOLATION
UNDER THE UNITED STATES AND MISSOURI
CONSTITUTIONS AND (2) AWARD RESPONDENTS
ALL COMPENSATORY AND CONSEQUENTIAL
DAMAGES INCURRED BECAUSE THE**

ORDINANCE WAS NOT ENACTED TO FURTHER A VALID PUBLIC BENEFIT, THE PRIVATE DETRIMENT OUTWEIGHED ANY “PUBLIC BENEFIT” AND RESPONDENTS POSSESSED A SUFFICIENT PROPERTY RIGHT TO INVOKE THE DUE PROCESS CLAUSES IN THAT THERE WAS NO PUBLIC BENEFIT TO ENACT THE ORDINANCE, RESPONDENTS HAD AN INVESTMENT-BACKED AND JUSTIFIABLE EXPECTATION REGARDING THE PRIOR ZONING OF THE PROPERTY AND RESPONDENTS WERE NOT MADE WHOLE BY THE TRIAL COURT’S

JUDGMENT. 70

A. Standard of Review 71

B. Procedural History 71

C. The downzoning ordinance violates the due process clauses 71

D. Respondents are entitled to compensatory damages for the violation of their constitutional rights under 42 U.S.C. § 1983 89

| | | |
|----|---|----|
| E. | Respondents are entitled to attorney fees for the violation of their constitutional rights under 42 U.S.C. § 1983 pursuant to 42 U.S.C. § 1988 | 90 |
| F. | Summary | 91 |
| V. | THE TRIAL COURT ERRED IN FAILING TO AWARD RESPONDENTS ALL COMPENSATORY AND CONSEQUENTIAL DAMAGES INCURRED IN THE SUM OF \$83,332.01, AS SET FORTH IN RESPONDENTS’ TRIAL EXHIBITS NOS. 61 THROUGH 73 AND 84, IN CONNECTION WITH THEIR INVERSE CONDEMNATION CLAIM BECAUSE UNDER ARTICLE I, § 26 OF THE MISSOURI CONSTITUTION, RESPONDENTS DID NOT RECEIVE FULL INDEMNITY OR REMUNERATION FOR THE LOSS OR DAMAGE SUSTAINED BY RESPONDENTS AS A RESULT OF APPELLANT’S ACTIONS IN THAT THE TRIAL COURT’S DAMAGE AWARD ONLY PARTIALLY COMPENSATED RESPONDENTS. | 92 |
| A. | Standard of Review | 93 |

B. Procedural History 93

C. The additional damages are recoverable 93

Conclusion 102

Certificate of Service 104

Certificate of Compliance with Rules 84.06(b) and (c) 105

Respondents’/Cross-Appellants’ Substitute Appendix 106

TABLE OF AUTHORITIES

Federal Cases

| | |
|--|----------------------------|
| <u>Kirby Forest Industries, Inc. v. United States</u> , 467 U.S. 1, 104 S.Ct. 2187 (1984)..... | 35, 55, 56 |
| <u>Memphis Community School District v. Stachura</u> , 477 U.S. 299 (1986) | 89 |
| <u>Nasierowski Bros. Investment Co. v. City of Sterling Heights</u> , 949 F.2d 890 (6 th Cir. 1991) | 74, 78 |
| <u>Penn Central Transportation Company v. City of New York</u> , 438 U.S. 104 (1978) | 34, 37, 38, 39, 46, 47, 49 |
| <u>Schmidt v. Cline</u> , 171 F.Supp.2d 1178 (D. Kan. 2001) | 90 |
| <u>Shakopee Mdewakanton Sioux v. City of Prior Lake</u> , 771 F.2d 1153 (8 th Cir. 1985) | 91 |
| <u>Tandy Corp. v. City of Livonia</u> , 81 F.Supp.2d 800 (9 th Cir. 1999) | 74, 78 |
| <u>United States v. 50 Acres of Land</u> , 469 105 S. Ct. 451 (1984) | 60 |
| <u>United States v. 564.54 Acres of Land</u> , 441 U.S. 506, 99 S. Ct. 1854 (1979) | 60 |
| <u>United States v. Miller</u> , 317 U.S. 369 (1943) | 53, 94 |
| <u>Wheeler v. City of Pleasant Grove</u> , 896 F.2d 1347 (11 th Cir. 1990) | 101, 102 |

State Cases

66, Inc.. v. Crestwood Commons, 130 S.W.3d 573 (Mo. App. 2003) 99, 100, 101

Aboussie v. Chicago Title Ins. Co., 949 S.W.2d 207 (Mo. App. 1997) 100, 101

Aronstein v. Missouri State Highway Commission, 586 S.W.2d 328

(Mo. 1979) 50

Casey’s General Stores, Inc. v. City of Louisiana, 734 S.W.2d 890

(Mo. App. 1987) 78

City of St. Louis v. Paramount Shoe Mfg. Co., 168 S.W.2d 149 (St.

Louis Ct. App. 1943) 51, 54

Clay County v. Bogue, 988 S.W.2d 102 (Mo. App. 1999) 33, 34, 38, 39, 68, 69, 99

Cunningham v. Board of Aldermen of City of Overland, 691 S.W.2d

464 (Mo. App. 1985) 79

Daniel v. Indiana Mills and Mfg., Inc., 103 S.W.3d 302 (Mo. App.

2003) 62

David Ranken, Jr. Tech. Inst. v. Boykins, 816 S.W.2d 189 (Mo. 1991)

(en banc) 65

Dorman v. Township of Clinton, 714 N.W.2d 350 (Mich. App. 2006) 38

First Missionary Baptist Church v. Rollins, 151 S.W.3d 846 (Mo.

App. 2004) 67

| | |
|---|--------------------|
| <u>Furlong Companies, Inc. v. City of Kansas City</u> , 189 S.W.3d 157, 170 | |
| (Mo. banc 2006) | 72, 73, 79, 86, 91 |
| <u>Glenn v. City of Grant City</u> , 69 S.W.3d 126 (Mo. App.2002) | 69 |
| <u>Golt v. Dir. of Rev.</u> , 5 S.W.3d 155 (Mo. 1999) (en banc) | 65 |
| <u>Great Lakes Pipe Line Company v. Hendrickson</u> , 393 S.W.2d 481 | |
| (Mo. 1965) | 78 |
| <u>Greenbriar Hills Ctry Club v. Dir. Of Rev.</u> , 47 S.W.3d 346 (Mo. | |
| 2001) (en banc) | 65 |
| <u>Gunter v. City of St. James, Missouri</u> , 189 S.W.3d 667 (Mo. App. | |
| 2006) | 72 |
| <u>Harris v. Missouri Dept. of Conservation</u> , 755 S.W.2d 726 (Mo. App. | |
| 1988) | 33, 69 |
| <u>Heffernan v. Reinhold</u> , 73 S.W.3d 659 (Mo. App. 2002) | 63 |
| <u>Howsmon v. Howsmon</u> , 77 S.W.3d 752 (Mo. App. 2002) | 62 |
| <u>In Re Beyersdorfer</u> , 59 S.W.3d 523 (Mo. 2001) (en banc) | 65 |
| <u>In re Estate of Cannamore</u> , 44 S.W.3d 883 (Mo. App. 2001) | 62, 67 |
| <u>Jackson v. Cannon</u> , 147 S.W.3d 168 (Mo. App. 2004) | 62 |
| <u>Jones Co. Custom Homes v. Commerce Bank</u> , 116 S.W.3d 653 (Mo. | |
| App. 2003) | 62 |

| | |
|---|------------|
| <u>Kamo Electric Cooperative, Inc. v. Cushard</u> , 416 S.W.2d 646 (Mo. App. 1967) | 50, 51, 95 |
| <u>Lenette Realty & Investment Co.</u> , 35 S.W.3d 399 (Mo. App. 2000) | 32, 73 |
| <u>Ridgway v. TTNT Development Corp.</u> , 126 S.W.3d 807 (Mo. App. 2004) | 69 |
| <u>Ryan v. Maddox</u> , 112 S.W.3d 476 (Mo. App. 2003) | 62 |
| <u>Schnuck Markets, Inc. v. City of Bridgeton</u> , 895 S.W.2d 163 (Mo. App. 1995) | 34, 69 |
| <u>Smith v. City of Sedalia</u> , 53 S.W. 907 (Mo. 1899) | 95 |
| <u>State v. Kinder</u> , 122 S.W.3d 624 (Mo. App. 2003) | 67 |
| <u>State ex rel. N.W. Electric Power Cooperative, Inc. v. Waggoner</u> , 319 S.W.2d 930 (Mo. App. 1959) | 54, 95 |
| <u>State ex rel. Nixon v. Jewell</u> , 70 S.W.3d 465 (Mo. App. 2001) | 69 |
| <u>Temple Stephens Co. v. Westhaver</u> , 776 S.W.2d 438 (Mo. App. 1989) | 69 |
| <u>Town of Georgetown v. Sewell</u> , 786 N.E.2d 1132 (Ind. App. 2003) | 38 |
| <u>Van de Vere v. Kansas City, et al.</u> 17 S.W. 695 (Mo. 1891) | 50, 51, 52 |
| <u>Vatterott v. City of Florissant</u> , 462 S.W.2d 711 (Mo. 1971) | 37 |
| <u>Watts v. Sechler</u> , 140 S.W.3d 232 (Mo. App. 2004) | 62 |

Statutes

Missouri Revised Statute § 1.020 64, 65, 66

Missouri Revised Statutes Chapter 64 64, 67

Missouri Revised Statute § 64.090 15, 21, 48, 67, 82

Missouri Revised Statute § 89.491 63, 64, 65, 66, 67

Missouri Rule of Civil Procedure 86.01 33, 55

Missouri Rule of Civil Procedure 84.04(f) 13

Missouri Rule of Civil Procedure 86.06 55

42 U.S.C. § 1983 73, 89, 90

42 U.S.C. § 1988 90, 91

Other Authorities

St. Louis County Charter § 2.180(33) 15, 21, 48, 82

St. Louis County Revised Ordinance § 1003.300 46, 48, 49, 70, 77,
..... 78, 79, 81, 83, 84, 86, 88, 91

Missouri Constitution, Article I, Section 26 32, 49, 50, 52, 53, 92, 94, 95, 96

Missouri Constitution, Article V, Section 10 12

United States Constitution, Fifth Amendment 49, 50, 53, 55, 95

JURISDICTIONAL STATEMENT

In this illegal downzoning case, Appellant/Cross-Respondent St. Louis County (“Appellant” or “County”) enacted an ordinance downzoning Respondents/Cross-Appellants Dianna Reagan’s and M.T.C. Construction, Inc.’s d/b/a K. Bates Steel Services, Inc.’s (“Respondents” or “Reagan”) property from M-1 Industrial to R-3 Residential. The trial court entered judgment in favor of Respondents on their inverse condemnation claim but denied the substantive due process claim.

This appeal originated in the Missouri Court of Appeals, Eastern District. On September 26, 2006, this Court granted Respondents’ Application for Transfer pursuant to Rule 83.04. Jurisdiction is proper in this Court pursuant to Mo. Const. Art. V, § 10.

STATEMENT OF FACTS

The County's presentation of the facts sets forth many irrelevant and conflicting details. Accordingly, pursuant to Rule 84.04(f), Respondents hereby submit the following as a fair and concise outline of the facts relevant to the questions presented for determination.

A. Liability

Dianna Reagan resides in St. Louis County and owns a small business, MTC Construction, Inc. d/b/a K. Bates Steel Services, Inc. ("MTC"). (Tr., p. 247, ll. 19-23; Supp. L.F., p. 407).¹ MTC is a qualified disadvantaged business enterprise and engages in the business of supplying labor and installing reinforced steel for various construction projects. (Tr., p. 248, ll. 4-8; Supp. L.F., p. 428). At all relevant times, Reagan operated her business from a small office in a strip mall comprising approximately 1700 square feet, and the steel used in projects is delivered from the supplier directly to the job site. (Tr., p. 248, ll. 9-25; p. 249, ll. 18-25; p. 250, ll. 1-25). This business office housed four people who performed clerical work. (Tr., p. 249, ll. 12-25). Nothing was manufactured at the business

¹ References are as follows: Legal File (L.F.); Supplemental Legal File (Supp. L.F.); Transcript (Tr.); Trial Exhibits (Tr. Ex.); Appellant's Substitute Appendix in Substitute Brief (App. Subst. Appen.); Respondents' Substitute Appendix in Substitute Brief (Resp. Subst. Appen.).

office and no industrial equipment was parked or stored there. (Tr., p. 249, ll. 24-25; p. 250, ll. 1-25; p. 251, ll. 1-2). In fact, the only supplies stored at the business office were office equipment such as a copier, blueprint machine and computers. (Tr., p. 250, ll. 15-21). The business office received deliveries from UPS at most twice a week, with weeks going by with no such deliveries, and the UPS truck was the only large truck expected to visit the premises. (Tr., p. 252, ll. 4-18).

In 1999, Reagan contacted a realtor to attempt to locate between one and two acres of ground to construct an office building. (Tr., p. 255, ll. 21-24; p. 250, ll. 7-11; Supp. L.F., p. 428). She wanted to build a new office to provide some additional space and to avoid continuing to pay rent at the strip mall. (Tr., p. 255, l. 25; p. 256, ll. 1-7; Supp. L.F., p. 428).

The realtor located two small adjacent lots located at 4261 Chott Lane and 6212 Hawkins Road in South St. Louis County. (Tr., p. 256, ll. 8-22; Supp. L.F., p. 431; Tr. Ex. 9; Tr. Ex. 43; Tr. Ex. 83, pp. 55-56-explains color coding on Tr. Ex. 43). The property had been zoned M-1 Industrial **since 1965**. (Tr., p. 43, ll. 19-25). It was situated directly in a mixed land use area that was very diverse in the

types and intensity of existing uses.² (Tr., p. 33, ll. 6-13; p. 34, ll. 5-25; p. 35, ll. 1-25; p. 36, ll. 1-25; p. 37, ll. 1-10; p. 38, ll. 16-22; p. 132, ll. 6-25; p. 139, ll. 10-24; Tr. Ex. 5, pp. 134-35; Tr. Exs. 9, 43, 50; Tr. Ex. 83, pp. 39-43; Supp. L.F., p. 68). According to the County's Comprehensive Zoning Plan (hereinafter "Comprehensive Plan"), mixed land use was encouraged by Appellant.³ (Tr., p. 37, ll. 5-10; p. 38, ll. 16-22; Tr. Ex. 5, pp. 134-35).

At all relevant times under the Comprehensive Plan, the County had a policy to promote economically productive uses for vacant and underutilized industrial sites in the area of the property. (Tr., p. 61, ll. 1-5, 19-20; Tr. Ex. 5, p. 93). At the

² During trial, the County's Planning Director, Glenn Powers, admitted that an office development just one-eighth of a mile "up the road" from the property certainly fitted in with the overall character of the area as depicted on Tr. Ex. 50. (Tr., p. 113, ll. 12-25; p. 114, ll. 1-16).

³ The Comprehensive Plan is comprised of three documents: General Plan -1980, General Plan Update-1985, and the Sixth County Council District Community Area Study -2000. (Tr. Exs. 3, 4 and 5; Tr., p. 28, ll. 11-17; p. 29, ll. 6-11; Tr. Ex. 82, pp. 30 and 31). The County is required to follow the mandates of the Comprehensive Zoning Plan when considering any zoning issues. (See Mo. Rev. Stat § 64.090 and St. Louis County Charter § 2.180(33)-App. Subst. Appen., A-47; Tr., p. 29, ll. 6-10).

time of Reagan's purchase, the property was vacant, unused, poorly maintained and contained some unsafe, unattractive and dilapidated structures, which also presented health and safety issues to neighboring landowners. (Tr., p. 261, ll. 16-25; p. 262, ll. 1-25; p. 263, ll. 1-3).

Before she purchased the property, the County advised Reagan that M-1 zoning would allow construction of her planned office building. (Tr., p. 257, ll. 17-25; p. 258, ll. 1-22; p. 357, ll. 5-15). At this time, the County further advised Reagan that her planned office development was a "permitted and **appropriate** use" of the property. (Tr., p. 63, ll. 19-25; p. 64, ll. 1-17; p. 257, ll. 17-23; Supp. L.F., p. 87). The County also represented to Reagan that zoning for the property would not be changed from its M-1 Industrial classification. (Supp. L.F., p. 416). Accordingly, in April 1999, Reagan purchased the property, making her Special Sales Contract contingent upon the property being zoned M-1 Industrial. (Tr., p. 257, ll. 22-25; p. 258, ll. 1-4).

Reagan became aware that the two lots comprising the property were apparently illegally subdivided, and her title company worked with the County for over one year to correct that issue. (Supp. L.F., pp. 362-64; Tr., pp. 83, 118-20). The County ultimately confirmed that the lots were properly subdivided and "buildable." (Supp. L.F., pp. 362-64; Tr., p. 83, ll. 18-20; p. 126, ll. 22-25).

On October 19, 2000, Reagan applied for demolition permits to raze the dilapidated and environmentally unsafe structures on the property. (Tr. Ex. 20; Tr. Ex. 77, pp. 9-17). The applications for demolition permits were approved by the County on or about December 12, 2000. (Tr. Ex. 20; Tr. Ex. 77, pp. 9-17). In order to obtain the approvals, Reagan's representatives had to disconnect the utilities (water, electricity and gas connections), as well as remove the propane tank and destroy a cistern. (Tr. Ex. 20; Tr. Ex. 77, pp. 9-17). In addition, Reagan was required to obtain St. Louis County Health Department approvals for asbestos removal and waste management. (Tr. Ex. 20; Tr. Ex. 77, pp. 9-17; Tr. Ex. 80, pp. 6-10). After meeting each requirement, the last remaining dilapidated structure on the property was "down and clear" on March 16, 2001. (Tr. Ex. 20; Tr. Ex. 77, pp. 9-17).

As contained in the Comprehensive Plan, the County recognized that as continued development occurs there is an increased likelihood that light industrial, commercial and residential uses may be located adjacent to each other. (Tr., p. 40, ll. 11-16; Tr. Ex. 3, p. 41). To minimize the effects that adjacent mixed land uses pose to each other, such as an office building next to some residences, the County employed strategies. (Tr., p. 42, ll. 5-9; Tr. Ex. 3). Pursuant to the Site Plan Review Procedure of the County's Zoning Ordinance, before approving a site plan for any proposed development, the County must ensure that the characteristics of

the site design are appropriate to “preserve the integrity of adjacent properties.” (Tr. Ex. 2, §1003.179; Tr., p. 42, ll. 5-19; p. 64, ll. 11-25; p. 65, ll. 1-25; p. 66, ll. 4-16; p. 77, ll. 16-18). This stated policy is accomplished through such practices as architectural blending of building material and landscape buffering techniques, such as the planting of trees, shrubs and fencing. (Tr., p. 42, ll. 5-19).

In May 2001, Reagan submitted a site development plan to the County for approval. (Tr. Ex. 18). Among other things, consistent with the County’s own policies and procedures (Tr., p. 87, ll. 4-20), Reagan’s site development plan contained numerous property setbacks, landscape buffering, lighting restrictions and sight proof fencing to preserve the integrity of adjacent properties.⁴ (See highlighted areas on Tr. Ex. 18; Tr. Ex. 76, pp. 62-72; Tr., p. 64, ll. 11-25; p. 65, ll. 1-25; p. 66, ll. 4-16; p. 77, ll. 16-18).

Glenn Powers, the County’s Director of Planning, candidly admitted that Reagan could have built her office building in accordance with her site development plan, that she was “following the process,” and that the site development plan was a “reasonable solution” to the zoning dispute. (Tr., p. 77, ll. 3-17; p. 87, ll. 4-20). Matthew Prickett, a Zoning Planner for the County,

⁴ An architectural drawing of Reagan’s planned office building, depicting architectural blending, was introduced as an Exhibit and discussed at trial. (Tr. Ex. 51; Tr., p. 267, ll. 17-25; p. 268, ll. 1-4; p. 62, ll. 19-25; p. 63, ll. 1-7).

approved the site development plan, pursuant to the County's own review procedure on June 28, 2001. (Tr. Exs. 18 and 26; Tr. Ex. 76, p. 63; Tr., p. 64, ll. 11-25; p. 65, ll. 1-25; p. 66, ll. 4-16; p. 77, ll. 16-18). Reagan then proceeded to file her application for a building permit with the County. (Tr. Ex. 21; Tr., p. 83, ll. 24-25; p. 84, l. 1; p. 87, ll. 4-20).

In April 2001, because of some misconceived complaints from some neighboring residential landowners, St. Louis County Councilman John Campisi introduced a resolution to downzone the property from the M-1 Industrial District to an "R" Residential District. (App. Subst. Appen. A-12). The ill-informed residents had advised Mr. Campisi and the County that Reagan intended to build a "big re-bar company" or a "manufacturing plant for re-bar construction" at the property. (Tr. Exs. 14 and 15; Tr. Ex. 79, p. 7, ll. 19-20).

When asked if any reason precipitated the downzoning request other than the residents' complaints, Mr. Powers stated, "Once you get away from the immediate neighborhood, people – there's no reason why anyone would have an opinion on [the proposed downzoning] pro or con." (Supp. L.F., pp. 74-75; see also Tr., p. 47, ll. 2-10). Prior to introduction of the downzoning resolution (App. Subst. Appen. A-12), Mr. Powers warned Mr. Campisi that Reagan had the "**right**" to develop the office building under the then existing zoning. (Tr., p. 64, ll. 1-8). Mr. Powers

was very cautionary about initiating the downzoning because of “the whole takings issue.” (Tr., p. 74, ll. 12-23; p. 117, ll. 18-25; p. 118, ll. 1-5).

Based upon their misassumptions of the proposed use of the property as a “manufacturing plant for re-bar construction,” the neighboring landowners complained to the County that they were worried about the effects of dust, lights, noise, sufficiency of roadway, safety of children, industrial vehicles and property values, among others. (Tr. Exs. 14 and 15; Tr., p. 51, ll. 11-25; p. 52, ll. 1-25; p. 53, ll. 1-12). Accordingly, based upon the misleading nature of the information put out by the residents and the political pressure from Councilman Campisi, the Planning Department, through Mr. Prickett, authored a downzoning report recommending that the property be downzoned to R-3 Residential from M-1 Industrial. (Tr. Ex. 7; Tr. Ex. 76, p. 11, ll. 5-7; Tr., p. 64, ll. 24-25; p. 65, ll. 1-5).

In reaching the recommendation to downzone, the County never considered the effect that Reagan’s office development might pose to the complaining neighbors. (Tr. Ex. 76, p. 20, ll. 1-6, p. 29, ll. 17-23; Supp. L.F., p. 93; Tr., p. 53, ll. 13-25; p. 54, ll. 1-12; p. 55, ll. 5-10). It neither prepared nor requested any traffic or drainage study. (Tr. Ex. 76, p. 20, ll. 1-10; p. 21, ll. 18-21; Tr., p. 53, ll. 13-25; p. 54, ll. 1-12; p. 55, ll. 5-10). It did not request any engineering report or other study to examine the effect that the office might have on the surrounding property, such as a noise, light or dust study. (Tr. Ex. 76, p. 22, ll. 10-14; p. 29, ll.

17-25; p. 30, ll. 1-3; Tr., p. 53, ll. 13-25; p. 54, ll. 1-12; p. 55, ll. 5-10; p. 113, ll. 7-11). It did not consider what effect, if any, Reagan's office development would have on the value of the residents' homes. (Tr. Ex. 76, p. 29, ll. 17-23; Tr., p. 53, ll. 13-25; p. 54, ll. 1-12; p. 55, ll. 5-10). Mr. Powers testified that his office **"probably didn't consider any number of those major reasons for why we would rezone or not rezone."** (Tr., p. 54, ll. 2-12).

The County did not consider the Comprehensive Plan in deciding to downzone, despite the statutory mandate set forth in Mo. Rev. Stat. § 64.090, as well as St. Louis County Charter § 2.180(33). (Tr. Ex. 76, p. 44, ll. 2-6; App. Subst. Appen., A-25, A-47). In fact, Mr. Prickett, who authored the downzoning report, testified that he was not even familiar with the Comprehensive Plan. It was not reviewed or considered by the Planning Department when recommending downzoning. (Tr. Ex. 76, p. 42, ll. 11-25; p. 43, ll. 1-25; p. 44, ll. 1-25; p. 45, ll. 1-14; Tr., p. 352, ll. 1-25; p. 353, ll. 1-4).

Mr. Powers testified that the County should always protect property rights and the rights of owners to a reasonable use of their property. (Tr., p. 18, ll. 9-25; p. 19, ll. 1-21; p. 20, ll. 16-25; p. 21, ll. 1-12). Mr. Powers further testified that the County's zoning laws are in place to protect all landowners, including owners of land in M-1 Industrial Districts. (Tr., p. 18, ll. 9-25; p. 19, ll. 1-21; p. 20, ll. 16-25; p. 21, ll. 1-12; Supp. L.F., p. 61). The County never once considered the effect that

the downzoning would have on Reagan's planned development, despite Mr. Powers' testimony that good zoning practice dictates such consideration. (Tr. Ex. 76, p. 32, ll. 1-25; p. 33, ll. 1-13; Supp. L.F., p. 83; Tr., p. 70, ll. 11-15; p. 73, ll. 6-15, 22-25; p. 74, l. 1). The County did not consider Reagan's public written comments. (Tr., p. 80, ll. 1-23; Tr. Ex. 19; Tr. Ex. 79, p. 20, ll. 6-21). Nor did the County even consider or attempt to work out any alternative solution with Reagan, short of downzoning the property to a Residential District. (Tr. Ex. 76, p. 37, ll. 8-13; Supp. L.F., p. 84; Tr., p. 75, ll. 9-12; Tr. Ex. 79, p. 22, ll. 4-14; p. 23, ll. 3-25; p. 24, ll. 1-7).

Pursuant to the Planning Department's downzoning report, the St. Louis County Council adopted the downzoning ordinance, which became effective in July 2001. (App. Subst. Appen. A-13). The adoption of the downzoning ordinance destroyed Reagan's ability to build her planned office development. (Tr. Ex. 6; Tr. Ex. 2, § 1003.113; Tr., p. 87, ll. 4-20). As a result of the County's unlawful and arbitrary actions, which rendered the property unusable to Reagan, as set forth herein, and as she could not use the property for her intended use, Reagan sold the property to a real estate developer in September 2002. (Supp. L.F., p. 495).

The following testimony of Mr. Powers best summarizes the reason the property was downzoned:

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

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

Messrs. Powers and Prickett both testified that they were not aware of another situation where a piece of property in St. Louis County was downzoned over the existing owner’s objections, such as this case. (Tr., p. 84, ll. 14-19, 24-25; p. 85, l. 1; Supp. L.F., p. 84; Tr. Ex. 76, p. 34, ll. 1-10). In fact, Mr. Powers admitted that in his 25 years of employment with the County, he has “never seen anything like this occur before.” (Tr., p. 86, ll. 11-19; Supp. L.F., p. 84). Mr. Prickett testified that the County’s actions herein regarding the property and the downzoning request were not “standard practice.” (Tr. Ex. 76, p. 34, ll. 1-10). Indeed, the property had been zoned M-1 Industrial **since 1965** (Tr., p. 43, ll. 19-25) and, in over 20 years after the complaining subdivisions were built, no prior requests to downzone had ever been made. (Tr., p. 56, ll. 10-25; p. 57, ll. 1-12).

B. Damages

The fair market value of the property as M-1 Industrial on the date of the downzoning ordinance in July 2001 was \$210,000. (Tr., p. 197, ll. 3-10; p. 198, ll. 5-11). The fair market value of the property as R-3 Residential in July 2001 was \$167,000. (Tr., p. 305, ll. 3-17). Reagan sold the property in September 2002 as R-3 Residential for \$171,969.31 minus real estate commissions of \$16,313.41, for

a net sale price of \$155,655.90. (Tr. Ex. 61; Tr., p. 300, ll. 4-6). The fair market value of the property as M-1 Industrial around the time of the sale was \$200,000 to \$225,000. (Tr., p. 196, ll. 15-18). The trial court determined that the diminution of value of the property as a result of the downzoning ordinance was \$65,300. (L.F., p. 146).

Reagan also incurred \$83,332.01 in other damages resulting from her efforts to prepare the property for its intended use. She incurred costs resulting from the demolition and environmental remediation of the property, site development plan, real estate taxes, interest charges on the mortgage for the property, loan origination fees, survey fees, title insurance, closing fees in connection with purchasing the property, maintenance and upkeep of the property, among others.⁵ (Tr. Ex. 84 – a summary; Tr. Exs. 61-73 – supporting documents for damage summary).

⁵ The trial court took evidence of these additional compensatory damages with the case. (Tr., pp. 280-84). The only objection made to these damages at trial by the County was that they were not allowed as an element of damage. No objections were made to foundation or authenticity. The trial court failed to award Respondents any monies for these damages, which forms part of the basis for Respondents' cross appeal.

Reagan's legal bills totaled the sum of \$134,364.23 below, although the trial court only awarded the sum of \$103,763.75. Respondents' taxable court costs below totaled \$7,591.50. Respondents will file a motion for all attorney fees and costs expended on appeal.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE DOWNZONING ORDINANCE WAS A TAKING UNDER THE MISSOURI CONSTITUTION AND VIOLATED RESPONDENTS' RIGHT TO JUST COMPENSATION IN THAT IT DESTROYED THEIR RIGHT TO BUILD THEIR OFFICE, DEVALUED THEIR PROPERTY, COST THEM THOUSANDS OF DOLLARS IN OUT-OF-POCKET EXPENSES AND DID NOT ADVANCE A LEGITIMATE PUBLIC INTEREST.

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

Harris v. Missouri Dept. of Conservation, 755 S.W.2d 726 (Mo. App. 1988)

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

Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 104 S.Ct. 2187 (1984)

St. Louis County Revised Ordinance § 1003.300

Missouri Constitution, Article I, Section 26

Missouri Revised Statutes, Section 64.090

Missouri Rules of Civil Procedure 86.01, et seq.

II. THE TRIAL COURT DID NOT ERR IN FINDING THAT A PORTION OF RESPONDENTS' DAMAGES (DIMINUTION IN VALUE OF PROPERTY) EQUALED \$65,300 BECAUSE THIS WAS A CORRECT MEASURE OF DAMAGE AND WAS SUPPORTED BY THE RECORD.

United States v. Miller, 317 U.S. 369 (1943)

State ex rel. N.W. Electric Power Cooperative, Inc. v. Waggoner, 319 S.W.2d 930
(Mo. App. 1959)

City of St. Louis v. Paramount Shoe Mfg. Co., 168 S.W.2d 149 (St. Louis Ct.
App. 1943)

Missouri Constitution, Article I, Section 26

Missouri Rules of Civil Procedure 86.01, et seq.

III. THIS COURT SHOULD UPHOLD THE TRIAL COURT’S AWARD OF RESPONDENTS’ ATTORNEY’S FEES AND COSTS BECAUSE:

(1) APPELLANT HAS WAIVED ITS DEFENSE THAT ATTORNEY’S FEES AND COSTS MAY NOT BE ASSESSED AGAINST THE COUNTY IN THE ABSENCE OF STATUTORY AUTHORITY IN THAT THIS THEORY WAS NEVER RAISED AT THE TRIAL COURT LEVEL, AND, IN ANY EVENT, THERE IS STATUTORY AUTHORITY, AND (2) THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING FEES AND COSTS IN THAT UNUSUAL CIRCUMSTANCES EXIST THAT WARRANT THE AWARD.

Daniel v. Indiana Mills and Mfg., Inc., 103 S.W.3d 302 (Mo. App. 2003)

Jackson v. Cannon, 147 S.W.3d 168 (Mo. App. 2004)

Jones Co. Custom Homes v. Commerce Bank, 116 S.W.3d 653 (Mo. App. 2003)

Missouri Revised Statutes, Section 1.020

Missouri Revised Statutes, Section 89.491

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

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

Gunter v. City of St. James, Missouri, 189 S.W.3d 667 (Mo. App. 2006)

Nasierowski Bros. Investment Co. v. City of Sterling Heights, 949 F.2d 890 (6th Cir. 1991)

Tandy Corp. v. City of Livonia, 81 F.Supp.2d 800 (9th Cir. 1999)

St. Louis County Revised Ordinance § 1003.300

Missouri Constitution, Article, I, Section 10

42 U.S.C. § 1983

42 U.S.C. § 1988

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

Kamo Electric Cooperative, Inc. v. Cushard, 416 S.W.2d 646 (Mo. App. 1967)

United States v. Miller, 317 U.S. 369 (1943)

State ex rel. N.W. Electric Power Cooperative, Inc. v. Waggoner, 319 S.W.2d 930
(Mo. App. 1959)

Wheeler v. City of Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990)

Missouri Constitution, Article I, Section 26

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE DOWNZONING ORDINANCE WAS A TAKING UNDER THE MISSOURI CONSTITUTION AND VIOLATED RESPONDENTS' RIGHT TO JUST COMPENSATION IN THAT IT DESTROYED THEIR RIGHT TO BUILD THEIR OFFICE, DEVALUED THEIR PROPERTY, COST THEM THOUSANDS OF DOLLARS IN OUT-OF-POCKET EXPENSES AND DID NOT ADVANCE A LEGITIMATE PUBLIC INTEREST.

A. Standard of Review

Since zoning decisions are legislative acts, the Court reviews challenges to their validity de novo, with deference to the trial court's assessment of credibility of witnesses and resolution of evidentiary conflicts. Lenette Realty & Investment Co., 35 S.W.3d 399, 405 (Mo. App. 2000).

B. The Downzoning Ordinance Is a Regulatory Taking

The trial court held that the downzoning ordinance constituted a taking under Article I, § 26 of the Missouri Constitution, which states, in pertinent part, "That private property shall not be taken or damaged for public use without just compensation." (App. Subst. Appen. A-14).

Normally when a governing body seeks to claim private property for public use, it will initiate eminent domain proceedings under Mo.R.Civ.P. 86.01, et seq. Where the governing body takes actions damaging a landowner's rights in property through regulation rather than a total physical appropriation of the property by eminent domain, Missouri courts recognize that a landowner "has the right to challenge land use regulation by way of a suit for inverse condemnation under both the federal and Missouri constitutions." See Harris v. Missouri Dept. of Conservation, 755 S.W.2d 726, 729 (Mo. App. 1988).

A landowner seeking inverse condemnation "does not have to show an actual taking of property, but must plead and prove an 'invasion or appropriation of some valuable property right which the landowner has to the legal and proper use of his property, which invasion or appropriation directly and specially affect[s] the landowner to his injury.'" Id.

In evaluating whether a zoning regulation constitutes a taking under an inverse condemnation theory, courts must first determine whether a property owner is entitled to compensation for a per se regulatory taking without a "case specific inquiry." These per se situations arise (1) when a regulation causes an actual physical invasion of property, or (2) when a regulation denies all economically beneficial or productive use of land. Clay County v. Bogue, 988 S.W.2d 102 (Mo. App. 1999). If the government's regulatory action does not fall into either of these

two per se taking categories, courts are to undertake a factual inquiry into the specific circumstances of the case to determine whether a taking occurred. Id. at 107.

Here, because there was no actual physical invasion of the property, nor was Reagan denied all economically beneficial or productive use of the property, the Court must undertake a factual inquiry into the specific circumstances of Reagan's case under the Clay County factors to determine whether a taking occurred. Clay County at 107; see also Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). The Clay County analysis must consider whether the County went so far in restricting Reagan's use of her property that the rezoning was more like a taking, and whether in all fairness and justice the burden of that restriction should be borne by the public.

The factors outlined in Clay County for making a determination of whether a taking has occurred (when there is no per se taking) are: (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the government action. Id. at 107. See also Schnuck Markets, Inc. v. City of Bridgeton, 895 S.W.2d 163, 168 (Mo. App. 1995). The following is an application of the Clay County factors to Reagan's particular situation:

(1) Economic Impact of Regulation

Reagan suffered a substantial economic impact due to the downzoning of the property. Reagan's economic impact consisted of two components:

(a) Depreciation in market value of property due to rezoning

The method which Reagan used to compute the depreciation in the market value of her property is discussed in detail under Point II below. The trial court accepted Reagan's argument and determined that Reagan suffered damages of \$65,300, and this amount, along with Reagan's out-of-pocket costs discussed under (b) below in the amount of \$83,332.01, are sufficient to find that the County's rezoning of the property resulted in a severe economic impact to Reagan.

The County argues that because Reagan sold the property for more than she paid for it she has not been damaged, which is incorrect. The proper method of calculating the economic impact of the rezoning is to determine the difference between the value of the property before the taking, and the value of the property after the taking (which is the time the damage award is entered, i.e. trial. (See Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 104 S.Ct. 2187 (1984))).

The County's damage calculation has the result that a condemnee is not entitled to just compensation for the value of what is taken; rather, a condemnee is limited to out-of-pocket damages. For purposes of an exaggerated example, suppose that a party buys a parcel of property for \$1. The property appreciates in

value to \$1,000,000 under its current zoning. The County then rezones the property and the landowner is forced to sell the property for \$2. The County and the Court of Appeals claimed that the proper measure of economic impact is the landowner's out-of-pocket costs (\$2 sale price - \$1 purchase price = \$1 profit, i.e. no damages according to the County and the Court of Appeals). (Resp. Subst. Appen. A-6). Reagan's position is that the proper measure of damages is the value of what was taken from the landowner (\$1,000,000 value - \$2 sale price = \$999,998 damages). The County's formula obviously does not allow the landowner to receive just compensation for his property worth \$1,000,000.

The trial court used the correct formula in determining that Reagan had been damaged in the amount of \$65,300 due to the effect of the rezoning on the value of Reagan's property. (App. Subst. Appen. A-6)

(b) Loss of expenditures made in reliance on existing zoning

Reagan also spent the sum of \$83,332.01 readying the property for development, which included costs for demolition of the existing structures, asbestos removal, engineering fees, etc. (Tr., p. 280, ll. 5-25; p. 281-283, p. 284, ll. 1-4; Tr. Ex. 84; Tr. Ex. 61-73). Upon the rezoning of the property by the County, the property and these cost expenditures were rendered useless to her. (Tr., p. 258, ll. 11-22). Reagan's costs of \$83,332.01 should be included in the

analysis of the economic impact of the rezoning on Reagan (even if the Court does not deem that these costs are recoverable by Reagan).

Thus, the economic impact to Reagan of the County's rezoning of the property was \$148,632.01 (\$65,300 plus \$83,332.01), which is sufficient to satisfy the first Penn Central prong.

The County cites Vatterott v. City of Florissant in support of its position that Reagan did not suffer a substantial economic impact. Vatterott v. City of Florissant, 462 S.W.2d 711, 713 (Mo. 1971). This case is distinguishable from Reagan's situation due to the following: (1) in Vatterott, it was the landowner who requested a rezoning from residential to commercial solely to increase the value of his property immediately prior to sale; (2) the Court based its decision to uphold the denial of the plaintiff's request for rezoning on numerous factors in addition to economic factors, including, unlike here, detailed studies conducted by the City; (3) the plaintiff in Vatterott intended to sell his property after it was rezoned, and the plaintiff had not invested any sums in reliance on being able to use the property for a specific use; (4) in Vatterott, the City was concerned about what a third-party buyer might decide to construct on the property, whereas in Reagan's situation the County knew exactly what Reagan intended to build on the property, and the County found no detriment to the community from her proposed use.

The Missouri Court of Appeals (No. ED85763) applied the Dorman and Sewell analyses to Reagan's situation, and found that Reagan had not suffered a sufficient economic impact from the rezoning to establish a taking because she was not deprived of all uses of her property. (Resp. Subst. Appen. A-5, 6). Dorman v. Township of Clinton, 714 N.W.2d 350 (Mich. App. 2006); Town of Georgetown v. Sewell, 786 N.E.2d 1132 (Ind. App. 2003).

As cited by the Court of Appeals in its opinion, the Dorman court found that to establish a taking the landowner must show "the property was either unsuitable for use as [re]zoned or unmarketable as [re]zoned." (Resp. Subst. Appen. A-5, 6). The Sewell court found that "a taking only occurs when the land use regulation prevents all reasonable use of the land." Id.

The Dorman and Sewell cases do not utilize the proper analysis for a taking under the Penn Central factors. The courts in both Dorman and Sewell used a standard which is equal to a "per se" standard under Missouri law (and federal law as well). Under Dorman and Sewell, a plaintiff is required to show that it has been deprived of all uses of the land in order to establish a taking. Such a standard is the same as Missouri's per se standard under Clay County, which requires a plaintiff to show that it has been denied all economically beneficial or productive use of the land in order to establish a per se taking. Clay County at 107.

If Reagan had in fact shown that she had been deprived of all uses of her property, such a showing would establish a per se taking under Missouri law without the need for a case specific inquiry or the application of the three Penn Central factors outlined in Clay County. The Court of Appeal's opinion in effect eliminates the distinction between a per se taking and a non-per se taking by requiring a plaintiff to show it has been deprived of all reasonable uses of its property in order to prove either claim. Thus, the Court of Appeals applied the wrong standard in determining that Reagan had not suffered a sufficient economic impact to establish a taking.

(2) Interference with Investment-Backed Expectations

As stated in Penn Central, a takings analysis should focus particularly on “the extent to which the regulation has interfered with investment-backed expectations.” Penn Central, 488 U.S. at 124. This distinction between the general economic impact of a regulation and the extent to which the regulation has interfered with investment-backed expectations is necessary because of two very different factual situations involving rezoning.

These two different scenarios are as follows: (1) a party buys a piece of property knowing that its existing zoning does not allow her intended use of the property, and the party must petition the zoning authority to rezone the property; and (2) a party buys a piece of property in reliance on the existing zoning, seeking

to use the property for its permitted use at the time of purchase. The party that seeks to change the zoning has assumed the risk of the zoning authority denying the rezoning request, whereas, the party that buys the property and incurs development costs in reliance on a specific use under the existing zoning has an investment-backed expectation that the existing zoning will remain unchanged. The landowner who has invested money in development costs towards completing his project is entitled to more protection from a taking than a landowner who purchased a property for speculative reasons and has not taken any steps towards a specific development project.

Prior to Reagan's purchase of the property, the County advised Reagan that her office was a "permitted and appropriate use" of the property. (Tr., p. 257, ll. 17-25, p. 258, ll. 1-22; p. 271, ll. 15-25; p. 272, ll. 1-8; p. 357, ll. 5-15; Tr. Ex. 19; Tr. Ex. 77, pp. 9-17). Mr. Powers testified that she had a "right" to build her office under the existing zoning. (Tr., p. 64, ll. 2-10). Reagan's sale contract and financing from her bank were contingent upon the property being zoned M-1 Industrial. (Tr., p. 257, ll. 22-25; p. 258, ll. 1-4; p. 264, ll. 11-14). Reagan invested substantial amounts of money readying the property for development, including demolition of existing structures and asbestos removal, among other costs. (Tr., p. 280, ll. 2-25, p. 281-283; p. 284, ll. 1-4; Tr. Ex. 84; Tr. Exs. 61-73).

As a result, Reagan had a substantial investment-backed expectation that she would be permitted to use the property for her intended use.

The County and the Court of Appeals claimed that Reagan should have known that her property might be zoned inappropriately for the area. (App. Subst. Br., p. 24-28; Resp. Subst. Appen. A-7-9). The County is the party responsible for assigning a zoning classification to Reagan's property, and it is not Reagan's duty to doubt that the County has zoned the property correctly before she purchased it. Despite the foregoing, Reagan did confirm with the County that her proposed office was a permitted use prior to her purchase. (Tr., p. 257, ll. 17-25, p. 258, ll. 1-22; p. 271, ll. 15-25; p. 272, ll. 1-8; p. 357, ll. 5-15; Tr. Ex. 19; Tr. Ex. 77, pp. 9-17). The County did not rezone Reagan's property until two years after her purchase, and the County only initiated the rezoning due to complaints from the neighbors. (Tr., p. 47, ll. 6-10; p. 50, ll. 14-25; p. 51, ll. 1-5; p. 250, ll. 1-6; p. 274, ll. 3-5; p. 275, ll. 5-25; p. 276, ll. 1-8; p. 342, ll. 10-25; p. 343, ll. 1-11; Tr. Exs. 14 and 15).

It is absurd for the County to claim that Reagan should have conducted some sort of zoning analysis on her own prior to her purchase, especially when the evidence is clear that the County itself didn't plan on rezoning the property until it received complaints from the neighbors two years after Reagan purchased the property. The complaining subdivisions were built in the 1980s. (Tr., p. 56, ll. 15-

25, p. 57, ll. 1-17). If the County believed its own argument that the existence of these subdivisions required Reagan's property to be rezoned, the County should have rezoned the property in the 1980s instead of waiting until 2001, after Reagan had already purchased the property and invested substantial sums in development of the property. Reagan did everything in her power to inform the County of her intended use and to verify that it would be allowed prior to her purchase of the property and expenditure of development costs.

The County also claims that it was "two or more years before Reagan ever filed a site development plan," and infers that Reagan took no action to develop the property subsequent to her purchase. (App. Subst. Br., p. 25). This inference is incorrect. Reagan took substantial steps to develop the property, including attempting to resolve an illegal subdivision issue, demolishing the existing buildings on the property, and removing asbestos from the property. The County was fully aware of these activities due to the fact that Reagan had to obtain various permits to carry out these activities, which involved both verbal discussions and written documents being exchanged between Reagan and the County over the two-year period. (Tr., p. 83, ll. 13-23; Supp. L.F., pp. 362-363; Tr. Ex. 77, pp. 9-17). It is also important to note that the character of the neighborhood did not change during that two-year period, and the County's concerns focused on subdivisions which had been built in the 1980s. (Tr., p. 56, ll. 15-25, p. 57, ll. 1-17).

The County argues “there is no evidence that Reagan ever talked with a member of the County Council, much less a majority of the Council. Only the Council itself is charged with the authority to zone and rezone property.” (App. Subst. Br., p. 25). The County claims that even though Reagan confirmed with the County’s Planning Department that her office building was permitted on the property prior to her purchase, these representations mean nothing because the Planning Department has no authority to enact zoning.

The rezoning was carried out by the County Council on the basis of the Planning Department’s recommendation. (See Tr. Ex. 8, the Planning Department’s recommendation to rezone, which is identical to Tr. Ex. 7, the Planning Commission’s recommendation to rezone upon which the County Council based its decision). The Planning Department’s recommendation resulted in Reagan’s property being rezoned, and thus the Planning Department did have substantial influence over the rezoning. Regardless, the County cannot separate its overall responsibility for the various aspects of the different departments and commissions which constitute the County government, and the County cannot claim its own Planning Department had no authority to represent to Reagan that her use was permitted. The Planning Department did make representations on behalf of the County, and Reagan relied on those representations. The County

Council should have taken Reagan's reliance on this information into account when deciding whether to rezone Reagan's property.

Another complaint the County raises is that "the list of permitted uses in an "M-1" Industrial District as listed in the Zoning Ordinance should have put any reasonable person on notice that "M-1" Zoning was not appropriate for the parcel." (App. Subst. Br., p. 26). As discussed above, the County itself did not even consider rezoning the property until the neighbors complained, so it is unreasonable for the County to expect Reagan to conduct her own zoning analysis of the area. Also, the list of permitted uses cited by the County is irrelevant for purposes of this litigation. The County was fully aware of Reagan's intended use of the property for an office building due to Reagan's extensive contact with the County, including but not limited to the filing of her site development plan which was approved by the County and which detailed her proposed use down to the exact square footage. (See highlighted areas on Tr. Ex. 18; Tr. Ex. 76, pp. 62-72; Tr., p. 64, ll. 11-25; p. 65, ll. 1-25; p. 66, ll. 4-16; p. 77, ll. 3-17; p. 87, ll. 4-20). The County believed the site plan, with its landscaping and buffering, was a reasonable solution to their concerns. (Tr., p. 77, ll. 16-17).

As a result, the County cannot claim that it was concerned the property would be used for any of the other uses permitted in an "M-1" Industrial District. Regardless, the situation was easily remedied if the County so desired. The

County could have permitted Reagan to construct her office, and then rezoned the property after Reagan completed construction. Reagan would have been authorized to continue operation of her office building on the property as a non-conforming use, and any subsequent purchaser seeking to change the existing use as an office building would be forced to select a permitted use from the new zoning category which the County had chosen. The County could have allowed Reagan to proceed, and still protected itself against any other detrimental uses.

The County claims Reagan had no reasonable investment-backed expectation of using the property for her intended use because Reagan had not yet obtained a building permit. Reagan discusses her rights to use her property for her intended use in detail under Point IV below as part of her due process arguments. In short, Reagan had filed her Permit Application Form (“PAC”), which is the first step in receiving a building permit from the County. The County admitted that Reagan was following the process for obtaining a building permit. (Tr., p. 83, ll. 13-25; p. 84, ll. 1-4; p. 87, ll. 4-20; p. 112, ll. 9-11). The County knew that it had no discretion to deny Reagan’s building permit application as long as Reagan’s office met the code requirements. The only reason Reagan did not obtain a building permit was because the County rezoned her property. The County cannot claim Reagan’s failure to obtain a building permit somehow impacts her rights

when the County's own wrongful actions were the reason that Reagan was blocked from obtaining the building permit.

The County's arguments are not valid, nor do they warrant the overturning of the trial court's finding that the County's rezoning of Reagan's property constituted a taking. Reagan's investment-backed expectations of using the property for her intended use easily satisfies the second prong of the Penn Central test.

(3) Character of Government Action

Reagan's arguments regarding her due process claim under Point IV below contain a detailed discussion regarding the character of the County's actions. In short, the County's actions were not legitimate because the County ignored its own standard for carrying out a rezoning.

Section 1003.300.2 of the County's Zoning Code specifies that only when "the public necessity, convenience, general welfare, and good zoning practice require" should the County consider rezoning a property. (Tr., p. 21, ll. 13-17; see also App. Subst. Appen. A-49). The County did not attempt to prove nor did it establish at trial that the rezoning of Reagan's property was required by "the public necessity, convenience, general welfare, and good zoning practice." These terms are not even mentioned in the County's Substitute Brief filed with this Court.

As a result, the County has not established that its rezoning of Reagan's property was motivated by a legitimate state interest, and the third Penn Central factor weighs in favor of Reagan.

The County claims that the rezoning was carried out to create a "contiguous group of residential uses that included the Property." (App. Subst. Br., p. 28-29). There is no legal presumption that residential zoning is preferred to Reagan's office use, nor is there a legal presumption that all zoning in a particular area must be zoned identically.

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

⁶ During trial, the County's Planning Director, Glenn Powers, admitted that an office development just one-eighth of a mile "up the road" from the property certainly fitted in with the overall character of the area as depicted on Tr. Ex. 50. (Tr., p. 113, ll. 12-25; p. 114, ll. 1-16).

own Comprehensive Plan states that mixed land use is encouraged by the County.⁷ (Tr., p. 37, ll. 5-10; p. 38, ll. 16-22; p. 40, ll. 7-16; Tr. Ex. 5, pp. 134-35).

Regardless, even if the overall character of the area is residential, such fact alone would not establish a valid basis for the rezoning. As stated above, there is no legal presumption that residential zoning is preferred to Reagan's proposed office use even if the overall character of the neighborhood is residential. The County's claim that rezoning Reagan's property created a "contiguous group of residential uses" does not establish why or how such action is required by "the public necessity, convenience, general welfare, and good zoning practice," as mandated by Section 1003.300. The neighbors to whom the County is referring purchased their property knowing that Reagan's property was zoned M-1 Industrial, and thus Reagan's office development was easily foreseeable. (Tr., p.

⁷ The Comprehensive Plan is comprised of three documents: General Plan -1980, General Plan Update-1985, and the Sixth County Council District Community Area Study -2000. (Tr. Exs. 3, 4 and 5; Tr., p. 28, ll. 11-17; p. 29, ll. 6-11; Tr. Ex. 82, pp. 30 and 31). The County is required to follow the mandates of the Comprehensive Zoning Plan when considering any zoning issues. (See Mo. Rev. Stat § 64.090 and St. Louis County Charter § 2.180(33)-App. Appen.; Tr., p. 29, ll. 6-11; see also Tr. Ex. 3, p. 26, Government Policy No. 1; p. 41, Land Use Policy No. 1).

56, ll. 15-25, p. 57, ll. 1-17). As pointed out by the County, “landowners must be charged with knowledge of information in the public record...” (App. Subst. Br., p. 24).

The trial court specifically determined that the County found no detriment to the community from Reagan’s proposed office, nor did the County find any public interest served by the rezoning. (App. Subst. Appen. A-4, 5). The County cannot overcome the trial court’s findings by claiming that the County wanted to create a “contiguous group of residential uses,” unless the County explains how or why such an action would be required by the rezoning standard of Section 1003.300.

C. Article I, Section 26 of the Missouri Constitution requires a different takings analysis than the analysis required under the Fifth Amendment to the U.S. Constitution discussed in Penn Central due to the additional language “or damaged” included in the Missouri Constitution

Even if this Court determines that the County’s actions do not rise to the level of a taking under the Penn Central factors, Reagan’s property rights have still been damaged in a manner which requires compensation under Article I, Section 26 of the Missouri Constitution.

The Penn Central balancing test is based on the Fifth Amendment to the U.S. Constitution, which states:

“...nor shall private property be taken for public use, without just compensation.”

There is a distinction between the Fifth Amendment and Article I, Section 26 of the Missouri Constitution which states, in relevant part:

“private property shall not be taken **or damaged** for public use without just compensation.” (emphasis added)

(App. Subst. Appen. A-14).

The phrase “or damaged” was added to the Missouri Constitution by specific amendment in 1875, and thus it can be presumed that the phrase “damaged” means something different than “taken.” The phrase “or damaged” is not included in the relevant takings language of the Fifth Amendment to the U.S. Constitution, or in the takings language of many other state constitutions.

The Missouri Supreme Court has recognized that there is a distinction in a takings analysis created by the language “or damaged.” Van de Vere v. Kansas City, et al., 17 S.W. 695 (Mo. 1891); Kamo Electric Cooperative, Inc. v. Cushard, 416 S.W.2d 646 (Mo. App. 1967); and Aronstein v. Missouri State Highway Commission, 586 S.W.2d 328 (Mo. 1979).

The court in Van de Vere discussed in detail the amendment of the Missouri Constitution to include the language “or damaged,” and established the standard for finding a violation of the “or damaged” language. Id. at 697. The court stated

that the amendment was intended to address a situation where the corpus of the property was not taken, yet rights directly annexed to the property were injured, and that for such consequential damages the property owner had no remedy prior to the amendment because the act was authorized by law. Id. The court determined that in order to bring a case within the amendment “or damaged,” the landowner must show that the property itself, or some right connected therewith, is directly affected, and that it is specially affected, and such direct and special injury must be such as to depreciate the value of the owner’s property. Id.

In Kamo Electric, the court determined that the aesthetics of a property and damage thereto caused by an unsightly power transmission line can be considered a compensable right. Kamo Electric at 655. The court stated that “...anything which is directly injurious to such capability or special adaptation for a particular use, and thereby affects the market value of the property, is therefore competent to be shown as a legitimate factor in bringing about the total damage sustained for which it is contemplated that the owner shall receive just compensation.” Id. (citing City of St. Louis v. Paramount Shoe Mfg. Co., 168 S.W.2d 149 (St. Louis Ct.. App. 1943)). It should be noted that interference with the aesthetics of a property like in Kamo Electric is a much less severe action than interference with a right to use the property for a permitted use like in Reagan’s situation, especially where development costs have already been incurred in reliance on that use.

In Reagan's situation, the rezoning of her property deprived her of her right to use the property for an office building, a permitted use under the existing zoning which was the sole reason for her purchase of the property and expenditure of development costs. The evidence is undisputed that Reagan had no use for the property once it was rezoned to residential. The evidence is also undisputed that the only reason the County rezoned the property was to terminate Reagan's right to construct an office building. (Tr., p. 78, ll. 22-25, p. 79, l. 1). The value of Reagan's property was depreciated when it was rezoned from Industrial to Residential.

The trial court determined that the downzoning of Reagan's property directly affected her property rights regarding the property, and that she was damaged by the rezoning. The damage to Reagan was not suffered by the public-at-large, and thus Reagan was specially affected. Such a finding meets the requirements outlined in Van de Vere for a determination that Reagan's property was "damaged" without just compensation, in violation of Article I, Section 26 of the Missouri Constitution.

D. Summary

Due to the impact of the County's actions on Reagan's investment-backed expectations, and the lack of a legitimate state interest motivating the rezoning, the County's rezoning effectuated a taking or damaging of Reagan's property for

which she is entitled to just compensation under Article I, Section 26 of the Missouri Constitution.

II. THE TRIAL COURT DID NOT ERR IN FINDING THAT A PORTION OF RESPONDENTS' DAMAGES (DIMINUTION IN VALUE OF PROPERTY) EQUALED \$65,300 BECAUSE THIS WAS A CORRECT MEASURE OF DAMAGE AND WAS SUPPORTED BY THE RECORD.

A. Standard of Review

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

B. Discussion

Article I, § 26 of the Missouri Constitution states “private property shall not be taken or damaged for public use without just compensation.” (App. Subst. Appen. A-14). Courts interpreting the term “just compensation” have stated that it means “the full and perfect equivalent in money of property taken, so that the owner will be put in as good a position pecunarily as he would have occupied if his property had not been taken.” United States v. Miller, 317 U.S. 369 (1943) (interpreting “just compensation” provision of Fifth Amendment to U.S. Constitution, which is similar to the language of Article I, § 26 of Missouri Constitution).

The owner of the property is entitled to just compensation for all that is taken and not for something less. State ex rel. N.W. Electric Power Cooperative, Inc. v. Waggoner, 319 S.W.2d 930 (Mo. App. 1959). Just compensation means full indemnity or remuneration for the loss or damage sustained by the owner of the property taken or injured. Id. at 934. Where only a part of the property is condemned, the owner is entitled to compensation not only for the part actually taken but for whatever consequential damages may proximately result. Id. This includes damages resulting from any destruction, restriction, diminution, or interruption of the rights of ownership in and to the property. Id. In the case where no available land is owned by the person whose land is taken by a condemnation, the price at which he may buy equally valuable, convenient and accessible land may be shown by the owner as measuring the amount of depreciation to which the land damaged, but not physically taken, has been subjected. City of St. Louis v. Paramount Shoe Mfg. Co., 168 S.W.2d 149 (St. Louis Ct. App. 1943).

Thus, the trial court had discretion to determine the amount of the award which would put Reagan in as good a position pecunarily as if her property had not been downzoned.

The County argues that the proper measure of damages in inverse condemnation cases is “the same as the measure of damages in condemnation

cases which is the difference in fair market value of the entire tract immediately before and immediately after the appropriation.” (App. Subst. Br., p. 31). Reagan agrees this standard would be correct in a formal eminent domain proceeding conducted pursuant to Mo.R.Civ.P. 86.01, et seq., but Reagan disputes that it should be applied in an inverse condemnation situation.

There is an important distinction between Reagan’s inverse condemnation situation and a formal eminent domain proceeding. In a formal eminent domain proceeding, the condemning authority is required to pay the award at the time of the taking, and the payment is based on the current market value of the property. See Mo.R.Civ.P. 86.06; see also Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984).

For example, in Kirby Forest the property owner complained because the value of his property was determined as of March 6, 1979, but the condemnation award was not paid by the United States until March 26, 1982. Id. at 16. The Court agreed that if the result of the valuation approach used in a condemnation proceeding is to provide the landowner with substantially less than the fair market value of the property on the date payment is tendered, it violates the just compensation provision of the Fifth Amendment. Id. at 17.

The County claims that Reagan’s damages should be based on the difference in market value immediately before and immediately after the rezoning in July

2001, even though the County did not pay Reagan any compensation for the downzoning in July 2001. The County's position is incorrect due to Kirby's definition of just compensation.

Reagan's appraiser used a valuation date of April, 2003 (which was between the filing date of Reagan's lawsuit and the trial date). Under the Kirby case, Reagan would have been permitted to use a valuation date of the property even later than April 2003, and up through at least the trial date of August 2004. Assuming for discussion that the property had appreciated in value, Reagan would have been entitled to more damages under Kirby if she had submitted a valuation of the property dated later than April 2003. The April 2003 valuation date used by Reagan was a compromise on Reagan's part which recognized that even though the Kirby case might entitle Reagan to damages for lost appreciation value of the property after the valuation date of April 2003 up through the date of payment of compensation by the County, Reagan was willing to forego the additional lost appreciation of the property from April 2003 forward. The April 2003 valuation date was also instructive because of its proximity to the time Reagan was forced to sell the property in September 2002. (Tr., p. 277, ll. 2-15).

Michael Green, Reagan's appraiser, testified at trial that the value of the property zoned M-1 Industrial as of April 2003 would be between \$200,000 and \$225,000. (Tr., p. 196, ll. 15-18). The trial court determined that Reagan's

property would be valued at \$220,000 (based on the range of \$200,000 to \$225,000 specified by Mr. Green) if Reagan had been allowed to retain it as M-1 Industrial property. (L.F., p. 146-149; L.F., p. 267).

The trial court then determined that Reagan had sold the property as zoned Residential in September 2002 for the net amount of \$154,700 (\$171,969.31 sales price minus \$16,313.41 commissions = \$155,655.90 sales proceeds, trial court's calculations appear to be slightly off), and Reagan's damages from the lost market value of her property due to the County's actions were therefore \$65,300.00 (\$220,000.00 value in April 2003 minus \$154,700.00 sales proceeds in September 2002). Id. The corrected amount of Reagan's damages is \$64,344.10 (\$220,000 value in April 2003 minus \$155,655.90 sales proceeds in September 2002).

The trial court deducted commissions on Reagan's sale of the property because such amount reduces the amount of compensation which Reagan received for her property, and the sale was forced due to the County's rezoning of the property which rendered it useless to Reagan. The trial court did not deduct potential commissions from the value of Reagan's property if she had retained it as zoned M-Industrial because the evidence was clear that Reagan intended to hold the property and operate her business from the property. Since there was no sale of the property planned by Reagan if she had been allowed to construct her office,

there was no reason to deduct potential commissions from such sale as argued by the County. (App. Subst. Br., p. 34, n. 11).

The trial court's calculation was authorized by case law, and it is also the only approach that makes sense from a fairness standpoint. It is not "just compensation" to Reagan if she receives payment from the County after the trial in December 2004 based on a property valuation from the time of the rezoning in July 2001. Such a result would cause Reagan to forfeit any appreciation value of her property which occurred between July 2001 and December 2004. Obviously, one of the purposes of the "just compensation" requirement is to allow the condemnee to relocate his residence or business to a new parcel of property. This purpose is frustrated if Reagan does not receive the current market value of her property, which presumably is also the cost to purchase a new, similar property. Under the County's arguments, the County would not have to pay Reagan the July 2001 value of her property until December 2004, which would not allow Reagan to purchase a similar piece of property in December 2004. It is not "just compensation" to require Reagan to invest an extra \$65,300 to purchase a new property identical to the property which the County rezoned.

The County assumed the risk that the value of what was taken from Reagan would appreciate over the time period during which the County refused to pay Reagan compensation, and Reagan is entitled to a market value of what was taken

based on its value around the time the compensation is actually paid. The trial court was authorized to use Reagan's April 2003 valuation rather than the County's July 2001 valuation because it was a more up-to-date valuation than the County's July 2001 valuation, and because it was the only way to provide Reagan with just compensation.

As discussed above, the County's position that the property's valuation as of July 2001 should be used is incorrect because it would not provide just compensation to Reagan due to the change in the property's value between the date of valuation in July 2001 and the entry of the trial court's award in December 2004. Although Reagan disputes that the proper valuation date is July 2001, even if used as the valuation date, the trial court's damage award is only slightly reduced. Mr. Green testified that the value of the property as zoned M-1 Industrial was between \$190,000 and \$210,000 in July 2001. (Tr., pp. 197, ll. 3-25, pp. 198, ll. 1-11). Although there was competing testimony regarding the value of the property as zoned residential after the downzoning in July 2001, even if the County's expert witness's valuation is used, Reagan still suffered damages. The County's appraisal expert, Thomas McReynolds, testified that the value of the property on July 3, 2001 as zoned residential was \$167,000. (Tr., p. 363, ll. 9).

These figures still result in damages to Reagan of \$43,000 (\$210,000 minus \$167,000). As discussed above, Reagan does not believe this damage computation

is relevant because it is based on a valuation of the property as of July 3, 2001, which is not the proper valuation period for determining an award of “just compensation” in 2004.

The County cites several cases involving federal condemnation actions in support of its argument that the Court should exclude any and all evidence relating to “replacement costs” or “substitute facilities costs.” United States v. 564.54 Acres of Land, 441 U.S. 506, 99 S. Ct. 1854 (1979); United States v. 50 Acres of Land, 469 105 S. Ct. 451 (1984).

These cases are not relevant to Reagan’s situation because both cases cited by the County involve a “substitute facilities costs” argument whereby the condemnees sought replacement costs for facilities located on their properties. The court in these cases refused to award costs to the plaintiffs for constructing replacement facilities when their old facilities were condemned. The reason given by the court for denying an award for replacement facilities was that the court was afraid that the plaintiffs would receive a windfall because the plaintiffs would be receiving new facilities in exchange for old, depreciated facilities.

These cases do not apply to Reagan’s situation because (1) Reagan’s land was vacant, and she is not seeking replacement costs for a depreciating asset such as a building, and (2) her valuation of damages is based on her loss of fair market

value appreciation of her property as zoned M-1 Industrial, which would still be in her possession if the County had not downzoned the property.

Thus, the trial court's award of \$65,300 to Reagan for loss of market value of her property due to the rezoning was justified.

III. THIS COURT SHOULD UPHOLD THE TRIAL COURT'S AWARD OF RESPONDENTS' ATTORNEY'S FEES AND COSTS BECAUSE:

(1) APPELLANT HAS WAIVED ITS DEFENSE THAT ATTORNEY'S FEES AND COSTS MAY NOT BE ASSESSED AGAINST THE COUNTY IN THE ABSENCE OF STATUTORY AUTHORITY IN THAT THIS THEORY WAS NEVER RAISED AT THE TRIAL COURT LEVEL, AND, IN ANY EVENT, THERE IS STATUTORY AUTHORITY, AND (2) THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING FEES AND COSTS IN THAT UNUSUAL CIRCUMSTANCES EXIST THAT WARRANT THE AWARD.

The County asserts that the trial court erred in awarding Reagan her attorney's fees and costs because the County is not liable for such expenses in the absence of statutory authorization and because no "unusual circumstances" exist that would otherwise justify an award. The County's arguments are in error and must fail.

A. Standard of Review

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

B. Appellant Waived its Argument against Attorney's Fees and Costs, and There is Statutory Authority Supporting the Award

It is well established that "on appeal, a party is bound by the position he [or she] took in the Circuit Court and will not be heard on a different theory." Jackson v. Cannon, 147 S.W.3d 168, 172 (Mo. App. 2004), citing Howsmon v. Howsmon, 77 S.W.3d 752, 757 (Mo. App. 2002). Review on appeal "is limited to issues and theories heard by the trial judge." Watts v. Sechler, 140 S.W.3d 232, 236 (Mo. App. 2004). Arguments not presented to the court below are waived and not preserved for appeal. Jones Co. Custom Homes v. Commerce Bank, 116 S.W.3d 653, 659 (Mo. App. 2003); Ryan v. Maddox, 112 S.W.3d 476, 479 (Mo. App. 2003). To undertake consideration of an issue not raised at the trial court level "would be akin to rendering an advisory opinion, something appellate courts are wont not to do." Daniel v. Indiana Mills and Mfg., Inc., 103 S.W.3d 302, 318 (Mo. App. 2003).

In this instance, this Court is without jurisdiction to consider the County's contention that the trial court was prohibited as a matter of law from awarding Reagan her attorney's fees because the County never raised this theory with the trial court. Rather, the County opposed an award of attorney's fees based solely on the contention that the American rule does not provide for an award of fees and costs in the absence of unusual circumstances, and that no such circumstances exist here. (L.F., pp. 254-55).

Because the County did not raise this theory with the trial court, the County has waived it, and this Court is without jurisdiction to consider the issue. The Court "may not consider any theories advanced by the [appellants] for the first time on appeal, but only consider those properly before the trial court. Heffernan v. Reinhold, 73 S.W.3d 659, 663 (Mo. App. 2002).

Even if the Court considers this new theory, it should uphold the award of fees because there is statutory authority for an award of fees.

First, Reagan is by statute entitled to her attorney's fees and costs if she prevails on her substantive due process claim as set forth in Point IV.

Second, Reagan is entitled to her attorney's fees and costs pursuant to Mo. Rev. Stat. § 89.491. (App. Subst. Appen. A-36). This section expressly authorizes plaintiffs to recover their attorney's fees and costs from those violating zoning requirements, including local governments:

1. Any person or neighborhood organization as defined in section 32.105, RSMo., aggrieved by a violation described in this subsection may commence a civil action on his own behalf *against any person* who is alleged to be in violation of the provisions of chapter 64, RSMo. or this chapter, or in violation of any standard, regulation, or ordinance which has been adopted by any county or city pursuant to chapter 64, RSMo., or this chapter.

* * *

4. The appropriate circuit court, in issuing any final order in any action brought pursuant to this section, shall award costs of litigation, including reasonable attorney's fees, to the prevailing party.

Mo. Rev. Stat. § 89.491.

Although § 89.491 does not define the term "person," Mo. Rev. Stat. § 1.020 does provide an instructive definition:

As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:...

(11) The word "person" may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations.

Mo. Rev. Stat. § 1.020.

While the courts have noted the permissive nature of this definition in that it provides political subdivisions “may” be considered persons for statutory purposes, the Missouri Supreme Court has suggested that the word “person” should be deemed to include corporations and political subdivisions unless “plainly repugnant” to the intent of the legislature. See David Ranken, Jr. Tech. Inst. v. Boykins, 816 S.W.2d 189, 191 (Mo. 1991) (en banc) (overruled on other grounds).

In this instance, including political subdivisions within the definition of person as used in § 89.491 is not plainly repugnant to the intent of the legislature. In fact, excluding political subdivisions would lead to an absurd result, which is to be avoided in statutory interpretation. In Re Beyersdorfer, 59 S.W.3d 523, 526 (Mo. 2001) (en banc).

The purpose of § 89.491 is to permit public or private enforcement of zoning ordinances and comprehensive plans. Such enforcement is in the public interest, ensures compliance with valid zoning requirements and permits governing bodies and residents to protect community interests. These purposes must be considered in construing the statute. See Golt v. Dir. of Rev., 5 S.W.3d 155, 159 (Mo. 1999) (en banc) (when construing a statute, court must consider the object the legislature seeks to accomplish with an eye toward finding resolution to the problem addressed therein).

Enforcement of zoning ordinances against political subdivisions is not plainly repugnant to these purposes. Permitting such enforcement accomplishes the legislative intent by requiring that both citizens and government follow valid zoning restrictions. There is nothing to suggest the legislature intended to exclude political subdivisions from having their own zoning requirements enforced against them. To the contrary, if zoning requirements are to have any meaning, political subdivisions must adhere to them.

Further evidencing the legislature's intent was the legislature's deliberate election not to define the term "person" in § 89.491, but rather to rely upon the pre-existing definition in Mo. Rev. Stat. § 1.020. See Greenbriar Hills Ctry Club v. Dir. Of Rev., 47 S.W.3d 346, 352 (Mo. 2001) (en banc) (legislature is presumed to know pre-existing law). If the legislature had intended to exclude political subdivisions, they would have enacted a definition of person specific to Chapter 89, excluding political subdivisions as they have done in other chapters, but chose not to do here.

Excluding political subdivisions from the definition would lead to an absurd result. Citizens could bring suit to enforce zoning requirements against other citizens, and recover their attorney's fees and costs. But political subdivisions could violate their own zoning rules with virtual impunity, knowing it is impractical for citizens to bring suit against them. It is unreasonable to suggest

private citizens are liable for attorney's fees for violating zoning ordinances, but political subdivisions may violate their own laws without liability for such fees. See State v. Kinder, 122 S.W.3d 624, 631 (Mo. App. 2003) (courts are to presume a logical result, as opposed to an absurd or unreasonable one).

In this instance, the trial court specifically found that the County "did not follow §64.090 RSMo." (App. Subst. Appen. A-4, A-25). Mo. Rev. Stat. § 89.491.4 authorizes the recovery of attorney's fees and costs against any person found to be in violation of the provisions of chapter 64, RSMo. The County violated the provisions of Chapter 64 of the Missouri Revised Statutes and its own charter and zoning ordinances, thus permitting an award of all fees and costs under § 89.491.

C. The Trial Court's Award of Attorney's Fees Based on Its Balancing of the Benefits Was Not an Abuse of Discretion and Must be Upheld

While Missouri courts generally follow the American rule which provides that litigants bear their own attorney's fees, this rule is not absolute. First Missionary Baptist Church v. Rollins, 151 S.W.3d 846, 851 (Mo. App. 2004). The trial court may award attorney's fees to a successful litigant where (1) they are provided for by statute or contract, (2) very unusual circumstances exist such that equity demands balancing of the benefits, or (3) where the attorney's fees are

incurred due to involvement in collateral litigation. Id. The trial court is afforded substantial discretion in determining whether to grant or deny attorney's fees. See In re Estate of Cannamore, 44 S.W.3d 883, 885 (Mo. App. 2001).

In this instance, the trial court found unusual circumstances that justify an award of attorney's fees and costs, noting the Respondents cannot be made whole unless the County bears reasonable and necessary attorney's fees and costs of Respondents. (L.F., p. 284). Such finding was not an abuse of discretion for several reasons. This case presents unusual circumstances that justify an award of attorney's fees and costs.

First, the nature of this litigation is very unusual. While there are several legal theories under which a government may be liable for a regulatory property taking, this case involves liability based upon the factors outlined in Clay County v. Bogue, 988 S.W.2d 102 (Mo. App. 1999), as discussed in Point I, supra.

Litigation of this nature constitutes a very unusual circumstance. Also, there are only a few published Missouri state court decisions addressing a taking under

the Clay County factors,⁸ which is valid evidence of the unusual nature of the action. See Ridgway v. TTNT Development Corp., 126 S.W.3d 807, 819 (Mo. App. 2004) (noting that significant number of appeals involving a type of litigation is evidence that such litigation is not unusual). The County itself admits it has never rezoned property over the landowner's objections before. (Tr., p. 84, ll. 14-19, 24-25; p. 85, l. 1; p. 86, ll. 11-19; Supp. L.F., p. 84; Tr. Ex. 76, p. 34, ll. 1-10);

Second, the specific facts of this case demonstrate unusual circumstances that justify an award of fees and costs because, *inter alia*, it involves intentional misconduct. The Court of Appeals has upheld an award of fees based on misconduct in a zoning case. Temple Stephens Co. v. Westhaver, 776 S.W.2d 438, 443 (Mo. App. 1989).

The trial court found that the County had made repeated representations to Reagan that she would be permitted to construct her office building, only to have the County reverse course after she had purchased the land and expended significant sums to prepare for construction. (Tr., p. 63, ll. 19-25; p. 64, ll. 1-17; p.

⁸ See State ex rel. Nixon v. Jewell, 70 S.W.3d 465 (Mo. App. 2001); Schnuck Markets, Inc. v. City of Bridgeton, 895 S.W.2d 163 (Mo. App. 1995); and Glenn v. City of Grant City, 69 S.W.3d 126 (Mo. App. 2002). See also, Harris v. Missouri Dept. of Conservation, 755 S.W.2d 726, 730 (Mo. App. 1988) (mentioning but not providing analysis of facts in that case).

257, ll. 17-25; p. 258, ll. 1-22; p. 357, ll. 5-23; Supp. L.F., p. 416). In reliance on these representations, Reagan executed a sale contract and ultimately purchased the property, expending thousands of dollars readying the property for development.

Subsequently, the County introduced a resolution to downzone the property. (Tr. Ex. 13). Mr. Powers testified that the property was downzoned for the sole purpose of blocking the office (Tr., p. 78, ll. 22-25; p. 79, l. 1), despite Reagan's previous discussions with the County and reliance upon those discussions. As discussed under Point IV below, the County did not even attempt to follow its own rezoning standard under Section 1003.300 of its zoning code.

These facts present very unusual circumstances that justify an award of attorney's fees. The County downzoned Reagan's property, over her objection, based upon misinformation given to them. The Court specifically found that such action had never before been taken by the County Council.

IV. THE TRIAL COURT ERRED IN FAILING TO (1) FIND THAT THE DOWNZONING ORDINANCE WAS A SUBSTANTIVE DUE PROCESS VIOLATION UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS AND (2) AWARD RESPONDENTS ALL COMPENSATORY AND CONSEQUENTIAL DAMAGES INCURRED BECAUSE THE ORDINANCE WAS NOT ENACTED TO FURTHER A VALID PUBLIC BENEFIT, THE PRIVATE

DETRIMENT OUTWEIGHED ANY “PUBLIC BENEFIT” AND RESPONDENTS POSSESSED A SUFFICIENT PROPERTY RIGHT TO INVOKE THE DUE PROCESS CLAUSES IN THAT THERE WAS NO PUBLIC BENEFIT TO ENACT THE ORDINANCE, RESPONDENTS HAD AN INVESTMENT-BACKED AND JUSTIFIABLE EXPECTATION REGARDING THE PRIOR ZONING OF THE PROPERTY AND RESPONDENTS WERE NOT MADE WHOLE BY THE TRIAL COURT’S JUDGMENT.

A. Standard of Review

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

B. Procedural History

In addition to her inverse condemnation claim, Reagan also submitted this case on Count IV of her Second Amended Petition, alleging that the downzoning ordinance violated Reagan’s substantive due process rights. The trial court erred in finding no substantive due process violation. (App. Subst. Appen. A-5).

C. The Downzoning Ordinance Violates the Due Process Clauses

The trial court erred by finding that the County did not violate Reagan’s due process rights because the evidence clearly supported a determination that the County’s rezoning of the property was arbitrary, capricious and irrational.

The Missouri Supreme Court recently ruled on a similar due process property case. Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157, 170 (Mo. banc 2006); see also Gunter v. City of St. James, Missouri, 189 S.W.3d 667 (Mo. App. 2006). The Furlong case is similar to Reagan's situation because both cases involve a landowner that purchased the property because of the established favorable zoning. (Furlong at 161). In both cases, (1) the local governing body was opposed to the proposed development (Id. at 171); (2) there was no detriment to the community shown from the proposed use (Id. at 168); (3) the landowners had met all the requirements of the existing regulations governing their proposed uses (Id. at 168); and (4) approval of the proposed use should have been a ministerial act with no discretion allowed to the governing body. (Id. at 171).

The only factual distinction between Reagan's situation and the plaintiff's situation in Furlong is the method the governing body used to block the proposed development in each case. In Furlong, the City of Kansas City blocked the plaintiff's development by denying its preliminary plat. In Reagan's situation, the County approved Reagan's site plan, but blocked Reagan's development by rezoning her property to a zoning category which did not allow her intended use.

This distinction is irrelevant for purposes of a due process analysis because both procedural maneuvers by the respective governing bodies were intended to

deprive the plaintiffs of their right to use their property for their intended use. For example, the City of Kansas City could have chosen to block Furlong's development by rezoning the property to a zoning category which did not allow Furlong's intended use, and achieved the same result as denying its preliminary plat. Alternatively, the County could have chosen to block Reagan's development by denying her site plan, rather than rezoning her property. Regardless of the method used to block the proposed development, the Furlong analysis should be applied for purposes of due process review.

In Furlong, this Court determined that there are two elements that must be established to prevail on a due process claim under § 1983. Id. at 170. First, a claimant must establish a protected property interest to which the Fourteenth Amendment's due process protection applies. Second, a claimant must also establish that the governmental action was truly irrational.

1) Property right

A Missouri court has never directly addressed at what point a property owner's desire to maintain the existing zoning of a property reaches the level of a protected property interest for purposes of due process. The Lenette decision suggests that a plaintiff need only demonstrate that a rezoning decision will have a substantial impact on the plaintiff's rights or interests in order for a plaintiff to establish a property right in the outcome of a rezoning matter. 35 S.W.3d at 405.

Several non-Missouri cases have stated that a person's ownership in the land, coupled with an investment-backed "justifiable expectation" regarding the zoning of the property, establishes a constitutionally protected interest in the zoning of the property. See Tandy Corp. v. City of Livonia, 81 F.Supp.2d 800 (9th Cir. 1999).

The case of Tandy, 81 F.Supp.2d 800, is illustrative and contains a detailed discussion of Nasierowski Bros. Investment Co. v. City of Sterling Heights, 949 F.2d 890 (6th Cir. 1991). The plaintiffs in Nasierowski Bros. conditioned their acquisition of the property on the property being zoned to permit their intended use, and this was confirmed with the city. Also in Nasierowski Bros., the issue of rezoning the plaintiff's property arose while in the middle of obtaining site plan approval due to political opposition. The city rezoned plaintiff's property in order to block the intended development. The courts in both Tandy and Nasierowski determined the landowners had a protected property interest in their zoning classifications, which interests were secured by the landowners' acts taken in reliance on the zoning classifications.

The facts in this case are identical to those in Tandy and Nasierowski Bros. Reagan conditioned the acquisition of her property on a determination that it was zoned to allow construction of her office building. (Tr., p. 257, ll. 17-25, p. 258, ll. 1-4; p. 264, ll. 11-14). The County confirmed with Reagan that her proposed office was a permitted use prior to her purchase of the property. (Tr., p. 357, ll. 5-

15; p. 257, ll. 17-25; p. 258, ll. 1-22; p. 294, ll. 23-25; p. 295, ll. 1-8; p. 63, ll. 19-25; p. 64, ll. 1-17). Reagan's financing agreement with her lender required that the property be used for construction of an office building. (Tr., p. 257, ll. 22-25; p. 258, ll. 1-4; p. 264, ll. 11-14). The County's Director of Planning, Glenn Powers, admitted that Reagan had the "right" to develop the office building under the then existing zoning. (Tr., p. 64, ll. 1-8). Reagan had initiated the building permit process prior to the rezoning by filing a Permit Application Center ("PAC") form. (Tr., p. 83, ll. 13-25; p. 84, ll. 1-4; p. 87, ll. 4-20; p. 112, ll. 9-11). Reagan had taken steps and incurred substantial costs to ready the property for development prior to the rezoning. (Tr., p. 264, ll. 24-25; p. 265, p. 266, ll. 1-12; p. 267, ll. 10-16; p. 280, ll. 5-25; p. 281-283, p. 284, ll. 1-4; Tr. Ex. 84; Tr. Ex. 61-73). The County approved Reagan's site plan for her proposed office. (Tr., p. 64, ll. 11-18).

The County knew Reagan was developing the property and incurring expenditures prior to initiating the rezoning. (Tr., p. 82, ll. 18-25; p. 83, ll. 13-25; p. 84, ll. 1-2; p. 271, ll. 10-25; p. 272; p. 273, ll. 1-2; Tr. Ex. 77, p. 8-20; p. 21, ll. 1-4; p. 37, ll. 12-16; Tr. Ex. 19). The County did not caution Reagan about incurring development costs due to a potential rezoning. (Tr., p. 82, ll. 18-25; p. 83, ll. 13-25; p. 84, ll. 1-2; p. 118, ll. 1-5). Reagan spent the sum of \$83,332.01 in costs readying the property for development, which included costs for demolition

of the existing structures, asbestos removal, engineering fees, etc. (Tr., p. 280, ll. 5-25; p. 281-283; p. 284, ll. 1-4; Tr. Ex. 84; Tr. Ex. 61-73).

The rezoning was initiated by the County Council due to false complaints by the neighbors who alleged that Reagan was planning to construct a “manufacturing plant for re-bar construction.” (Tr., p. 47, ll. 6-10; p. 50, ll. 14-25; p. 51, ll. 1-5; p. 250, ll. 1-6; p. 274, ll. 3-5; p. 275, ll. 5-25; p. 276, ll. 1-8; p. 342, ll. 10-25; p. 343, ll. 1-11; Tr. Exs. 14 and 15). The rezoning was carried out even though Mr. Powers expressed a concern to the County Council member initiating the rezoning regarding Reagan’s rights. (Tr., p. 74, ll. 12-19; p. 117, ll. 18-25; p. 118, ll. 1-5). Mr. Powers did not cite any basis on which the County would have refused to issue a building permit to Reagan for construction of her office building if the property had not been rezoned. (Tr., p. 77, ll. 3-17; p. 83, ll. 21-25; p. 84, ll. 1-12; p. 87, ll. 4-20). Mr. Powers admitted that the rezoning was done solely to block Ms. Reagan’s development. (Tr., p. 78, ll. 22-25; p. 79, l. 1).

The property at issue had been zoned M-Industrial since 1965 (Tr., p. 43, ll. 23-25), and the subdivisions where the complaining neighbors lived had been built in the 1980s (Tr., p. 56, ll. 15-25). The County never initiated rezoning proceedings before 2001. (Tr., p. 57, ll. 1-17). The County waited until over two years after Reagan purchased the property in 1999 to initiate rezoning proceedings,

despite the fact that the County was fully aware of Reagan's development activities and cost expenditures during that time period. (Tr., p. 82, ll. 18-25; Tr. Ex. 19).

The above facts clearly indicate that if the neighbors had not provoked the rezoning by using false allegations regarding Reagan's intended use of the property, the County would have allowed Reagan to construct her office. Due to the factual circumstances of this case, Reagan had a valid expectation of being able to use the property for her intended use. This expectation was based on (1) the County's representations that such use was permitted prior to her purchase of the property, (2) Reagan's expenditure of development costs in readying the property for development; (3) the County's awareness of Reagan's expenditures prior to the rezoning, and the County's failure to advise Reagan to postpone incurring such expenditures; (4) the County's delay in rezoning the property until over two years after Reagan's purchase; and (5) the County's lack of discretion to deny a building permit to Reagan as long as Reagan's proposed office satisfied the building code requirements. Any reasonable landowner would assume that the County would take no adverse action regarding a permitted use of the property at such a late stage in the development process.

Reagan also had a legitimate expectation that the County would not rezone her property based on false concerns from complaining neighbors, and that the County would not rezone her property unless the standards of Section 1003.300

were met. (App. Subst. Appen. A-49; see also discussion of Section 1003.300 under (2) below). It is clear the County itself did not intend to take any adverse action regarding Reagan's office until the neighbors started complaining.

Reagan's vested property right is created by her investment-backed efforts taken in reliance on the expectation that she would be allowed to use the property for her intended, permitted use. (Tr., p. 280, ll. 2-25; p. 281-283; p. 284, ll. 1-4; Tr. Ex. 84; Tr. Exs. 61-73); Tandy Corp. v. City of Livonia, 81 F.Supp.2d 800 (9th Cir. 1999); Nasierowski Bros. Investment Co. v. City of Sterling Heights, 949 F.2d 890 (6th Cir. 1991); Great Lakes Pipe Line Company v. Hendrickson, 393 S.W.2d 481 (Mo. 1965); Casey's General Stores, Inc. v. City of Louisiana, 734 S.W.2d 890 (Mo. App. 1987).

Reagan was in full compliance with the County's zoning ordinance prior to the downzoning, and she invested substantial sums with the County's knowledge in reliance on the existing zoning of the property. She therefore possessed a protected right to use the property in compliance with the pre-amendment zoning code. The downzoning ordinance specifically targeted Reagan's property and severely altered her permissible use of the property, thereby depriving her of a valuable and constitutionally protected property right.

2) Governmental action was truly irrational

This Court in Furlong defined a “truly irrational” action as one where “the government acts with intentional disregard of its own valid law, knowing that its actions deprive individuals of their property rights...”. (Furlong at 171).

(a) Intentional disregard of the County’s own valid law

The relevant law in this matter for purposes of substantive due process review is the County’s standard for rezoning a property. Section 1003.300 of the County’s Zoning Code specifies that only when “the public necessity, convenience, general welfare, and good zoning practice require” should the County consider rezoning a property. (See Tr., p. 21, ll. 13-17; see also App. Subst. Appen. A-49). Zoning ordinances are strictly construed against the zoning authority and in favor of the property owner. Cunningham v. Board of Aldermen of City of Overland, 691 S.W.2d 464 (Mo. App. 1985). The use of the conjunctive word “and” in Section 1003.300, along with the word “require,” indicate that all four factors must be satisfied in order to meet the rezoning threshold.

The County initiated the rezoning at the request of Councilman Campisi. (Tr. Exs. 13 and 37; Tr. Ex. 79, p. 27, ll. 8-20). Councilman Campisi submitted his rezoning request due to complaints from local residents regarding development of the property. (Tr., p. 47, ll. 2-14; Tr. Exs. 14 and 15; Tr. Ex. 77, p. 26, ll. 4-25; p.

27, ll. 1-3; Tr. Ex. 79, p. 11, ll. 7-18; Tr. Ex. 81, p. 7, ll. 5-25; p. 8, ll. 1-17; Tr. Ex. 81, p. 10, ll. 5-21).

Reagan's property had been zoned M-1 Industrial since 1965, and the complaining subdivisions had been built in the 1980s. Id. These neighbors had purchased their property knowing that Reagan's property was zoned M-1 Industrial, and thus Reagan's office development was easily foreseeable by the neighbors. (Tr., p. 56, ll. 15-25; p. 57, ll. 1-17). The County did not initiate rezoning proceedings until 2001, which was over two years after Reagan had purchased the property. Id. If the County believed its own argument that the rezoning was required due to the existence of those subdivisions and the character of the neighborhood, then the County should have rezoned Reagan's property in the 1980s upon construction of those subdivisions. The County stated that they did not rezone the property back when the subdivisions were built because the property owner at that time did not want it rezoned. (Tr., p. 337, ll. 14-25; p. 338, ll. 1-7).

The misinformed residents alleged through form letters that Reagan was constructing a "manufacturing plant for re-bar construction" on the property, which was simply untrue. (Tr. Exs. 14 and 15). The residents submitted similar false complaints at the public hearing (Tr., p. 341, ll. 24-25; p. 342, ll. 1-7), but the County cannot find the tape of the hearing and thus Reagan was unable to submit

the neighbors' testimony to the trial court. (Tr., p. 86, ll. 20-25; p. 87, ll. 1-3; p. 112, ll. 14-25; p. 113, ll. 1-2).

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

Even after the rezoning process was initiated by Councilman Campisi, the County did not attempt to establish that the rezoning was "required" by "the public necessity, convenience, general welfare, and good zoning practice" as mandated by Section 1003.300. A review of the trial transcript along with all of the evidence related to the rezoning process shows that these factors were not even mentioned during the County's case (for example, see Tr., p. 313, ll. 1-6). The County's representatives testified that their only analysis consisted of whether residential zoning was an acceptable zoning for Reagan's property, and not whether Reagan's proposed office use was inappropriate. (Tr., p. 78, ll. 1-18).

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

⁹ During trial, the County's Planning Director, Glenn Powers, admitted that an office development just one-eighth of a mile "up the road" from the property certainly fitted in with the overall character of the area as depicted on Tr. Ex. 50. (Tr., p. 113, ll. 12-25; p. 114, ll. 1-16).

¹⁰ The Comprehensive Plan is comprised of three documents: General Plan -1980, General Plan Update-1985, and the Sixth County Council District Community Area Study -2000. (Tr. Exs. 3, 4 and 5; Tr., p. 28, ll. 11-17; p. 29, ll. 6-11; Tr. Ex. 82, pp. 30 and 31). The County is required to follow the mandates of the Comprehensive Plan when considering any zoning issues. (See Mo. Rev. Stat § 64.090 and St. Louis County Charter § 2.180(33)-App. Subst. Appen.; Tr., p. 29, ll. 6-11; see also Tr. Ex. 3, p. 26, Government Policy No. 1; p. 41, Land Use Policy No. 1).

ll. 5-10; p. 38, ll. 16-22; p. 40, ll. 7-16; Tr. Ex. 5, pp. 134-35). The Comprehensive Plan contemplates that mixed-use areas such as an office next to a residential area might occur, and provides specific options including landscaping, etc. for dealing with mixed-use areas, i.e. alternatives to rezoning. (Tr., p. 40, ll. 7-16; p. 41, ll. 22-25; p. 42, ll. 1-19; p. 102, ll. 11-19; p. 325, ll. 3-17; Tr. Ex. 3, p. 41, Land Use Policy No. 3). Matt Prickett, the County Planner who authored the Planning Department's recommendation to rezone (Tr. Ex. 7), admitted that he had never seen the Comprehensive Plan (Tr. Ex. 76, p. 42, ll. 15-25; p. 43-45; p. 46, ll. 1-18), despite the fact he was required to utilize the Comprehensive Plan policies in his analysis of the rezoning. (See Tr. Ex. 3, p. 88, Section III.1). The evidence showed that M-1 Industrial zoning was an appropriate zoning for Reagan's property.

Even if residential zoning may also have been an appropriate zoning classification for Reagan's property, that fact does not establish that the existing industrial zoning or Reagan's proposed use was inappropriate, nor does it require the property to be rezoned under the standard of Section 1003.300. The County does not cite a single legal authority which establishes a presumption that residential zoning is preferred over Reagan's office use, even if the overall character of the neighborhood is residential.

Without claiming a legal presumption that residential zoning is preferred to Reagan's proposed office use, the County was required to establish some detriment to the community from Reagan's proposed office, or a public benefit from the rezoning. The County admitted that it relied in part on the residents' complaints when deciding to rezone the property. (Tr., p. 342, ll. 10-25; p. 343, ll. 1-11). The County's Planning Department did not attempt to determine whether the complaining residents' claims were true or false, nor did the County find any detriment to the community from Reagan's proposed office use. (Tr., p. 50, ll. 14-25; pp. 51-54; p. 55, ll. 1-22; Tr. Ex. 77, p. 20, ll. 17-24; p. 21, ll. 1-4; p. 22, l. 1). Mr. Powers stated he did not feel that Reagan's proposed office would be incompatible with the residences in the area. (Tr., p. 55, ll. 11-22).

For example, if the County had determined that Reagan's proposed office would lower property values in the area, such a fact might be a reason for the County to consider rezoning the property. If the County had determined that Reagan's proposed office would create pollution problems for the area, such a fact might be a reason for the County to consider rezoning the property. The County did not consider any of these factors when deciding to rezone Reagan's property. (Tr., p.54, ll. 5-7; p. 91, ll. 23-25; p. 92, ll. 1-7). Without even considering those factors, there is no way the County can argue in good faith that it tried to follow the rezoning standard in Section 1003.300 when rezoning Reagan's property. The

County did not argue a single reason for rezoning Reagan's property that falls under the standard of "the public necessity, convenience, general welfare, and good zoning practice."

If Reagan had been the party seeking to rezone her property from M-1 Industrial to Residential, then she would have been required to present evidence such as traffic studies, evidence of impact on school enrollment, etc. to show that the new residential zoning classification of the property is required by the "public necessity, convenience, general welfare, and good zoning practice." The fact that the County initiated the rezoning does not obviate the need for the County to present similar evidence to establish that the rezoning is required by the "public necessity, convenience, general welfare, and good zoning practice."

Additionally, the County approved Reagan's site plan for construction of an office building on the property. (Tr., p. 64, ll. 11-17). The County would not have approved Reagan's site plan unless Reagan's site plan preserved the "integrity of adjacent properties." (See Tr., p. 65, ll. 6-25; p. 66, ll. 1-16; Tr. Ex. 2, Section 1003.179.2(3); Tr. Ex. 78; p. 27, ll. 5-11). Mr. Powers thought Reagan's office development as shown on the site plan with its landscaping and buffering was a "reasonable solution." (Tr., p. 77, ll. 11-17; see also Tr. Ex. 76, p. 67, ll. 10-25; p. 68, pp. 69-72).

Without showing that Reagan's proposed office would cause a detriment to the community, or how the rezoning would provide a public benefit to the community, the County did not meet the rezoning standard of Section 1003.300. Mr. Powers admitted that Section 1003.300 had to be followed. (See Tr., p. 21, ll. 13-17). The County had never rezoned a property over the landowner's objection before, so the County had no established procedure in place for analyzing the rezoning of Reagan's property under Section 1003.300. (Tr., p. 84, ll. 14-25; p. 85, p. 86, ll.1-19; p. 357, ll. 16-25; p. 358, ll. 1-9; Tr. Ex. 78, p. 18, ll. 22-25; p. 19, ll. 1-11).

By ignoring the rezoning standard of Section 1003.300, the County intentionally disregarded its own law applicable to the rezoning, and such action qualifies as truly irrational under Furlong. The trial court specifically ruled that the County "found no detrimental effect on the residential owners" posed by Reagan's project, and that the County had not found "any public interest which would be served by the rezoning." (App. Subst. Appen. A-4, 5). As a result, the trial court was thus also required to find that the County's rezoning of the property was truly irrational.

(b) Knowledge Reagan was deprived of her rights

The County had full knowledge that Reagan would be deprived of her rights due to the rezoning, and the only reason the County rezoned the property was to

deprive Reagan of those rights. (Tr. Ex. 19; Tr., p. 78, ll. 22-25; p. 79, l. 1). Mr. Powers testified that the specific reason Reagan's property was rezoned was to prevent Reagan from building her proposed office development. Id.

The rezoning was carried out despite the fact that (1) the County had informed Reagan that her proposed office use was permitted prior to her purchase of the property, and she purchased the property and incurred development costs in reliance on that representation (Tr., p. 257, ll. 17-25; p. 258, ll. 1-22; p. 271, ll. 15-25; p. 272, ll. 1-8; p. 357, ll. 5-15; Tr. Ex. 19; Tr. Ex. 77, pp. 9-17); (2) the County was aware that Reagan's property rights were entitled to equal protection with the complaining residents under the Zoning Code (Tr., p. 20, ll. 16-25; p. 21, ll. 1-12); (3) the County admitted that Reagan's office was a permitted and appropriate use of the property if not for the rezoning (Tr., p. 63, ll. 19-25; p. 64, l. 1; p. 87, ll. 4-8); (4) Mr. Powers informed County Councilman Campisi (the Councilman who initiated the rezoning) that Reagan had a right to develop the property as intended under the existing zoning (Tr., p. 64, ll. 2-10); (5) Mr. Powers informed Councilman Campisi that the County should proceed with caution due to the takings issue (Tr., p. 74, ll. 12-19; p. 117, ll. 18-25; p. 118, ll. 1-5); (6) the County approved Reagan's site plan for her development, which indicates Reagan's office was compatible with the area (Tr., p. 64, ll. 11-17; p. 66, ll. 4-16; p. 77, ll. 16-17); (7) the County was aware that Reagan had spent thousands of dollars in readying

the property for construction of her office building in reliance on the existing zoning (Tr., p. 82, ll. 18-25; Tr. Ex. 76, p. 41, ll. 4-13; Tr. Ex. 19; Tr. Ex. 77, pp. 9-17); and (8) the County was aware Reagan did not want the property rezoned (Tr., p. 77, ll. 23-25; p. 271, ll. 10-25, p. 272, p. 273, l. 1; Tr. Ex. 76, p. 33, ll. 18-21; Tr. Ex. 19). All of the above factors indicate that the County was fully aware that Reagan would be deprived of her rights in the property in the event it was rezoned.

Despite the fact that the County was aware that Reagan would be detrimentally affected by the rezoning, the County consciously ignored Reagan's rights when making the decision to rezone the property (Tr., p. 73, ll. 6-19; p. 79, ll. 14-25; p. 80; p. 81, ll. 1-4; p. 355, ll. 17-25; p. 356; p. 357, ll. 1-15; Tr. Ex. 76, p. 30, ll. 6-25; pp. 31-32; p. 33, ll. 1-21). Mr. Powers agreed in retrospect it would have been appropriate to consider the effect of the rezoning on Reagan. (Tr., p. 73, ll. 22-25; p. 74, l. 1). Nor did the County attempt to work out an alternative solution to the rezoning with Reagan (Tr., p. 74, ll. 20-25; p. 75, ll. 1-12), despite the fact the Comprehensive Plan required the County to consider alternative solutions. (Tr., p. 41, ll. 22-25; p. 42, ll. 1-19; Tr. Ex. 76, p. 37, l. 25; p. 38, ll. 1-12).

The County intentionally ignored the rezoning standard of Section 1003.300 when rezoning Reagan's property. The County did not try to make any showing at trial that the rezoning was required by "the public necessity,

convenience, general welfare, and good zoning practice,” nor did the County show any detriment from Reagan’s office development or public benefit from the rezoning. The County was fully aware that its actions would deprive Reagan of her rights in the property, and the County consciously disregarded the detrimental effect on Reagan when deciding whether to rezone the property. Such actions constitute a violation of Reagan’s due process rights in her property.

D. Respondents are entitled to compensatory damages for the violation of their constitutional rights under 42 U.S.C. § 1983

The Supreme Court has held that 42 U.S.C. § 1983 creates “a species of tort liability” in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution. Memphis Community School District v. Stachura, 477 U.S. 299 (1986). When § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts, and may include out-of-pocket costs and other monetary harms. Id. at 306.

Respondents suffered substantial out-of-pocket monetary damages in addition to the lost value of the property. The lost value of Reagan’s property was \$65,300 (or alternatively, \$64,344.10, see discussion under Point II above). Reagan also incurred out-of-pocket costs totaling \$83,332.01 (Tr., p. 280, ll. 2-25; pp. 281-283; p. 284, ll. 1-4; Tr. Ex. 84; Tr. Ex. 61-73). These costs represent

payments made by Reagan in connection with holding and/or development of the property. Reagan would not have incurred these costs but for her reliance on the County's representation that her proposed use of the property was permitted. (Tr., p. 258, ll. 11-22). If Reagan had not purchased the property, she would have been able to invest the \$83,332.01 in the stock market or some other appreciating asset, rather than wasting the funds to maintain the property and prepare it for a development she would never be allowed to complete.

As a result, Reagan's total consequential damages from the rezoning of her property amount to \$148,632.01 (\$65,300.00 lost value of property due to downzoning plus \$83,332.01 out-of-pocket costs).

E. Respondents are entitled to attorney fees for the violation of their constitutional rights under 42 U.S.C. § 1983 pursuant to 42 U.S.C. § 1988

Under 42 U.S.C. § 1988, the court may allow the prevailing party in § 1983 litigation its attorney's fees and costs, including expert fees. In a fee request under § 1988, a claimant must prove: (1) that claimant was "prevailing party" in proceeding, and (2) that claimant's fee request is reasonable. Schmidt v. Cline, 171 F.Supp.2d 1178 (D. Kan. 2001). In determining a proper § 1988 attorney's fees award, a court should multiply "the product of reasonable hours times a

reasonable rate.” Shakopee Mdewakanton Sioux v. City of Prior Lake, 771 F.2d 1153 (8th Cir. 1985); see also Furlong Companies, Inc. v. City of Kansas City.

The Court may award Respondents their attorney’s fees under 42 U.S. § 1988 in the event the Court finds there was a violation of Respondents’ substantive due process rights.

F. Summary

The County intentionally ignored its own standard for rezoning Reagan’s property as contained in Section 1003.300 of the Zoning Code. The County did not allege nor did it attempt to prove that the rezoning of Reagan’s property was required by “public necessity, convenience, general welfare, and good zoning practice” as mandated by Section 1003.300. Rather, the County simply argued that the overall character of the neighborhood is residential. This allegation fails to support the rezoning even if true.

There is no legal presumption that a residential use is entitled to automatic preference over Reagan’s office building. The County demonstrated no detriment to the community from Reagan’s office building, nor did it show any public benefit from the rezoning. Additionally, the County’s Comprehensive Plan specifically allows mixed uses, and provides for alternative solutions to rezoning such as landscaping and buffering when mixed uses are adjacent to each other. As a result,

the rezoning of Reagan's property constitutes an intentional disregard by the County of its own standard for rezoning.

Reagan purchased the property in reliance on the County's representation that her proposed use was permitted, and Reagan incurred development costs in reliance on the same representation. The County was aware of Reagan's actions and costs incurred to develop the property, and yet the County did not initiate the rezoning process until two years after Reagan purchased the property. The County knew the rezoning would deprive Reagan of her property rights, and the County consciously ignored the rezoning's detrimental effect on Reagan when making its decision to rezone the property.

As a result, the County's actions were truly irrational and constitute a violation of Reagan's due process rights. Reagan incurred consequential damages from the due process violation in the amount of \$148,632.01, along with attorney's fees.

V. THE TRIAL COURT ERRED IN FAILING TO AWARD RESPONDENTS ALL COMPENSATORY AND CONSEQUENTIAL DAMAGES INCURRED IN THE SUM OF \$83,332.01, AS SET FORTH IN RESPONDENTS' TRIAL EXHIBITS NOS. 61 THROUGH 73 AND 84, IN CONNECTION WITH THEIR INVERSE CONDEMNATION CLAIM BECAUSE UNDER ARTICLE I, § 26 OF

THE MISSOURI CONSTITUTION, RESPONDENTS DID NOT RECEIVE FULL INDEMNITY OR REMUNERATION FOR THE LOSS OR DAMAGE SUSTAINED BY RESPONDENTS AS A RESULT OF APPELLANT'S ACTIONS IN THAT THE TRIAL COURT'S DAMAGE AWARD ONLY PARTIALLY COMPENSATED RESPONDENTS.

A. Standard of Review

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

B. Procedural History

In entering judgment for Reagan on her inverse condemnation claim, Count III of the Second Amended Petition, the trial court erred in failing to award damages to Reagan in the sum of \$83,332.01 for additional compensatory and consequential damages incurred. (L.F., p. 309; Tr. Ex. 84 – a summary; Tr. Exs. 61-73 – supporting documents for damage summary).

C. The Additional Damages are Recoverable

This is not the usual rezoning situation where a landowner petitions a governing body to have his property rezoned so that he may benefit in some way by the change in zoning. In that situation, the owner has assumed the risk that his request for rezoning will be denied and that his property will retain its current zoning.

Reagan's situation can also be distinguished from the situation where a landowner holds a piece of vacant property for a number of years and the local governing body then rezones the property. In that situation, where the landowner's intended use for the property has not been clearly stated or realized and no development costs have been incurred, it can be presumed that the owner is holding the property for investment purposes. As a result, said owner should anticipate paying the costs associated with holding the property such as real estate taxes, mortgage interest, etc. because the owner is receiving the offsetting speculative benefits which he expected to receive from the property.

Reagan's situation is distinct from the above scenarios because Reagan purchased her property due solely to the County's representation that she would be able to use the property to construct an office building. Reagan would not have incurred the \$83,332.01 of costs which she seeks to recover but for the County's improper actions.

Article I, § 26 of the Missouri Constitution states, "private property shall not be taken or damaged for public use without just compensation." Courts interpreting the term "just compensation" have stated that it means "the full and perfect equivalent in money of property taken, so that the owner will be put in as good a position pecuniarily as he would have occupied if his property had not been taken." United States v. Miller, 317 U.S. 369 (1943) (interpreting "just

compensation” provision of Fifth Amendment to U.S. Constitution, which is similar to language of Article I, § 26 of Missouri Constitution); see also State ex rel. N.W. Electric Power Cooperative, Inc. v. Waggoner, 319 S.W.2d 930 (Mo. App. 1959); see also discussion under Point II supra.

Each property has a bundle of different property rights attached to it, ex. rights of access, rights to freedom from nuisance caused by a neighboring parcel, rights to maintain an aesthetic view, rights to contaminant-free water, etc. See Kamo Electric Cooperative, Inc. v. Cushard, 416 S.W.2d 646 (Mo. App. 1967); see also Smith v. City of Sedalia, 53 S.W. 907 (Mo. 1899). A regulatory taking such as the taking claimed by Reagan in this case can involve damage to any one of these property rights.

Reagan’s compensable rights in this case should be considered as two separate property rights. Reagan’s first compensable property right affected by the rezoning was the depreciation in her property’s market value caused by the downzoning from Industrial to Residential. Reagan’s second compensable right affected by the rezoning was her right to use her property for a permitted use. These rights are separate, valid property rights held by Reagan, and the taking or damaging of each right constitutes a separate element of just compensation. The effect of the downzoning on Reagan’s first compensable property right, which is the market value of Reagan’s property, is discussed in Point II above.

Reagan's second property right which was taken or damaged, and therefore entitles her to just compensation under Article I, § 26 of the Missouri Constitution, was Reagan's right to use the property for her proposed, permitted use. The County represented to Reagan before she purchased the property and incurred the \$83,332.01 of development costs that her office building was permitted. (Tr., p. 257, ll. 17-25; p. 258, ll. 1-22; p. 271, ll. 15-25; p. 272, ll. 1-8; p. 357, ll. 5-15). The County was aware that Reagan was spending thousands of dollars in connection with her development after her purchase of the property. (Tr., p. 82, ll. 18-25; Tr. Ex. 76; p. 41, ll. 4-13; Tr. Ex. 19). The County did not initiate rezoning proceedings until two years after Reagan had purchased the property. As discussed under Point I above, the County's actions resulted in a taking or damaging of Reagan's property right to use her property for her intended use. Reagan is entitled to reimbursement of the \$83,332.01 she incurred in reliance on the County's representation that she would be able to use the property for her intended use, and to receive a lesser amount is not "just compensation" for the County's taking or damaging of Reagan's property rights under Article I, § 26 of the Missouri Constitution.

Reagan admits that in most situations a property owner involved in either a formal condemnation proceeding or an inverse condemnation will not be entitled to a separate award for consequential damages of the type claimed by Reagan. This

situation is unique, however, because Reagan's expenditures were never allowed to ripen into a benefit-producing asset under which Reagan could recoup her costs.

For example, if Reagan had been allowed to construct her office building and occupy that building for a number of years before a condemnation proceeding, she would have received an offsetting benefit from her use of the office building. Reagan agrees that if a landowner has reaped the benefits of her development she cannot recover the accompanying development costs when that property is condemned.

In Reagan's situation, however, Reagan spent \$83,332.01 to ready her property for a development that she was prevented from completing by the County. Reagan incurred these costs over the two-year period from her purchase of the property in 1999 until the County's rezoning of the property in 2001. If the County had rezoned Reagan's property when they first became aware of her intended use at the time of her purchase in 1999, Reagan would not have attempted to develop the property nor would she have incurred the \$83,332.01 of costs. The County was fully aware that Reagan was incurring substantial costs even before the County initiated the rezoning, due to Reagan's constant contact with the County regarding the demolition of the existing structures on her property. (Tr. Ex. 77, pp. 9-17). Reagan had no use for the property once it was rezoned to prevent her proposed development. (Tr., p. 258, ll. 11-22).

As a result, the County's "taking" does not relate just to the depreciation in the market value of the property caused by the downzoning. The County also "took or damaged" Reagan's property right to use the property for her intended use. The value of this right consists of the amount which Reagan spent in reliance on being able to use her property for her intended use, namely the \$83,332.01 in out-of-pocket costs which Reagan spent in readying the property for her intended use.

A finding by this Court that Reagan is entitled to reimbursement of her out-of-pocket costs will not open a flood of litigation with condemnees attempting to recover their carrying costs for a property which is condemned. This situation is factually unique because (1) Reagan purchased her property in reliance on a specific use of the property, and not as a speculative investment (Tr., p. 258, ll. 11-22); (2) the County represented to Reagan that her use was permitted (Tr., p. 257, ll. 17-25; p. 258, ll. 1-22; p. 271, ll. 15-25; p. 272, ll. 1-8; p. 357, ll. 5-15); (3) the County was aware that Reagan was investing substantial sums in readying the property for development (Tr., p. 82, ll. 18-25; Tr. Ex. 76; p. 41, ll. 4-13; Tr. Ex. 19); and (4) the County did not rezone Reagan's property immediately upon her purchase, but rather waited over two years after Reagan's purchase of the property before rezoning the property.

The rezoning was carried out solely to block Reagan's development, and the County was fully aware of the damage Reagan suffered due to the rezoning. (Tr., p. 78, ll. 22-25; p. 79, l. 1). It is important to note that Reagan will be forced to start over and to incur similar development costs on another parcel if she wishes to proceed with the construction of her office building. Reagan is not responsible in any way for the improper actions taken against her by the County, and in the interests of fairness and equity Reagan should be reimbursed for her costs incurred which have been rendered worthless by the County's actions. The County claims its actions were for the benefit of the community. As a result, it is only fair that the full costs of the rezoning, including Reagan's development costs of \$83,332.01, are spread among the community which the rezoning purportedly benefited, rather than being assessed solely against Reagan.

The trial court cited Clay County v. Bogue, 988 S.W.2d 102 (Mo. App. 1999) and 66, Inc. v. Crestwood Commons, 130 S.W.3d 573 (Mo. App. 2003) for the proposition that Reagan is not entitled to her consequential damages from the rezoning of the property (ex. asbestos removal and demolition costs, interest carry costs, etc.). (Tr. Ex. 84; Tr. Exs. 61-73).

Reagan respectfully disagrees with the trial court's conclusion that these cases limit Reagan's right to recover consequential damages from the rezoning. In Clay County, the Court of Appeals did not address the issue of the allowance of

damages; rather, it simply found that the trial court had not addressed damages at all.

The court in 66, Inc. cited Aboussie v. Chicago Title Ins. Co., 949 S.W.2d 207 (Mo. App. 1997) for the proposition that “ordinarily, if a litigant retains ownership of property and the benefits thereof, it cannot be damaged by the expenses of ownership, including mortgage interest.” 66, Inc. at 589; Aboussie at 209-210. This position is not applicable to Reagan’s situation. In 66, Inc., the plaintiff “continued to operate a movie theatre on the property during the pendency of the condemnation action.” 66, Inc. at 581. In Aboussie, the condominium owners who sued the developer over a title defect were still able to fully enjoy the use of their condos despite the existence of the title defects. The plaintiffs in both 66, Inc. and Aboussie received benefits from the ownership of their property which offset the expenses of ownership (ex. income from the movie theatre in 66, Inc.; use of the condo as a residence in Aboussie). The plaintiffs in these cases would have paid their out-of-pocket costs regardless, because such expenditures were required in order to receive the offsetting benefits from their properties. Additionally, the recovery of damages in Aboussie was limited by the standard recovery limitations under a title insurance policy, which is not applicable in this case. Aboussie at 209.

Reagan, however, did not receive any offsetting benefits from her ownership of the property like the plaintiffs in 66, Inc. and Aboussie. The County does not dispute that Reagan would not have purchased the property if it was not zoned M-1 Industrial. Once the property was rezoned to residential, Reagan could not make any use of the property without being in violation of her financing agreement with her lender, which required that the property be used for construction of an office building. (Tr., p. 257, ll. 22-25; p. 258, ll. 1-4; see also Tr., p. 264, ll. 11-14). Thus, Reagan was in the unique position of making payments incidental to ownership of a piece of property which she could never use and from which she received no offsetting benefits, due solely to the County's improper downzoning.

Reagan cannot cite any Missouri cases for its position which are directly on point because this factual scenario has never arisen before, at least in St. Louis County. (Tr., p. 84, ll. 14-25; p. 85; p. 86, ll.1-19; p. 357, ll. 16-25; p. 358, ll. 1-9; Tr. Ex. 78, p. 18, ll. 22-25; p. 19, ll. 1-11). Reagan believes the Wheeler v. City of Pleasant Grove case is illustrative of the flexibility the Court is allowed in computing Reagan's damages for the taking under a "just compensation" requirement. Wheeler v. City of Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990). The Court in Wheeler determined that an accurate measure of damages should be based on the difference in fair market value of the plaintiff's right to develop its apartment complex at the time a building permit was received and the fair market

value of what remained after the city withdrew the permit and passed an ordinance banning the development. Id. The Court determined that “the landowner’s loss takes the form of an injury to the property’s potential for producing income or an expected profit.” Id. at 1351. The Court awarded damages based on the expected value of the plaintiff’s project if plaintiff had been allowed to proceed with construction, i.e. the court awarded the plaintiff lost profits.

In this case, Reagan is only seeking reimbursement for her costs. Reagan’s lost profits from the value of her office building if constructed would obviously be a much higher number (i.e. profit = value of building minus construction costs of building), and under Wheeler Reagan would be entitled to recover said higher amount. Reagan is willing to forego any lost profits from her development, and she simply wants to be reimbursed for her costs of \$83,332.01 incurred due to the County’s improper actions.

CONCLUSION

For the reasons discussed herein, the Judgment of the trial court in favor of Respondents should be affirmed in part, and reversed in part. Specifically, the court should affirm the trial court’s award (1) of damages for diminution in value of the property, as discussed in Points I and II, and (2) attorney fees and costs, as discussed in Point III. However, the Court should reverse the trial court’s failure

to: (1) find a substantive due process violation, as discussed in Point IV, and (2) award full indemnity or remuneration, as discussed in Points IV and V.

Respectfully submitted this 21st day of November, 2006.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Brief and a disk in compliance with Rule 84.06(g) were mailed on the 21st day of November, 2006 by first-class mail, postage pre-paid, to: Mr. Christopher J. McCarthy, Assistant County Counselor, 41 South Central Avenue, 9th Floor, Clayton, MO 63105, Attorney for Appellant; and a copy of same to: Cynthia Clark Campbell, Campbell Law Firm, 1627 Main Street, Suite 400, Kansas City, MO 64108; and to J. David Breemer, Pacific Legal Foundation, 3900 Lennane Way, Suite 200, Sacramento, CA 95835.

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

The undersigned hereby certifies that the foregoing Brief complies with the limitations set forth in Rule 84.06(b) and that the number of words in the Brief are 21,358. The undersigned relied on the word count feature on his firm's word processing system to arrive at that number.

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

RESPONDENTS'/CROSS-APPELLANTS' SUBSTITUTE APPENDIX

Opinion of the Missouri Court of Appeals, Eastern District, dated June

30, 2006 A-1